No. 21-1064

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. ***Case Importance.*** The brief on behalf of the Federal Energy Regulatory Commission ("FERC") suggests that this case does not merit the Court's attention because it is "case-specific and lacks prospective significance, particularly in light of the termination of the system agreement." FERC Br. 20. But there is nothing case-specific about a holding that a tariff, once approved by FERC, trumps contrary language in a contract that FERC previously approved and is on file at the agency. There is nothing case-specific about a court creating rationales for an agency – that a contract did not prescribe a rate or that a deferral order need not authorize *both* the deferral and the amortization of the deferred costs. There is nothing case-specific about dismissing express language in the tariff's filing letter, which provided the notice of its effectiveness required by FERC regulations. The court of appeals' interpretation that "and," when it joins explanatory equivalents following a noun, unambiguously means *either* "and" or "or" could be applicable to any document that includes a similar appositive. The decision upends settled principles of agency law, ratemaking law, and language law.

This Court has twice reviewed cases involving the Entergy System's cost allocation agreements, the System Agreement and the Grand Gulf Unit Power Sales Agreement. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988). In those cases, the Court

required state agencies to rely on FERC and federal court litigation to protect consumers from excessive rates and undue discrimination. The Court's review now is necessary to ensure that FERC and the court of appeals do their jobs correctly.

2. ***Mobile-Sierra.*** FERC argues that the court below did not pass on the conflict between its decision and the *Mobile-Sierra* doctrine, which holds that utilities may not file tariffs that abrogate contractual requirements. Indeed, it argues that "[p]etitioner did not press its current *Mobile-Sierra* argument" and "did not . . . contend that the settlement agreement set any rates." FERC Br. 13. But in response to arguments that the agreement could not be considered, the Louisiana Commission argued that "as the Supreme Court has determined, the FPA is premised on the effectiveness of contracts." Reply Brief for Petitioner at 9, *La. Pub. Serv. Comm'n v. FERC*, 10 F.4th 839 (D.C. Cir. 2021) (No. 20-1024) (citing *NRG Power Mktg., LLC v. Me. PUC*, 558 U.S. 165, 172-73 (2010)). The LPSC said: "That should be especially true when a contract is executed by a utility and retail regulators." *Id*. Further, the LPSC explained how the agreement "modified the filed rate and determined its application." *Id*. at 8.

It was the court of appeals that held for the first time that once the tariff's approval became final, its inconsistency with the previously-approved contract could not be considered. App. 13 n.2. Once that ruling raised and decided the issue, the Louisiana Commission "pressed" the issue further on rehearing, but the court denied the petition. FERC Br. 10; Petition for

Rehearing at 13, *La. Pub. Serv. Comm'n v. FERC*, 10 F.4th 839 (D.C. Cir. 2021) (No. 20-1024) (citing *NRG Power Mktg., LLC v. Me. PUC*, 558 U.S. 165 (2010)) ("[T]he Supreme Court has held that a settlement contract at FERC controls rates unless it conflicts with the public interest.").

The "current" *Mobile-Sierra* argument arose from the court's ruling – not suggested by any party – that it could not consider whether the tariff amendment conflicted with the previously-approved agreement because the tariff approval was final. FERC Br. 13; App. 13 n.2. Implicit in that holding is that final approval of a tariff nullifies a contrary requirement in the agreement concerning the tariff. The court of appeals held that a finally-approved tariff amendment trumps the finally-approved contract that prescribed its content. That ruling conflicts with *Mobile-Sierra*, and *NRG* specifically.

The court of appeals necessarily did "pass on" the relevance of the agreement, regardless of FERC's assessment of the vigor with which the Louisiana Commission "'pressed'" the issue. FERC Br. 13. Moreover, under this Court's interpretations, the rule cited by FERC is "merely a prudential restriction," and in any event does not apply here. *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983). As the Court said in *Gates*: "'Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.'" *Id*. at 220 (citation omitted). In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), the Court held that "[o]ur traditional rule is that once a federal claim is properly presented,

a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* (citations omitted).

FERC cites *United States v. Williams*, 504 U.S. 36, 41 (1992), but that case reaffirmed the Court's willingness to review "an issue not pressed so long as it has been passed upon." *Id*. Here, the court of appeals necessarily ruled that a formula rate amendment trumps a conflicting contractual requirement concerning the content of the amendment. The LPSC did press the inconsistency between the tariff and the contract and relied on *NRG*, but in any event review is permissible and warranted.

FERC's assertion that "[t]he settlement agreement did not purport to 'alter the bandwidth formula' or to set any rates" suggests a failure of reading comprehension. FERC Br. 15. The applicable provision provided that Entergy "will make a Section 205 filing amending [the system agreement]. . . ." App. 197. That language required an alteration of the bandwidth formula. It provided that the amendment would dictate that "starting with the 2009 Bandwidth Calculation (i.e., effective May 31, 2009) . . . all purchased power costs will be included in the Bandwidth Calculation in the year the costs are incurred, regardless of whether they are deferred on the individual Operating Company's books." *Id*. The agreement required a change in the ratemaking treatment of deferrals – a new rate treatment different from FERC's accounting requirement and Entergy's accounting in 2005-06, which otherwise would control the rate. Recognizing the costs

in the year incurred meant ignoring the deferral and subsequent amortizations *starting with the 2009 Bandwidth Calculation*. *Id*.

FERC cites *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), for the proposition that a filed rate controls over an inconsistent contract. But in that case, the contract was not filed at FERC. After the contract subsequently was filed, the United States Court of Appeals for the Fifth Circuit found that FERC abused its discretion by refusing to waive the notice period to make the contract provision effective from the time it was executed. *Hall v. FERC*, 691 F.2d 1184, 1196 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983). The Fifth Circuit held that FERC was required to honor the intent of the parties. *Id*. at 1192 (relying on *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979)).

The *Hall* case involved a contract that required the pipeline to pay Hall the best rate it paid anyone else – a "favored nations clause." *Hall*, 691 F.2d at 1192. It did not explicitly "set any rates," but once filed, it still required paying the favored nations rate. Even if the D.C. Circuit's interpretation of setting rates were defensible, it still creates a conflict with the Fifth Circuit's decision in *Hall* that requires review.

In attempting to distinguish *Boston Edison Co. v. FERC*, 856 F.2d 361 (1st Cir. 1988), FERC attempts to assume away the issue in that case. FERC says that "the contract[] . . . was part of the filed rate," which is a true statement only because of the court's holding. FERC Br. 16. FERC had ruled that a contractual

waiver was not part of the filed rate and could not be considered in applying the rate, a determination that the court overruled. 856 F.2d at 371-72. The court held that a contract on file at FERC is necessarily "part and parcel" of the related rate and controlled over the rate. *Id*. The ruling here conflicts with that case as well.

FERC helpfully points out that the Louisiana Commission miscited another case that conflicts with the ruling below, but FERC is not so helpful as to provide the correct citation. FERC Br. 16 n.5. The correct citation is *Louisiana Public Service Commission v. FERC*, 20 F.4th 1 (D.C. Cir. 2021). The court held that a general claims waiver in a settlement agreement precluded enforcement of specific cost-allocation provisions of the "filed rate" – the System Agreement. *Id*. at 8-10. Again, the contractual provision controlled.

FERC is unwilling to venture into any discussion of Entergy's Filing Letter. That letter fulfilled FERC's requirements that the utility explain the effective date and application of the attached tariff. 18 C.F.R. § 35.10; 18 C.F.R. § 35.13(b)(2), (4), (5). FERC does not deny that the Filing Letter provided the statutorily-required notice of when and how the tariff amendment would be effective. 16 U.S.C. § 824d(d). The explanation that "[Entergy] is proposing that the Amendment apply only to new deferrals beginning in 2008," is not ambiguous and cannot be read consistently with the court of appeals' interpretation of the tariff. App. 172 n.15. The court refused to consider the contract and ignored the explanation in the Filing Letter – both actions are worthy of review.

3. ***Substitution of court's reasoning for that of FERC.*** FERC defends the reasoning of the court of appeals, but markedly fails to claim the reasoning for itself. FERC did say that the phrase "or the amortization of previously-deferred costs" expressly required the exclusion of the 2008 and 2009 amortization of the past deferral, but the remainder of the language interpretation was created by the court. App. 34; App. 11-12. Indeed, FERC admits that the court of appeals relied on "[b]asic rules of English grammar" in interpreting "and" in the tariff as distributive, a matter FERC says is outside FERC's reserved powers. FERC Br. 17. In doing so, it admits the interpretation may have broad application beyond this case.

Nor does FERC establish a link between FERC's decision and the remaining basis for the court's interpretation. FERC did not say, nor could it honestly say, that a regulatory agency could defer costs out of rates without authorizing a reciprocal amortization of the same costs into rates. *See* App. 12-13. FERC now says that the necessarily reciprocal debits and credits are separable because they may not occur in the "same year," which is not in the opinion of FERC *or* the court of appeals. FERC Br. 20. More important, it is neither here nor there to the issue: Was the amendment intended to alter the treatment of *both* the "debits *and* credits" from a deferral order, or *either*.

FERC also never said it could not consider the agreement or the filing letter. It said that it was "not persuaded" to change its ruling based on those documents. App. 33. The court of appeals manufactured the

argument that the contract could not be considered because "and" unambiguously meant "or" for this case, and it alone created the argument that a finally-approved filed contract could not trump an inconsistent tariff amendment. App. 13 n.2.

After confirming that the court's language interpretation involved an issue of English grammar, FERC says that the court made clear that its interpretation involved "the context of this specific language." App. 12. FERC attempts to translate that statement into an argument that the court relied on something contextual to the System Agreement, but that is not correct. The court relied on the context in which "and" was used to join "explanatory equivalents" of "effects" in a single sentence. App. 11. Any time explanatory equivalents are set off in apposition to a noun, the precedent would require a distributive interpretation.

4. ***Interpretation of "and."*** Nothing in FERC's brief undercuts the argument that the court of appeals' interpretation of "and" is wrong as a matter of grammar and law. Inexplicably, FERC provides the example that "[a]ll members of the bar, lawyers and judges, must pay annual dues," as if it supports the court's interpretation. FERC Br. 18. But under the distributive interpretation, *only one group* would be required to pay annual dues in any particular year. "And" in that sentence is conjunctive and does *not* reflect the distributive sense.

More important, FERC provides no basis suggesting that "debits and credits" from a deferral order are

not reciprocal. In the relevant expense accounts, the credit causes the deferral of costs from rates and the debit provides for the subsequent inclusion of these same costs in rates. FERC tries to alter the holding of the court of appeals, asserting that a deferral order could cause only a credit in one year and only debits in other years. FERC Br. 19. But that is not what the court said: it ruled that a regulatory decision could "cause only credits or only debits." App. 12. The court did not mention FERC's latest briefing rationale. And FERC appears to concede that under its accounting regulations a deferral order requires *both*. FERC Br. 19.

FERC offers another example of when "and" could be distributive, involving credit cards and credit and debit transactions in a foreign currency. FERC Br. 18. But the credit card context alters the ordinary meaning of "and." Credit card agencies rarely provide "credits" to customers; but they apply a debit for every purchase. A debit and credit would only be reciprocal for invalid transactions – and the credit for the invalid debit would be necessary and reciprocal.

Finally, the court of appeals' interpretation conflicts with the "Distributive – Phrasing Canon" of legal construction: "Distributive phrasing applies each expression to its appropriate referent." A. Scalia & B. Garner, *Reading Law* 214 (2012). In the case of Entergy's amendment, the "debits and credits" are transposed with the "deferral" and "amortization" in the passage: "excluding the effects, debits and credits, resulting from a regulatory decision that causes the

deferral of the recovery of current year costs or the amortization of previously deferred costs." App. 172. The language is not distributive.

5. ***Summary.*** The court of appeals substituted its own incorrect rationales to provide a basis for FERC's unreasoned decision. Now FERC provides new theories to rationalize the court's mistaken assumptions. This Court should grant certiorari to reimpose the correct standard of review, reaffirm the applicability of rate agreements, and avoid the consequences of an aberrant interpretation of "and" when used in an appositive.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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