No. 24-____

IN THE

Supreme Court of the United States

ENTERGY ARKANSAS, LLC,

Petitioner,

v.

DOYLE WEBB, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE ARKANSAS PUBLIC SERVICE COMMISSION; KATIE ANDERSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS PUBLIC SERVICE COMMISSION; JUSTIN TATE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS PUBLIC SERVICE COMMISSION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ALEX H. LOOMIS
QUINN EMANUEL URQUHART & SULLIVAN, LLP
111 Huntington Avenue
Suite 520
Boston, MA 02199
(202) 548-8393

SANFORD I. WEISBURST
Counsel of Record
K. MCKENZIE ANDERSON
JACOB DENZ
QUINN EMANUEL URQUHART & SULLIVAN, LLP
295 Fifth Avenue
New York, NY 10016
(212) 849-7000
sandyweisburst@quinnemanuel.com

Counsel for Petitioner

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QUESTION PRESENTED

After the Federal Energy Regulatory Commission ("FERC") ordered Petitioner Entergy Arkansas, LLC to pay other utilities compensation for a misinterpretation of an ambiguous wholesale tariff provision, the Arkansas Public Service Commission ("APSC") asked FERC to opine that its order would have no preemptive effect on APSC's decision as to what portion of the payment Entergy Arkansas may pass through to its retail electricity customers. FERC declined to render any opinion on that issue. The U.S. Court of Appeals for the Eighth Circuit held that, because FERC had not affirmatively stated that its order has preemptive effect, it has no such effect. That ruling conflicts with numerous precedents of this Court and other circuits, warranting summary vacatur or alternatively this Court's plenary review.

The question presented is:

Whether the preemptive effect of a federal agency's order is an issue for courts to decide and cannot be controlled by the agency's opinion, or lack of opinion, on such preemptive effect.

CORPORATE DISCLOSURE STATEMENT

Petitioner Entergy Arkansas, LLC states that it is a wholly-owned subsidiary of Entergy Utility Holding Company, LLC, which in turn is majority-owned by Entergy Corporation. Entergy Corporation's common stock is listed on the New York Stock Exchange under the symbol "ETR."

RELATED PROCEEDINGS

Entergy Arkansas, LLC v. Thomas, No. 23-1228, 76 F.4th 1069 (8th Cir. 2023) (affirming district court's denial of motion to intervene of Arkansas Electric Energy Consumers, Inc.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Entergy Arkansas, LLC ("EAL") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

INTRODUCTION

The Eighth Circuit, instead of independently determining whether a FERC order preempts state law, deferred entirely to FERC's silence on that question, treating such silence as a conclusive ruling that FERC's order has no preemptive effect. In other words, the Eighth Circuit announced a rule that, unless FERC's order affirmatively states that its order preempts state law, the order does not do so.

The Eighth Circuit's decision squarely conflicts with numerous decisions of this Court and other circuits. As this Court held in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003) ("*ELI*"), "the 'view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings' has been 'long rejected,'" *id.* at 50 (quoting *Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988) ("*MP&L*")). *See also, e.g.*, *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006) ("Pursuant to the [filed rate doctrine], the Supreme Court has determined that federal law preempts states from second-guessing FERC's allocations of electric power and from conducting prudence inquiries into FERC's cost allocations, even when FERC has not conducted such an inquiry.").

The conflict is not limited to the Federal Power Act context. In scores of cases involving various federal statutes and federal agencies, this Court and the lower courts "have not deferred to an agency's conclusion that state law is pre-empted. … The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009). That holding is, if anything, stronger in the wake of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). But the Eighth Circuit here deferred entirely to FERC on preemption.

The jurisprudential importance of the question is amplified by practical considerations. Shortly after being inaugurated, President Trump declared a national energy emergency, finding "a precariously inadequate and intermittent energy supply, and an increasingly unreliable grid," that "require swift and decisive action." Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025); *see also, e.g.*, Complaint of Governor Josh Shapiro and the Commonwealth of Pennsylvania at 14-15, *Gov. Josh Shapiro & The Commonwealth of Pa. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL25-46 (Dec. 30, 2024) ("Governor Shapiro Complaint") (similar). Yet the Eighth Circuit's decision creates a new regime where FERC orders will often lack preemptive force, freeing state authorities to prevent utilities from recovering their wholesale-level costs from retail customers. Absent cost recovery, utilities will find it difficult to make the sorts of investments needed to meet the national energy emergency.

This Court should grant the petition and summarily vacate the Eighth Circuit's judgment, or alternatively set the case for plenary briefing and argument. At a minimum, this Court should hold the petition pending its disposition of *Cotter Corp. v. Mazzocchio*, No. 24-1001 (petition for certiorari filed Mar. 10, 2025), in which the Eighth Circuit ruled that there was no federal preemption in partial reliance on the fact that the federal agency had so opined.

OPINIONS BELOW

The decision of the Eighth Circuit (App. 1a-10a) is reported at 122 F.4th 705 (2024). The decision of the district court (App. 11a-41a) is not reported but is available at 2024 WL 988851.

JURISDICTION

The Eighth Circuit entered its decision on December 4, 2024. App. 1a. On December 18, 2025, EAL timely filed a petition for rehearing *en banc*. On January 10, 2025, the Eighth Circuit issued an order denying panel rehearing or rehearing *en banc*. App. 42a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 201 of the Federal Power Act, 16 U.S.C. § 824, is reproduced at App. 43a-46a. Section 202 of the Federal Power Act, 16 U.S.C. § 824a, is reproduced at App. 47a.

STATEMENT

1. The filed-rate doctrine "requires that interstate power rates filed with FERC … must be given binding effect by state utility commissions determining intrastate rates." *ELI*, 539 U.S. at 47 (cleaned up); *see also* 16 U.S.C. § 824(a) (granting FERC exclusive jurisdiction over interstate wholesale sales of energy and transmission). "When the filed rate doctrine applies to state regulators, it does so as a matter of federal preemption through the Supremacy Clause." *ELI*, 539 U.S. at 47. "The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, and has been extended across the spectrum of

regulated utilities." *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (internal citations omitted). "The considerations underlying the doctrine ... are preservation of [FERC's] primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which [FERC] has been made cognizant." *Id.* at 577-78 (ellipsis in original) (quoting *City of Cleveland v. Fed. Power Comm'n*, 525 F.2d 845, 854 (D.C. Cir. 1976)).

In accord with these principles, this Court has long held that, when an interstate wholesale power rate or tariff on file with FERC allocates a wholesale-level cost to a utility, the filed-rate doctrine bars a state commission from preventing the utility from recovering that cost from its retail customers through an intrastate retail rate. Such "[t]rapping of costs 'runs directly counter' to the rationale for FERC approval of cost allocations." *ELI*, 539 U.S. at 48 (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 968 (1986)).

2. The Entergy System Agreement ("ESA") was the filed rate of a multi-state system of utilities in which EAL and other members pooled their power plants. C.A. App. 28-29; *ELI*, 539 U.S. at 42-43 (addressing a prior version of the ESA). From 2000 to 2009, EAL, in addition to selling energy to its retail customers in Arkansas, made short-term energy sales, known as "Opportunity Sales," to wholesale customers. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240, at P 2 (2012) ("Opinion No. 521") (C.A. App. 393).[1]

3. FERC disagreed with the Entergy System's interpretation of an "ambiguous" ESA accounting

[1] P_ refers to the paragraph number within the FERC opinion.

provision concerning which plants were deemed to supply a System member's customers when that member sold electricity both to retail customers and to Opportunity Sales customers. *Id.* at PP 3, 128 (C.A. App. 393-94, 445).[2]

Under FERC's interpretation, the costs of EAL should have been higher and the costs of other System members lower, relative to what they were under the interpretation the System had actually used in real time. To "put the parties as close as possible to the position they would have been in" had they predicted and originally followed FERC's interpretation, *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065, at P 90 (2016) ("Opinion No. 548") (C.A. App. 484), FERC ordered

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[2] Specifically, FERC concluded that "allocat[ion] [of] lower cost energy to the Opportunity Sales … violated the [ESA]." Opinion No. 521, 139 FERC ¶ 61,240, at PP 2-3 (C.A. App. 393-94). That energy instead should have gone to EAL's "load" (*i.e.*, mainly to its retail customers), with any excess to "other Operating Companies." *Id.* at P 134 (C.A. App. 448). And the Opportunity Sales should have been deemed supplied by the highest-variable-cost resources owned by any System member at the relevant time, with the margin on each Opportunity Sale (*i.e.*, revenues minus costs) assigned to EAL. *Id.*; *id.* at P 136 (C.A. App. 448-49). Additionally, EAL's retail customers had been charged more for transmission than they should have been charged. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065, at P 152 (2016) (C.A. App. 508).

As noted in text, FERC acknowledged that the ESA provision at issue was "ambiguous," Opinion No. 521, 139 FERC ¶ 61,240, at PP 2-3, 128 (C.A. App. 393-94, 445) and further found that "the Opportunity Sales were made and priced in good faith," *id.* at P 136 (C.A. App. 448); *see also Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565, 165 FERC ¶ 61,022, at P 77 (2018) (C.A. App. 614) (making "no finding that the Opportunity Sales were imprudent").

EAL to pay the other System members a Net Refund of $67 million (plus interest), comprised of two components: (1) an Unadjusted Refund of $81.7 million, reduced by (2) a Bandwidth Offset of $13.7 million because EAL's increased costs meant it had overpaid on ESA provisions requiring subsidy-like payments from low-cost members to high-cost members. *Id.* at P 196 (C.A. App. 524); C.A. App. 782 (compliance filing). EAL paid the Net Refund in December 2018. C.A. App. 650.

In other words, EAL had underpaid (while other System members had overpaid) using the System's original interpretation for the costs of electricity they had used, and the Net Refund was a FERC-ordered compensatory remedy to correct the error.

APSC was unhappy with FERC's use of the Bandwidth Offset to reduce the Unadjusted Refund. APSC interpreted this to mean that APSC would not be able to require EAL to pass through the Bandwidth Offset (but not the Unadjusted Refund) to EAL's retail customers. *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548-A, 161 FERC ¶ 61,171, at p 11 (2017) ("Opinion No. 548-A") (C.A. App. 563). FERC rejected APSC's interpretation of Opinion No. 548, explaining that FERC had "made no findings … as to how the bandwidth adjustment to damages owed by an Operating Company should be treated for purposes of retail rates …." *Id.*

4. APSC petitioned for review in the U.S. Court of Appeals for the D.C. Circuit. In July 2021, the D.C. Circuit denied the petition. The D.C. Circuit held that FERC's silence on preemption was simply that, and FERC's orders would not prevent APSC "from *litigating the issue* in another forum." *Entergy Servs., Inc. v. FERC*, No. 17-1251, 2021 WL 3082798, at *11

(D.C. Cir. July 13, 2021) (C.A. App. 109) (emphasis added).

5. EAL applied to APSC to recover a portion of the Net Refund from its retail customers. APSC in turn issued an order that not only prevented EAL from recovering any of the Unadjusted Refund component, C.A. App. 932-39, but required EAL to give the Bandwidth Offset component to retail customers, C.A. App. 940-41, even though the Bandwidth Offset would not have existed but for the Unadjusted Refund. By contrast, every other state commission but APSC, in implementing FERC's orders, directed the relevant utility to pass through both components (*i.e.*, the net amount) to its retail customers. C.A. App. 649, 996-1027.[3]

6. EAL filed a complaint against the APSC commissioners (Respondents in this Court) in the U.S. District Court for the Eastern District of Arkansas, asserting, *inter alia*, that filed rate doctrine preemption requires APSC to allow EAL to recover an appropriate portion of the FERC-ordered Net Refund from its retail

[3] This table depicts in yellow the amount each state commission allowed to be flowed through to retail customers, where figures without parentheses are payments made by the utility and figures within parentheses are payments received by the utility:

Member	Unadjusted Refund ($)	Bandwidth Offset ($)	Net Refund ($)
EAL	81,659,842	(13,709,000)	67,950,842
Ent. La.	(35,339,554)	6,063,000	(29,276,554)
Ent. Miss.	(24,391,046)	6,467,000	(17,924,046)
Ent. New Orleans	(3,588,177)	247,000	(3,341,177)
Ent. Tex.	(18,341,065)	932,000	(17,409,065)

customers. C.A. App. 17.[4] The originally-assigned district judge denied the APSC commissioners' motion to dismiss, C.A. App. 133, and thus did not accept their argument that the D.C. Circuit's opinion "supports the basic framework of the Brief in Support of [APSC commissioners'] Motion to Dismiss." C.A. App. 111.

The case was later reassigned to a different district judge, who presided over a bench trial. The district court issued a decision denying relief to EAL. The court reasoned that, while the ESA provision FERC interpreted is part of the filed rate, the remedy FERC ordered to enforce (and to bring the parties into compliance with) the filed rate is not, and therefore is outside the scope of the filed rate doctrine. App. 30a.

On appeal, EAL explained that the district court's ruling contradicts precedent, and that the FERC order interpreting and enforcing the filed rate is itself part of the filed rate.[5] But the Eighth Circuit never reached that issue. Instead, the court held that, because FERC declined to opine that its order had preemptive effect, it could not have such preemptive effect. App. 7a ("the

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[4] EAL filed the suit against the APSC commissioners in their official capacities only, and not their personal capacities, pursuant to *Ex parte Young*, 209 U.S. 123 (1908). Indeed, two of the three current commissioners (who now appear in the caption of the case) were not commissioners at the time the APSC's underlying decision was issued.

[5] *E.g.*, *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (Under "[t]he filed-rate doctrine," FERC "can enforce the terms of a filed rate and order refunds for past violations of one."); *Williston Basin Interstate Pipeline Co. v. FERC*, 215 F.3d 875, 879 (8th Cir. 2000) (FERC has "the power to order refunds to enforce the terms of [FERC]-approved tariffs"); *see also Kansas v. Nebraska*, 574 U.S. 445, 455-56 (2015) (in analogous context of interstate compacts, Supreme Court's "remedial authority … counts as federal law" with preemptive force).

filed rate doctrine does not apply because FERC made no preemptive decision regarding the refund's cost allocation"); *see also id.* ("FERC … declined to address how [the Net Refund] would be distributed between" EAL's retail customers and EAL (cleaned up)). In other words, the Eighth Circuit announced a rule that, unless FERC affirmatively states that its order should have preemptive effect, the order will not have such effect.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and summarily vacate the Eighth Circuit's judgment, or alternatively set the case for plenary briefing and oral argument. In adopting a rule that a federal agency's order has preemptive force only when the federal agency affirmatively opines that the order should have such force, the Eighth Circuit's decision squarely conflicts with decisions of this Court and other circuits, both in the Federal Power Act context and beyond. The issue is critically important because the Eighth Circuit's rule will often prevent utilities from recovering their wholesale-level costs, which in turn will suppress investment in the electricity grid—an outcome the Nation can ill afford in the context of the recently-declared national energy emergency.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS IN THE FEDERAL POWER ACT CONTEXT

The Eighth Circuit's holding that a FERC order has no preemptive effect unless FERC affirmatively states that its order should have preemptive effect, App. 7a-8a, conflicts with at least three decisions of this Court and two decisions of other circuits. The Eighth

Circuit's decision is so clearly incorrect that summary vacatur is warranted. Alternatively, this Court should set the case for plenary briefing and oral argument.

First, in *MP&L*, contrary to the Eighth Circuit's holding that FERC's order has no preemptive effect because "FERC … declined to address how [the Net Refund] would be distributed between" EAL's retail customers and EAL, App. 7-8a, this Court rejected "the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings," 487 U.S. at 374; *see also ELI*, 539 U.S. at 50 (unanimously reaffirming *MP&L*). The "particular matter" in *MP&L* was whether Entergy Mississippi had acted imprudently in entering into contracts to purchase electricity from the Grand Gulf Nuclear Station. *State ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 506 So.2d 978, 986 (Miss. 1987), *rev'd sub nom. Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 375 (1988). This Court held that, despite FERC's silence on that question, FERC's order preempted the Mississippi Commission and Mississippi state courts from deciding it. *MP&L*, 487 U.S. at 374 ("We have long rejected this sort of case-by-case analysis [of whether FERC's order expressly decided an issue] of the impact of state regulation upon the national interest in power regulation cases." (cleaned up)).

Second, the Eighth Circuit's holding conflicts with *ELI*, in which this Court unanimously reaffirmed *MP&L*'s rule that FERC's failure to address an issue does not deprive FERC's order of preemptive effect on that issue:

> The Louisiana Supreme Court's other basis for upholding the [Louisiana Public Service Commission's] order was that FERC had not

> specifically approved the MSS–1 cost allocation after August 5, 1997, when it issued Order No. 415. *See* [*Entergy La., Inc. v. La. Pub. Serv. Comm'n*,] 815 So.2d [27], 38 [(La. 2002)] ("The FERC never ruled on the issue of whether ELI's decision to continue to include the ERS units is a prudent one"). In so holding, the Louisiana Supreme Court revived precisely the same erroneous reasoning that was advanced by the Mississippi Supreme Court in *MP&L*. There this Court noted that the "view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings" has been "long rejected." *MP&L*, *supra*, at 374 (alteration in original). It matters not whether FERC has spoken to the precise classification of ERS units, but only whether the FERC tariff dictates how and by whom that classification should be made. The amended system agreement clearly does so, and therefore the LPSC's second-guessing of the classification of ERS units is pre-empted.

539 U.S. at 50. In other words, even though FERC's order was silent on "the precise classification of ERS [Extended Reserve Shutdown] units," *id.*, this Court held that the FERC-approved filed rate preempted a state commission from classifying those units, *id.* at 49-50. In the instant case, by contrast, the Eighth Circuit treated FERC's silence on the preemptive effect of its order to mean that the order could have no preemptive effect. App. 7a-8a.

Third, the Eighth Circuit's holding contravenes this Court's decision in *Nantahala*, 476 U.S. at 963-73. There, this Court held that a FERC order preempted a state supreme court from determining a cost allocation, without considering whether FERC's order had expressed a position on whether FERC believed its order would have preemptive effect. *Id.* at 963-73.

Fourth, the Eighth Circuit's holding conflicts with decisions of other circuits. In *AEP Texas North Company*, a case factually similar to this one, FERC approved tariffs that governed the allocation, among a system of affiliated utilities, of profits made from wholesale sales. 473 F.3d at 583. The utilities performed an allocation, but the Public Utility Commission of Texas asserted that more wholesale profits should have been allocated to the Texas utility, which would have reduced the costs to be collected by that utility from Texas retail customers. *Id.* at 583-84. The Fifth Circuit, without considering whether FERC had expressed a view on preemption, held that the FERC-approved filed rate preempted the Texas Commission from undertaking a revised allocation: "Pursuant to the [filed rate doctrine], the Supreme Court has determined that federal law preempts states from second-guessing FERC's allocations of electric power and from conducting prudence inquiries into FERC's cost allocations, even when FERC has not conducted such an inquiry." *Id.* at 584 (internal citation omitted).

In *Appalachian Power Corp. v. Public Service Commission of West Virginia*, 812 F.2d 898 (4th Cir. 1987), FERC issued an order, the Public Service Commission of West Virginia requested that FERC explicitly state its view whether FERC's order should have preemptive effect, and FERC did so (opining that it should), *id.* at 901. Although the Fourth Circuit recited FERC's preemption determination in the background section of the court's opinion, *id.*, the court did not mention it in the court's own analysis, *id.* at 902-05 (holding state commission preempted). In other words, even when FERC had expressly opined on the preemptive effect of its order, the court approached preemption de novo. In this respect, the conflict between *Appalachian* and the Eighth Circuit's decision in the instant case is striking because here, FERC was not just silent on the preemptive effect of its order—FERC made explicit that it was not taking a position on preemptive effect. *See* Opinion No. 548-A, 161 FERC ¶ 61,171, at P 11 (C.A. App. 563) ("[T]he Commission has made no findings in this proceeding as to how the bandwidth adjustment to damages owed by an Operating Company should be treated for purposes of retail rates[.]").

The D.C. Circuit, on direct review of FERC's order at issue in the instant case, understood that this meant APSC would be free to "litigat[e] the issue in another forum." *Entergy Servs., Inc*., 2021 WL 3082798, at *11 (C.A. App. 109). The Eighth Circuit's decision below thus conflicts with the D.C. Circuit's decision too. Unlike the D.C. Circuit, which treated the preemption issue as open to be litigated in the wake of FERC's order, the Eighth Circuit considered the issue of preemption to have been definitively decided by FERC's order in favor of a finding of no preemption.

The conflict between the Eighth Circuit, on the one hand, and this Court and the Fourth, Fifth, and D.C. Circuits, on the other hand, also implicates this Court's recent holding in *Loper Bright* that federal "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority …." 603 U.S. at 412. Under the Eighth Circuit's approach, by contrast, courts do not independently determine the preemptive effect of FERC's order, but rather leave FERC as the sole and unreviewable arbiter of preemption, even where FERC has deliberately refrained from deciding that question.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS BEYOND THE FEDERAL POWER ACT CONTEXT

The Eighth Circuit's holding that, unless a federal agency affirmatively opines that its order should have preemptive effect on state authorities, the order will have no preemptive effect, makes the federal agency the unreviewable decisionmaker on preemption. That conflicts with numerous decisions of this Court and other circuits beyond just the Federal Power Act context.

In *Wyeth v. Levine*, 555 U.S. 555, this Court held:

> In prior cases, we have given "some weight" to an agency's views about the impact of tort law on federal objectives when "the subject matter is technica[l] and the relevant history and background are complex and extensive." *Geier* [*v. Am. Honda Motor Co., Inc.*], 529 U.S. [861], 883 [(2000)]. *Even in such cases, however, we have not deferred to an agency's conclusion that state law is pre-empted.* … The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.

Wyeth, 555 U.S. at 577 (alteration in original) (emphasis added) (citations omitted). The Eighth Circuit's holding, by contrast, gives the federal agency absolute deference on the issue of preemption. Indeed, it does so even when, as here, the federal agency took pains *not* to express a view on preemption. *See Entergy Servs., Inc.*, 2021 WL 3082798, at *11 (C.A. App. 109) (D.C. Circuit characterizing FERC order as making "the decision to exclude the shareholder-ratepayer issue from the scope of the proceedings [before FERC]").

The Eighth Circuit's decision also conflicts with decisions of other circuits applying *Wyeth*. In *Fayus Enterprises v. BNSF Railway Company*, 602 F.3d 444 (D.C. Cir. 2010), for example, rail customers brought class action lawsuits against railroad companies seeking relief for alleged state antitrust violations. *Id.* at 445. The D.C. Circuit declined to defer to the Surface Transportation Board's suggestion that such claims were not preempted by the Interstate Commerce Commission Termination Act. *Id.* at 446-47. Instead, the D.C. Circuit independently analyzed the preemption issue and held that the state claims were preempted. *Id.* at 454.

In *Capron v. Office of Attorney General of Massachusetts*, 944 F.3d 9 (1st Cir. 2019), an au pair service company and host families sued the Massachusetts Attorney General seeking a declaratory judgment that the U.S. Department of State's ("DOS") wage and hour regulations for its au pair program preempted Massachusetts laws on the same topic. *Id.* at 13. DOS filed an *amicus* brief arguing that its regulations had preemptive effect. *Id.* at 40. The First Circuit disagreed with DOS and held that the regulations did not preempt Massachusetts law. *Id.* at 27, 40.

In *National Federation of the Blind v. United Airlines, Inc.*, 813 F.3d 718 (9th Cir. 2016), an advocacy group and three blind individuals contended that an airline's use of automatic kiosks inaccessible to the blind violated California's antidiscrimination laws. *Id.* at 722. The Ninth Circuit held that U.S. Department of Transportation ("DOT") regulations preempted the California statutes, which was also DOT's position, but the Ninth Circuit stated that it gave "minimal weight" to DOT's view and rejected as "unpersuasive" DOT's specific rationale that the California statutes were preempted prior to DOT's most recent regulation. *Id.* at 737. Instead, the Ninth Circuit held that only DOT's most recent regulation had preemptive effect. *Id.* at 723.

Numerous other circuit decisions likewise follow *Wyeth*'s instruction that courts must decide the legal question of preemption without deferring to the agency's views. *See, e.g.*, *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016) ("We do not defer to an agency's view that its regulations preempt state law ...."); *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 413 (5th Cir. 2010) ("the reach of preemption is unlikely to be a matter within the expertise of an agency"); *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1200 (10th Cir. 2010) ("An agency's position that state law is preempted is not necessarily entitled to deference.").

Again, however, in the instant case, the Eighth Circuit declined to exercise any independent judgment concerning whether FERC's orders have preemptive force. Instead, the Eighth Circuit relied entirely on the fact that FERC had declined to state an opinion on that issue:

> [T]he filed rate doctrine does not apply because FERC made no preemptive decision regarding the refund's cost allocation. Though FERC decided the amount of the refund and how it should be divided among members of the System, it declined to decide how the costs should be allocated.

App. 7a. This holding plainly contravenes *Wyeth* and the circuit decisions cited above.

III. THE IMPORTANCE OF THE QUESTION PRESENTED UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

The Eighth Circuit's decision, by nullifying filed rate doctrine preemption in all cases where FERC has not affirmatively opined that there should be preemption, will drastically curtail the filed-rate doctrine's prohibition on state authorities' trapping of costs at the wholesale level. Utilities will be forced to bear these costs without recovery. Even worse, they will have to do so even when the genesis of the dispute was the utility's participation in a multi-state group of utilities (such as the Entergy System), a type of coordination federal law encourages. *See, e.g.*, 16 U.S.C. § 824a(a) ("For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy …, the Commission [FERC] is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy ….").[6]

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[6] Here, the record evidence demonstrated that, if state authorities are allowed to prohibit utilities from recovering appropriate costs from retail customers, utilities will be unwilling "to participate in wholesale markets or participate in a regional power pool." Trial Tr. Vol 2, Dist. Ct. Dkt. 172, at 392:20-24 (Feb. 14, 2023) (not included in C.A. App. but available on PACER). Further, if other states were to follow Arkansas' lead, utilities would be increasingly deterred from (a) belonging to interstate alliances of utilities because companies participate in regional pools only because they "expect to recover [the FERC-set] costs in rates," *id.* at 392:4-16, 397:3-398:1, or (b) making sales to wholesale customers, which is an enormous ($232 billion) market, Trial Tr. Vol. 3, Dist. Ct. Dkt. 173, at 527:25-529:22 (Feb. 15, 2023). This would result in "fewer suppliers" and "resources," reduced

This federal policy is even more urgent now. President Trump recently issued an Executive Order declaring a national energy emergency, finding "a precariously inadequate and intermittent energy supply, and an increasingly unreliable grid" that "require swift and decisive action." Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025); *see also, e.g.*, Governor Shapiro Complaint at 14-15 ("[E]nergy markets have entered a period of dramatic change unforeseen even two years ago. Electrification and rapidly growing interest in generative AI and associated data centers have upended a 30-year trend of relatively flat load forecasts, replacing it with demand that is projected to skyrocket from 23 GW to 128 GW of growth in the next five years." (footnotes omitted)). The result of the Eighth Circuit's decision—preventing utilities from recovering appropriate portions of their wholesale-level costs from their retail customers—is hardly a recipe for responding to this national energy emergency. Instead, utilities need reasonable assurance of cost recovery so that they can make investments to improve the electricity grid.

Beyond the energy context, if the Eighth Circuit's decision is left intact, it will undercut the scope of federal preemption in the seven states within that circuit, even where, as in this and every case predating the Eighth Circuit's decision below, the federal agency had no notice of this rule. This Court's review is warranted before those practical consequences are allowed to occur.

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liquidity, and reduced reliability of electricity supply. Tr. Vol. 2, at 393:19-24.

IV. AT A MINIMUM, THE PETITION SHOULD BE HELD FOR *COTTER CORPORATION V. MAZZOCCHIO*, NO. 24-1001

The Eighth Circuit relied upon its idiosyncratic rule that federal agencies deserve deference on whether their orders have preemptive effect not just in the decision below, App. 7a, but also in another recent decision as to which a petition for a writ of certiorari is pending, *Mazzocchio v. Cotter Corporation*, 120 F.4th 565 (8th Cir. 2024), *pet. for cert. pending sub nom. Cotter Corporation v. Mazzocchio*, No. 24-1001 (petition for certiorari filed Mar. 10, 2025). Specifically, in *Mazzocchio*, the Eighth Circuit, in ruling that federal law does not preempt state standards of care in the nuclear-safety context, relied on the fact that "the NRC [federal Nuclear Regulatory Commission] doesn't maintain that federal dosage regulations preempt state standards of care." 120 F.4th at 569. If this Court grants certiorari in *Cotter*, it will likely address this aspect of the Eighth Circuit's decision and thus this Court's decision will bear on the instant petition as well. Accordingly, if this Court does not grant the instant petition, the Court should at a minimum hold the petition for *Cotter*.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Eighth Circuit summarily vacated. Alternatively, the petition for a writ of certiorari should be granted and the case set for plenary briefing and oral argument. At a minimum, this Court should hold the petition pending its disposition of *Cotter Corp. v. Mazzocchio*, No. 24-1001 (cert. pet. filed Mar. 10, 2025).

Respectfully submitted,

SANFORD I. WEISBURST
Counsel of Record
K. MCKENZIE ANDERSON
JACOB DENZ
QUINN EMANUEL URQUHART & SULLIVAN, LLP
295 Fifth Avenue
New York, NY 10016
(212) 849-7000
sandyweisburst@quinnemanuel.com

ALEX H. LOOMIS
QUINN EMANUEL URQUHART & SULLIVAN, LLP
111 Huntington Avenue
Suite 520
Boston, MA 02199
(202) 548-8393

Counsel for Petitioner

April 10, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 24-1586

ENTERGY ARKANSAS, LLC

Plaintiff-Appellant

v.

DOYLE WEBB, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE ARKANSAS PUBLIC SERVICE COMMISSION; KATIE ANDERSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS PUBLIC SERVICE COMMISSION; JUSTIN TATE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE ARKANSAS PUBLIC SERVICE COMMISSION

Defendants-Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: September 24, 2024
Filed: December 4, 2024

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

GRUENDER, Circuit Judge.

Entergy Arkansas, LLC appeals the dismissal of its complaint challenging the lawfulness of an order of the Arkansas Public Service Commission ("APSC"). We affirm.

I. Background

Entergy Arkansas is a public utility company that supplies power to wholesale and retail customers in Arkansas.[1] Wholesale customers purchase electricity for resale, while retail ratepayers purchase electricity to use. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016). Public utilities like Entergy Arkansas are regulated by both federal and state authorities. The Federal Energy Regulatory Commission ("FERC") regulates all interstate wholesale transactions. *See* 16 U.S.C. § 824. State commissions like the APSC regulate retail and *intra*state wholesale transactions. *See FERC*, 577 U.S. at 279. Electric providers must receive FERC's approval before conducting wholesale transactions across state lines. *See* 16 U.S.C. § 824d(c). They must submit a schedule that includes all rates and charges, as well as all classifications, practices, regulations, and contracts relevant to the rates and charges. *Id.* This schedule, once approved, is the "filed rate" or "tariff" and represents a significant limitation on the states' exclusive jurisdiction over in-state and retail transactions.

At all relevant times, Entergy Arkansas belonged to the Entergy System ("System"), a group of power companies that operated in several southern states. The System was governed by an operating agreement. Though each member company owned its own power plants, under the System agreement, all plants were operated centrally as if by a single large utility.

[1] Retail customers are often referred to as "ratepayers."

Costs and revenues were allocated among the different member companies. For example, the agreement provided for "bandwidth adjustment payments" to ensure that no member had annual costs of more than eleven percent above or below the System average. System members whose costs were lower than the System average had to pay bandwidth adjustments to other System members to achieve rough equalization of costs.

This litigation arises out of a series of short-term "opportunity sales" that Entergy Arkansas made to third-party wholesale customers between 2000 and 2009. In the late 1990s, after a series of settlement agreements and court orders, a portion of Entergy Arkansas's capacity was excluded from retail use and set aside to be exclusively sold to wholesale customers. In the early 2000s, Entergy Arkansas used this set-aside electricity to make short-term opportunity sales to various out-of-system wholesale customers.

In 2009, the Louisiana Public Service Commission filed a complaint with FERC, contending that Entergy Arkansas's accounting treatment of the opportunity sales violated the System operating agreement, thus shortchanging the other System members. FERC agreed that Entergy Arkansas had violated the agreement, though it noted that Entergy Arkansas appeared to have acted in good faith. *La. Pub. Serv. Comm'n*, 139 FERC ¶ 61240, ¶ 136 (2012) ("Opinion No. 521"). This resulted in Entergy Arkansas owing almost $81.7 million to the other System members. After years of litigation, FERC determined that because its ruling retroactively *increased* Entergy Arkansas's costs, it also retroactively *decreased* the bandwidth adjustment payments that Entergy Arkansas should have made to the other System members. *La. Pub. Serv. Comm'n*, 165 FERC ¶ 61022, ¶¶ 75-76 (2018) (“Opinion No. 565”). This resulted in overpayments of about $13.7 million. Including this bandwidth offset, Entergy Arkansas owed the other System members a net refund of approximately $68 million, plus another approximately $67 million in interest, for a total of approximately $135 million.

Notably, FERC did not decide how the refund costs should be allocated—that is, whether the costs should be borne by Entergy Arkansas’s shareholders or passed on to its retail ratepayers—even after the APSC petitioned for rehearing and clarification on that very issue. *See La. Pub. Serv. Comm’n*, 161 FERC ¶ 61171 (2017) (“Opinion No. 548-A”). As FERC “frequently explained,” its “only goal” was “to put the Operating Companies, not all ratepayers, in the position they would have been in had” Entergy Arkansas properly accounted for the opportunity sales. *Entergy Serv., Inc. v. FERC*, No. 17-1251, 2021 WL 3082798, at *11 (D.C. Cir. Jul. 13, 2021) (unpublished); Opinion No. 548-A at ¶ 11. “FERC never planned to address how costs would be distributed between ratepayers and shareholders.” *Entergy Serv.*, 2021 WL 3082798, at *11.

The APSC appealed FERC’s decision to the United States Court of Appeals for the District of Columbia, contending that FERC should have addressed the refund’s cost allocation, and that its associated costs should have been placed on Entergy Arkansas and not passed on to its retail customers. *See id.* The court disagreed, finding that FERC had “reasonably explained why this issue fell outside the scope of the proceedings.” *Id.* It pointed out that “[a]t argument, counsel for FERC specifically stated that FERC ‘went out of its way not to say something that would be preemptive or preclude someone from making argument[s]’ about that issue." *Id.* "FERC never decided that Entergy Arkansas's shareholders would receive the benefits of the damages offset while Entergy Arkansas's ratepayers would not. FERC merely declined to address how damages would be distributed between the two." *Id.*

In December 2018, Entergy Arkansas paid the other System members in full. In May 2019, it petitioned the APSC for permission to increase its retail rate to recover the $135 million net refund from its retail customers. The APSC denied this request and further ordered that Entergy Arkansas refund the $13.7 million bandwidth offset (plus interest) to its retail customers. The APSC reasoned that the original overpayments had been paid by Entergy Arkansas's retail customers and thus should be refunded to them.

Entergy Arkansas accordingly credited the bandwidth offset to its retail customers and then filed this lawsuit, arguing that the APSC's order was invalid because it violated the filed rate doctrine, the dormant Commerce Clause, and Arkansas law. After a three-day bench trial, the district court[2] upheld the APSC's order, finding that it did not violate Arkansas law and that neither the filed rate doctrine nor the dormant Commerce Clause applied.

II. Discussion

On appeal, Entergy Arkansas challenges the district court's determination that neither the filed rate doctrine nor the dormant Commerce Clause applied.[3] When reviewing bench trial judgments, we review "the

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[2] The Honorable Brian S. Miller, United States District Court for the Eastern District of Arkansas.

[3] Entergy Arkansas does not appeal the district court's determination that the APSC's order did not violate Arkansas law.

court's factual findings for clear error and its legal conclusions de novo." *Outdoor Cent., Inc. v. GreatLodge.com, Inc.*, 688 F.3d 938, 941 (8th Cir. 2012).

A. Filed Rate Doctrine

We first address Entergy Arkansas's contention that the district court erred when it concluded that the APSC's order did not violate the filed rate doctrine. "The filed rate doctrine requires that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (internal quotation marks omitted). As "a matter of enforcing the Supremacy Clause," FERC's decisions have "pre-emptive force." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963, 968 (1986). The filed rate doctrine ensures that states "give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 373 (1988). Thus, once FERC has approved an interstate rate schedule, states cannot "trap[]" costs by preventing electric providers "from recovering the costs of paying the FERC-approved rate." *Nantahala*, 476 U.S. at 970. Whether this "pre-emptive effect" applies does not "turn[] on whether a particular matter was actually determined in the FERC proceedings," "but only [on] whether the FERC tariff dictates how and by whom that classification should be made." *See Entergy La.*, 539 U.S. at 50. In other words: for the filed rate doctrine to apply, FERC need not have actually determined the result, but it does need to have decided how or by whom that result would be determined.

As the district court found, the System's operating agreement was "undisputed[ly]" a "filed rate." Thus, first, Entergy Arkansas contends that the refund is a filed rate and should be treated as a filed rate. It argues that the APSC violated the filed rate doctrine by forcing Entergy Arkansas to absorb the refund, thus "trapping costs." Second, Entergy Arkansas contends that the district court erred when it upheld the APSC's order to credit the retail ratepayers for the bandwidth adjustment. It argues that the bandwidth adjustment was "part of the same filed rate" and that "there is no basis to apply the filed rate doctrine to one part, but not a second part, of the same filed rate." Because the bandwidth costs would not have decreased but for the increased opportunity sales costs, Entergy Arkansas contends that the bandwidth offset should simply reduce the refund and not be allocated separately.

First, we conclude that the filed rate doctrine does not apply because FERC made no preemptive decision regarding the refund's cost allocation. Though FERC decided the amount of the refund and how it should be divided among members of the System, it declined to decide how the costs should be allocated. Rather—even when the APSC asked it to decide the cost allocation—FERC explained that "[t]he setting of retail rates within the Entergy system is a matter for state commissions, and nothing in [this decision] prevents the Arkansas Commission from pursuing this issue about the flow through of adjustments for bandwidth reductions in an appropriate forum." Opinion 548-A, 161 FERC ¶ 61171 at ¶ 11. At argument before the D.C. Circuit, FERC explained that it "went out of its way not to say something that would be preemptive or preclude someone from making argument[s]" about the cost allocation. *Entergy Serv.*, 2021 WL 3082798, at *11. Rather than deciding in favor of either the shareholders or the ratepayers, "FERC merely declined to address how damages would be distributed between the two." *Id.* In short, FERC made no decision that even arguably could have preempted the APSC's order.

Second, we conclude that the allocation of the bandwidth adjustment was also not part of the filed rate. Though the filed rate doctrine does not require an "actual[] determin[ation]," FERC must at least "dictate[] how and by whom that classification should be made." *See Entergy La.*, 539 U.S. at 49-50. Here, neither FERC nor the filed rate decided how the cost of any part of the refund should be allocated bandwidth adjustment or otherwise. But it did explain that this is "a matter for state commissions." Opinion 548-A, 161 FERC ¶ 61171 at ¶ 11. Therefore, as the state regulatory authority, the APSC retains its authority to regulate all retail and in-state wholesale rates. Entergy Arkansas's arguments to the contrary are irrelevant because they do not address this fundamental question. Thus, we conclude that the APSC's order does not violate the filed rate doctrine.

B. Dormant Commerce Clause

We next address Entergy Arkansas's contention that the APSC's order violates the dormant Commerce Clause because it discriminates against and imposes a clearly excessive burden on interstate commerce. The dormant Commerce Clause prohibits the enforcement of state laws driven by economic protectionism. *Nat. Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023). Under the dormant Commerce Clause, a law is subject to strict scrutiny if it "overtly discriminates" against interstate commerce—either facially or through "a discriminatory purpose or a discriminatory effect." *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1026 (8th Cir. 2020). It may also be struck down for imposing a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

We have before struck down an APSC order because it violated the dormant Commerce Clause. *See Middle S. Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 406 (8th Cir. 1985). Middle South Energy (the Entergy System's predecessor) had received FERC's approval to make certain interstate electric contracts—contracts that the APSC sought to block. *Id.* Though the district court found for Middle South as a matter of preemption, we affirmed because the APSC's order discriminated against interstate commerce—both in purpose and effect. *Id.* at 411. We found evidence of discriminatory purpose where the APSC's order expressed hopes of "circumvent[ing] or deflect[ing] the economic harm that looms over the State from the imminent prospect of being mandated by a federal agency to pay for a power generating plant." *Id.* at 412. Further, the APSC's order discriminated in effect by shifting Arkansas's share of costs onto citizens of Mississippi and Louisiana. *Id.* at 416-17.

Leaning on *Middle South*, Entergy Arkansas argues that the APSC's order violates the dormant Commerce Clause—both by overtly discriminating and by imposing a clearly excessive burden on interstate commerce. It first argues that the APSC's order discriminates against interstate commerce by shifting the burden of the refund from retail ratepayers to Entergy Arkansas's mostly out-of-state shareholders. It also points out that some of the high-cost energy used in the opportunity sales came from out of state. By preventing Entergy Arkansas from passing these costs onto retail ratepayers, it argues, the APSC's order discriminates against interstate commerce. In the alternative, Entergy Arkansas argues that the APSC's order impermissibly burdens interstate commerce because it "penalizes" Entergy Arkansas for making good-faith sales to out-of-state entities. This could deter future electric providers from entering regional pools and from providing wholesale electricity.

The district court correctly found that the APSC's order does not discriminate and is not an impermissible burden. Unlike in *Middle South*, the APSC's order is not economic protectionism. Rather, as the district court explained, the "APSC has the power to ensure that public utilities, including [Entergy Arkansas], can only recover costs that are reasonably necessary in providing utility service to ratepayers." Further, there is no indication that the APSC placed the burden on Entergy Arkansas and its shareholders because they are out-of-state. Unlike in *Middle South*, Entergy Arkansas has produced no evidence of overt discrimination. Moreover, we agree with the district court that negative effects on interstate commerce are "largely speculative and not clearly excessive" burdens on interstate commerce. Therefore, the APSC's order does not violate the dormant Commerce Clause.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

Case No. 4:20-CV-01088-BSM

ENTERGY ARKANSAS, LLC

Plaintiff

v.

DOYLE WEBB, *et al.*

Defendants

ORDER

This case was tried to the bench over the course of three days, from February 13 to 15, 2023. Having listened to the testimony and reviewed the evidence, judgment is entered for the Arkansas Public Service Commission ("APSC") and against Entergy Arkansas, LLC ("EAL").

I. BACKGROUND

Should retail customers of EAL pick up part of the tab for a $135 million refund that the Federal Energy Regulatory Commission ("FERC") ordered EAL to pay to other energy companies? EAL sued Ted Thomas, Kimberly O'Guinn, and Justin Tate in their official capacities as APSC Commissioners[1] challenging APSC's order saying that they should not. In that order, *In the*

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[1] Doyle Webb and Katie Anderson are substituted for Ted Thomas and Kimberly O'Guinn pursuant to Fed. R. Civ. P. 25(d).

Matter of the Application of Entergy Arkansas, LLC for Approval of a Rider to Recover Certain Payments, Docket No. 19-020-TF, Order No. 12 (APSC July 1, 2020) ("Order No. 12"), JTX-1155, APSC denied EAL's application for approval of a rider to recover from EAL's retail customers in Arkansas a portion of increased costs that FERC allocated to EAL. In compliance with FERC's orders, EAL paid the $135,037,914 net refund to the other Entergy Operating Companies in the Entergy System. EAL also returned the $13,709,000 bandwidth offset to retail customers. EAL now seeks to recover a percentage of those costs from its Arkansas retail customers.

A. Regulatory Framework

Under the Federal Power Act ("FPA"), FERC regulates wholesale sales of electricity in interstate commerce, 16 U.S.C. § 824(b), and must ensure that wholesale rates are "just and reasonable." *Id*. § 824d(a); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 41 (2003). "FERC's exclusive jurisdiction applies not only to wholesale rates but also to power allocations among integrated public utilities that affect wholesale rates." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988). FERC has the power to make "just and reasonable" any public utility "rule, regulation, practice or contract affecting [a] rate, charge, or classification [that] is unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a).

State regulators govern "[a]ll matters other than the transmission and wholesale sale of energy in interstate commerce." *Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 593 F. Supp. 363, 366 (E.D. Ark. 1984), *aff'd*, 772 F.2d 404 (8th Cir. 1985); 16 U.S.C. § 824(a) and (b). State regulators, including APSC, establish rates that public utilities may charge in retail sales, allowing utility companies to recover costs and a reasonable rate of return. *Entergy La.*, 539 U.S. at 42. "[I]nterstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nahantala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986). Put another way, FERC regulates interstate wholesale rates while APSC regulates intrastate retail rates, but APSC must give binding effect to wholesale rates filed by FERC. That said, "it is often difficult to draw the distinction between interstate and intrastate power sales." *Middle South*, 593 F. Supp. at 366.

B. Entergy Arkansas and the Entergy System

EAL is a public utility company that provides electricity in Arkansas. At all relevant times, EAL was a member of the Entergy System, which consisted of five Entergy Operating Companies ("EOCs") that operated in Arkansas, Louisiana, Mississippi, and Texas. These EOCs shared capacity under an arrangement that allowed each EOC to access additional capacity when needed. *Entergy La.*, 539 U.S. at 42. The loads on the system were centrally dispatched using generators located across the system. Under this sharing arrangement, costs of power generation and transmission were allocated among the EOCs. This allocation of costs constitutes "the sale of electric energy at wholesale in interstate commerce" under the FPA. 16 U.S.C. § 824(b)(1); *Entergy La.*, 539 U.S. at 43 n. 1.

The Entergy System allocated costs through the Entergy System Agreement, a FERC-approved tariff originally executed in 1982. Entergy System Agreement ("ESA") at 5, JTX-66. The system agreement was administered by the Entergy operating committee, which consisted of a representative from each EOC and Entergy Services, which provided administrative services to the Entergy System. *See Entergy La.*, 539 U.S. at 42. The system agreement allowed the EOCs "to equalize the costs and benefits of generating energy." *Entergy Servs., Inc. v. FERC*, No. 17-1251, 2021 WL 3082798, at *1 (D.C. Cir. July 13, 2021). The costs and revenues were run through a monthly invoice called the Intra-System Bill ("ISB"). *Id*. at *2. EAL exited the system agreement in 2013, and it was terminated three years later. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 565, 165 FERC ¶ 61,022 at P 4 n. 11 (2018) ("Opinion 565"), JTX-1042. EAL joined the Midcontinent Independent System Operator ("MISO"), a different regional power grid, in 2013. 2/13 Tr. 96:4–8 (Castleberry).

Service Schedule MSS-3 of the system agreement governed how energy and associated costs were allocated among the EOCs. *See* Andrew Dornier Rebuttal Testimony in APSC Docket No. 19-020-TF at 7, JTX-1119. Two cost-allocation provisions of the system agreement found in Service Schedule MSS-3 are significant here: sections 30.03 and 30.04. Under section 30.03, energy from the lowest cost source available was to be allocated "(a) first to the loads of the Company having such sources available . . . [and] (b) second to supply the requirements of the other Companies' Loads (Pool Energy)." ESA at 44–45; *Entergy Servs.*, 2021 WL 3082798, at *1. Under section 30.04, energy used to supply others was to be provided in accordance with rate schedules on file with FERC. ESA at 45. As the D.C. Circuit explained, under these provisions,

> the lowest-cost energy on the System was allocated to the 'loads' of the Entergy System member which produced that energy. If that utility produced energy in excess of its 'loads,' then under section 30.03(b) it was deemed to

> have sent its excess energy to the pool, to be used by other System members to cover the requirements of their 'loads.' After energy was allocated to fulfill each of the System member's loads, the remaining energy—the most expensive on the System—was deemed to have been used to fulfill 'Sales to Others' under section 30.04.

Entergy Servs., 2021 WL 3082798, at *2 (citation omitted).

To help allocate costs under the system agreement, each EOC carried a responsibility ratio, which is the ratio between the company's load responsibility and the system load responsibility. ESA 2.18; *Entergy Servs.*, 2021 WL 3082798, at *2. The responsibility ratio helped distribute the costs, revenues, and reserves among the companies equally. *Entergy Servs.*, 2021 WL 3082798, at *2. Each EOC's responsibility ratio was determined using a rolling average of its contribution to the monthly peak system load over the preceding twelve months. ESA 2.16–2.18.

The bandwidth remedy formula, also found in Service Schedule MSS-3 of the system agreement, ensured that no individual EOC had annual costs more than eleven percent above or below the system average. MSS-3 section 30.11, ESA at 51–52; *Entergy Servs.*, 2021 WL 3082798, at *2. If an EOC's annual costs were above or below these limits, "payments were made by the low cost Operating Companies to the high cost Operating Companies to equalize the distribution of costs." *Entergy Servs.*, 2021 WL 3082798, at *2 (cleaned up). Because EAL had low production costs, EAL made bandwidth payments to other EOCs with higher production costs from 2005 to 2009. EAL recovered these bandwidth payments from retail ratepayers through a Production Cost Allocation ("PCA") rider. Order No. 40, *In the Matter of the Application of Entergy Arkansas, Inc., for Approval of Changes in Rates for Retail Electric Service*, Docket No. 13-028-U (Jan. 9, 2015), Doc. No. 60-24.

In the years leading up to the current dispute, EAL and APSC reached a series of settlement agreements governing the allocation of certain fixed costs incurred by EAL. In 1985, APSC reached an agreement with EAL's predecessor, allowing it recover from retail customers 78% of the costs FERC allocated to the company for the construction of the Grand Gulf nuclear facility in Mississippi. *In the Matter of the Application of AP&L for Approval of Changes in Rates Applicable to Residential, General Service, Industrial, and Other Retail Electric Service*, Order No. 26, APSC Docket No. 84-249-U; Order No. 4, Docket No. 85 198-U (Sept. 9, 1985), PX-14. The remaining 22% was to be retained by EAL. 2/13 Tr. 71:5–11 (Castleberry). In 1997, APSC approved a settlement allocating a fixed level of EAL's wholesale load—13.87%—to EAL's wholesale business, not to its retail customers. *In the Matter of the Application of Entergy Arkansas, Inc. for Approval of Changes in Rates for Retail Electric Service*, Order No. 31, APSC Docket No. 96-360-U (Dec. 12, 1997), PX19; Direct Testimony of Diana K. Brenske in Docket No. 19-020-TF, JTX-1109 at 11–13. As a result of these settlements, two tranches of EAL's capacity were excluded from its retail base: 91 MW of Grand Gulf capacity and 644 MW of slice-of-system capacity. Opinion 565, 165 FERC ¶ 61,022 at P 5.

From 2000 to 2009, EAL made short-term (lasting no longer than a month) wholesale sales of this excluded capacity to off-system customers. *Entergy Servs.,* 2021 WL 3082798, at *2. These sales were known as opportunity sales. EAL allocated the costs of these opportunity sales under section 30.03 of the MSS-3, treating the energy that supplied these sales as part of its own load. *Id*.

C. FERC Proceedings—Docket No. EL06-61

In 2009, the Louisiana Public Service Commission ("LPSC") filed a complaint under section 206 of the FPA, 16 U.S.C. § 824e, alleging that EAL's opportunity sales violated the system agreement. Formal Complaint of LPSC in FERC Docket No. EL09-61, JTX-2.

After initial proceedings before an administrative law judge, FERC found that, while the system agreement authorized EAL to make the opportunity sales, EAL violated the system agreement by treating the sales as part of EAL's load under section 30.03 instead of as "sales to others" under section 30.04. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 521, 139 FERC ¶ 61,240 at P 106 (2012) ("Opinion 521"), JTX-372. In reaching this determination, FERC found that the opportunity sales should be treated as "sales to others" based on the language of sections 30.03 and 30.04 and the context of the system agreement as a whole. *Id*. at P 129. FERC also found that the opportunity sales were made and priced in good faith. *Id*. at P 136. FERC ordered a rerun of the ISB to determine the difference between the energy costs allocated under the original accounting under section 30.03 and how they should have been accounted under section 30.04, and determined that the difference should be refunded to the other EOCs. *Id*. at PP 135 and 136.

During further proceedings to determine the appropriate refund amount, FERC explained that "the goal of the damage proceeding was to put the parties as close as possible to the position they would have been in had the Opportunity Sales been correctly allocated for." *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548, 155 FERC ¶ 61,065 P 149 (2016) ("Opinion 548"), JTX-701. To that end, FERC found that the damages calculation should be adjusted to reflect the impact of the opportunity sales on the system agreement's service schedules, including the bandwidth formula, had the accounting been done properly in the first place. *Id*. at P 9. But FERC found that no changes to the system agreement were needed to calculate damages. *Id*. at P 95. And FERC determined that the distribution of damages between ratepayers and shareholders was outside the scope of the proceeding. *Id*. at P 201. FERC later reiterated its determination that the treatment of the bandwidth adjustment for purposes of retail rates was outside the scope of the proceeding. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Opinion No. 548-A, 161 FERC ¶ 61,171, P 11 (2017) ("Opinion 548-A"), JTX-1032. As FERC stated, "[t]he setting of retail rates within the Entergy system is a matter for state commissions, and nothing in Opinion No. 548 prevents the Arkansas Commission from pursuing this issue about the flow through of adjustments for bandwidth reductions in an appropriate forum." *Id*.

Following additional proceedings, FERC found that "the best method to determine the damages that Entergy Arkansas owes to the other Operating Companies is to do a full rerun of the ISB, with an adjustment to recognize the full amount of the additional bandwidth payments Entergy Arkansas made to the other Operating Companies as a result of Entergy's original incorrect accounting for the Opportunity Sales." Opinion 565, 165 FERC ¶ 61,022 at P 75. FERC reasoned that the other EOCs would receive double damages if the bandwidth payments were not considered in calculating damages. *Id*. at P 76. FERC also noted that LPSC could not point to any finding that the opportunity sales were imprudent, nor could it demonstrate that they were imprudently made. *Id*. at P 77.

EAL, APSC, and LPSC sought judicial review of FERC's orders in the D.C. Circuit, which upheld the orders. The D.C. Circuit concluded that FERC's interpretation of the system agreement to require accounting for opportunity sales under section 30.04 was reasonable. *Entergy Servs.*, 2021 WL 3082798, at *5. The court also concluded that FERC reasonably ordered EAL to refund the other EOCs because EAL's "violation harmed the other operating companies and their customers by causing them to overpay for energy." *Id*. at *6. In reaching this conclusion, the court reasoned that EAL "would have retained a windfall from its violation" without a refund because EAL "made a substantial profit on the opportunity sales it misallocated." *Id*.

The D.C. Circuit also held that FERC's calculation of the refund was reasonable. *Id*. at *7. The court determined that FERC rationally reduced the refund to account for the excess bandwidth payments paid by EAL during the years at issue because the other EOCs "received more in bandwidth payments than they would have under the correct allocation." *Id*. at *8. The court further concluded that FERC rationally reduced the refund to reflect that EAL's responsibility ratio would have been lower had the opportunity sales been allocated correctly. *Id*. In upholding FERC's decision not to adjust the refunds to account for EAL's losses from the opportunity sales resulting from the ISB rerun, the court noted that EAL assumed sole responsibility for the opportunity sales and that FERC found "that responsibility included any negative margins resulting from the sales." *Id*. at *9. "Entergy Arkansas did not share the profits of the opportunity sales, so could not share its losses. Put another way, Entergy Arkansas 'must take the bitter with the sweet.'" *Id*. (citation omitted). Finally, the D.C. Circuit determined that FERC reasonably declined to address how the bandwidth reduction should be allocated between EAL's ratepayers and shareholders. *Id*. at *11. In reaching this conclusion, the court noted that "state commissions, like Arkansas, are responsible for setting retail rates for the Entergy System" and that Arkansas could litigate the issue in another forum. *Id*.

In compliance with the FERC orders, EAL paid a total of $135,037,914 ($67,950,842 in principal plus $67,087,072 in interest) to the other EOCs in December 2018. Entergy Services Compliance Filing Refund Report at 8, Docket No. EL09-61 (Dec. 17, 2018), JTX-1044. The $67,950,842 principal amount included the unadjusted refund calculated by the ISB rerun ($81,659,842) less the bandwidth offset ($13,709,000). JTX-1044 at 7.

D. APSC Proceedings—Docket No. 19-020-TF

In May 2019, EAL applied to APSC for a retail rate surcharge to recover $135,036,834 from its retail customers. *In the Matter of the Application of Entergy Arkansas, LLC for Approval of a Rider to Recover Certain Payments Arising from FERC Opinion No. 565 and Related Orders*, APSC Docket No. 19-020-TF, JTX-1060. In its application, EAL contended that the federal filed rate doctrine and the Commerce Clause required APSC to allow EAL to recover an appropriate portion of the refund from retail customers. *Id*. at 14–15. EAL argued that the appropriate percentage to collect from retail customers was 99.9992 percent because that was the allocation factor in place when EAL made the refund payment to the other EOCs. *Id*. at 16. In the alternative, EAL argued that no lower than 86.13 percent should be allocated to retail customers, because an 86.13/13.87 retail/wholesale split was used until 2003. *Id*. at 16–17.

APSC denied EAL's application a year later, following written testimony and briefing from EAL, the Arkansas Attorney General, APSC staff, and the Arkansas Electric Energy Consumers, Inc. ("AEEC"). Order No. 12. In Order No. 12, APSC first found that the filed rate doctrine did not preempt it from considering the merits of EAL's application. *Id*. at 103. In APSC's view, FERC did not set a wholesale rate when it ordered the refund; instead, "it calculated a damages payment for violations" of the system agreement. *Id*. The filed rate doctrine does not apply, according to APSC, because "the damages payment is not the type of wholesale cost that could be impermissibly 'trapped' by this Commission." *Id*. at 104. APSC further concluded that the damages payment is not a cost incurred by EAL's "payment of just and reasonable FERC-set rates." *Id*.

After finding that the filed rate doctrine did not apply, APSC determined that collateral estoppel barred the consideration of EAL's application. *Id*. at 105. At issue was whether APSC's decision in an earlier proceeding, Docket No. 10-096-TF, precluded consideration of the issues in the current proceeding. In Docket No. 10-096-TF, EAL sought to recover a FERC-ordered damages payment from retail customers, which APSC denied. *Id*. at 106; *In the Matter of the Application of Entergy Arkansas, Inc., for Approval of a Rider to Recover Certain Charges Arising from FERC Opinion Nos. 468 and 468-A and Related Orders*, Docket No. 10-096-TF, Order No. 2 (June 2, 2010) and

Order No. 3 (July 20, 2011). APSC determined that two issues raised and decided in that docket—"whether charging retail ratepayers for the refund costs would violate Arkansas law" and "whether the doctrine of federal preemption requires the pass-through of the refund costs to EAL's retail ratepayers"—are the same issues raised in the current docket. *Id*. at 106. APSC noted EAL's contention that the issues were different because FERC ordered the refund in the current docket under section 309 of the FPA, not section 206(c) as in Docket No. 10-096-TF, but did not find that difference significant. *Id*.

Even though APSC determined that collateral estoppel barred consideration of EAL's application, it considered the application on the merits anyway and concluded that recovery of the FERC-ordered refund from EAL's retail customers was not in the public interest. APSC concluded that EAL should not be allowed to recover from retail customers because those customers "should be placed in the position they would have been but for the improper allocation of the Opportunity Sales." *Id*. at 108. If EAL were allowed to recover the refund from retail customers, APSC found, those customers "would be held solely responsible for EAL's wholesale business costs, an obligation which belongs entirely to EAL's shareholders." *Id*. In support of this conclusion, APSC found that EAL had made representations in earlier proceedings, Docket Nos. 96-360-U and 03-028-U, "that it would hold ratepayers harmless from the unforeseen costs of its wholesale business." *Id*. at 108. Specifically, APSC pointed to EAL's agreement in Docket No. 96-360-U that it would "take steps to hold [EAL] ratepayers harmless from unforeseen events" and testimony from an EAL witness in Docket No. 03-028-U that "you will not have any cost or circumstances from the wholesale side flowing over on to the retail side" along with testimony from EAL's then-CEO that wholesale business costs could "never be reallocated to retail customers." *Id*. at 109–110.

APSC also determined that the Dormant Commerce Clause does not require it to allow EAL to recover from retail customers because the denial of EAL's application "does not result in EAL receiving different treatment from other utility companies in Arkansas." *Id*. at 110. APSC noted that utility companies "may only recover costs that are 'reasonably necessary in providing utility service to ratepayers'" and determined that EAL's proposed treatment of the refund "is not such a cost." *Id*. According to APSC, the denial of EAL's application "is an exercise of its traditional regulatory role, rather than an indication of discriminatory intent or economic protectionism." *Id*.

Not only did APSC deny EAL's request to recover the FERC-ordered refund from retail customers, it also ordered EAL to refund the $13,709,000 bandwidth offset to retail customers. *Id*. at 111–12. APSC noted that EAL's improper accounting of the opportunity sales lowered EAL's total production costs while increasing the total production costs of the EOCs, resulting in increased bandwidth payments from EAL to the other EOCs. *Id*. at 112. And APSC pointed out that retail customers had already reimbursed EAL for the bandwidth payments. *Id*. at 111. To put EAL retail customers in the place they would have been but for the improper accounting of the opportunity sales, APSC determined a refund of the bandwidth overpayments was proper. *Id*. at 112–13. EAL credited the bandwidth offset—$15,446,957 including interest—to retail customers in August 2020. Compliance Testimony of Myra Talkington, Docket No. 19-020-TF at 3–4, JTX-1165.

D. Current Proceedings

After APSC denied its application to recover the net refund from retail customers, EAL filed this lawsuit. EAL's complaint contains three counts. Count I asserts that APSC violated the filed rate doctrine. Count II asserts that APSC violated the Dormant Commerce Clause. Count III asserts that APSC's order violates Arkansas law because it is arbitrary and capricious and not supported by substantial evidence.

Nearly two and a half years of litigation followed before this case was tried. AEEC filed a motion to intervene, which was denied before trial, along with the parties' motions for summary judgment. The denial of AEEC's motion to intervene was affirmed. *Entergy Ark., LLC v. Thomas*, 76 F.4th 1069 (8th Cir. 2023). At trial, EAL offered five witnesses in support of its position. APSC did not proffer any witnesses, and maintained its position that this case should only be decided on the administrative record.

II. STANDARD OF REVIEW

This court has jurisdiction over Counts I and II pursuant to 28 U.S.C. § 1331 because they arise under federal law. This court has supplemental jurisdiction over Count III pursuant to 28 U.S.C. § 1367(a).

The parties disagree as to what standard of review is appropriate and what evidence I can consider. EAL argues that this case is subject to a *de novo* determination, at least on Counts I and II, of whether Order No. 12 violated federal law. EAL's Proposed Findings of Fact and Conclusions of Law at 46–47, Doc. No. 177. EAL also contends that review is not limited to the administrative record but should include evidence presented at trial. *Id*. at 48–49. APSC counters that Order No. 12 must be reviewed solely on the administrative records of the proceedings before FERC and APSC. APSC's Proposed Findings of Fact and Conclusions of Law at 29, Doc. No. 178. APSC argues that this review is limited to whether its findings are supported by substantial evidence and whether its actions were arbitrary or capricious. *Id*. at 21–26. APSC maintains that none of the evidence presented at the bench trial should be considered and that the trial itself was not appropriate. *Id*. at 9 n. 1.

As an initial matter, the law of the case doctrine does not control what evidence I can review. Before this case was transferred to me, Judge Baker, in ruling on EAL's motion to compel, determined that the case is not purely "an action for review on an administrative record" pursuant to Federal Rule of Civil Procedure 26(a)(1)(B)(i) and permitted discovery on Counts I and II. Doc. No. 43. EAL contends that Judge Baker's ruling is the law of the case, and that I am held to her earlier ruling. Under the law of the case doctrine, courts must "adhere to decisions made in earlier proceedings in order to ensure uniformity of decisions, protect the expectations of the parties, and promote judicial economy." *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008). The doctrine applies to final decisions made by district courts that have not been appealed, but it does not apply to interlocutory orders. *Id*. Because Judge Baker's order on the motion to compel was an interlocutory order, law of the case does not apply. *See FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 276 (1991) (a discovery ruling is "clearly" an interlocutory decision).

Even though I am not bound by Judge Baker's ruling, I agree with it. Counts I and II are subject to a *de novo* determination, and evidence presented at trial, even if not presented in the administrative proceedings, will be considered. The cases cited by APSC for the proposition that review is limited to the administrative record involve federal courts reviewing decisions by federal agencies—*e.g., Camp v. Pitts*, 411 U.S. 138 (1973) (reviewing action by the Comptroller of the Currency); *Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006) (reviewing action by IRS); *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) (reviewing letters sent by EPA)—or Arkansas courts reviewing decisions by Arkansas agencies—*e.g., Ark. Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001) (reviewing action by state licensing board). But this is not an appeal under the Administrative Procedure Act. Other federal courts have reviewed actions by state public service commissions *de novo*, including *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013) (bench trial deciding whether state commission order was preempted or violated Dormant Commerce Clause); *AEP Texas Cent. Co. v. Hudson,* 441 F. Supp. 2d 810 (W.D. Tx. 2006) (bench trial deciding whether state public utilities commission order was preempted); and *Middle South Energy*, 593 F. Supp. 363 (hearing on whether APSC proceedings were preempted or violated Dormant Commerce Clause). Accordingly, evidence presented at trial will be considered on EAL's preemption and Dormant Commerce Clause claims.

Review of Count III, however, is limited to the administrative record pursuant to Arkansas Code Annotated section 23-2-423(b)(2). Accordingly, evidence outside the administrative record will not be considered. On this count, review of Order No. 12 is limited to whether there is substantial evidence to support APSC's findings. *See* Ark. Code Ann. § 23-2-423(c)(4) ("[R]eview shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas."). The order will be upheld if it is supported by substantial evidence and not arbitrary or capricious. *Petit Jean Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 2022 Ark. App. 215, at 11–12, 646 S.W.3d 123, 132.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

For the reasons stated below, judgment is entered for APSC and against EAL.

A. <u>Does Order No. 12 Violate the Filed Rate Doctrine?</u>

Order No. 12 does not violate the filed rate doctrine because the FERC-ordered refund is not part of the filed rate.

1. Filed Rate Doctrine

In Count I of its complaint, EAL argues that APSC's refusal to allow it to recover a portion of the refund from retail customers violates the filed rate doctrine. The filed rate doctrine applies to state regulators as a matter of federal preemption through the Supremacy Clause. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581–82 (1981). This doctrine requires "that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Entergy La.*, 539 U.S. at 47 (quoting *Nantahala*, 476 U.S. at 962); *see also Mississippi Power & Light*, 487 U.S. at 373 (holding that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.... Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable"). "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." *Nantahala*, 476 U.S. at 970. In other words, a state cannot "trap" those costs. *Id*. Trapping occurs when a utility "cannot fully recover its costs of purchasing at the FERC-approved rate." *Id*.

Under the filed rate doctrine, "FERC-approved cost allocations between affiliated energy companies may not be subjected to reevaluation in state ratemaking proceedings." *Entergy La.*, 539 U.S. at 41–42. *Nantahala*, *Mississippi Power & Light*, and *Entergy Louisiana* applied the filed rate doctrine to prohibit state regulators from failing to give effect to cost allocations among utility companies. In *Nantahala*, FERC approved a certain apportionment of low-cost power to a utility company, but the state regulator determined that the utility's share of the low-cost power was higher than that allocated by FERC. 476 U.S. at 960–61. As a result, the utility company was unable to recover the full costs of acquiring power, and a portion of those costs was "trapped" in violation of the filed rate doctrine. *Id*. at 971. *Mississippi Power & Light* involved FERC's allocation of costs associated with the construction of the Grand Gulf nuclear plant to the participating operating companies. 487 U.S. at 356.

State courts declined to allow the utility to pass those costs to retail customers without a prudence review. *Id*. at 367. The Supreme Court concluded that FERC's allocation preempted a state prudence review of the utility's decision to participate in the nuclear plant, reasoning that "FERC-mandated allocations of power are binding on the States, and States must treat these allocations as fair and reasonable when determining retail rates." *Id*. at 371. In *Entergy Louisiana*, the state regulator would not allow the utility company to charge retail rates that would allow it to recoup certain payments made to the other EOCs under the Entergy system agreement. 539 U.S. at 45–46. The Court held that the state order impermissibly trapped costs that were allocated in a FERC tariff. *Id*. at 49. These cases make clear that the preemptive effect of FERC jurisdiction does not turn on whether a particular matter was actually determined in the FERC proceedings. *Miss. Power & Light*, 487 U.S. at 374.

FERC has the power to order refunds for violations of filed rates, as it did here. *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (FERC "can enforce the terms of a filed rate and order refunds for past violations of one"). FERC may order a refund of portions of newly-filed rates or charges "found not justified," 16 U.S.C. § 824d(e); it may order a refund after finding a rate "unjust, unreasonable, unduly discriminatory, or preferential," *Id*. § 824e(b); or it may order refunds of amounts improperly collected in excess of the filed rate. *Id*. § 825h. *Towns of Concord, Norwood & Wellesley, Mass. v. FERC*, 955 F.2d 67, 72–73 (D.C. Cir. 1992).

2. Is Refund a Filed Rate?

Is the FERC-ordered refund for the misallocation of EAL's opportunity sales part of the filed rate? EAL argues that it is, and that APSC must therefore allow EAL to recover a portion of the refund from retail customers, or costs would be impermissibly trapped. *See* 2/15 Tr. 457: 22–24 (Massey) (stating that "any remedy that is imposed by FERC to effectuate the filed rate becomes part and parcel of the filed rate."). APSC counters that it is not, and that retail customers received no benefit from the opportunity sales and so should not be burdened with paying the refund arising from misallocation of those sales.

It is undisputed that the Entergy System Agreement was a filed rate. Order No. 12 at 7. And the accounting provisions at issue in the FERC proceedings—sections 30.03, 30.04, and 30.11 through 30.13—are included in Service Schedule MSS-3 of that system agreement. JTX-66. But it does not necessarily follow that a refund for a violation of that agreement is part of the filed rate such that EAL must be allowed to pass on the costs to its retail customers.

The parties dispute the effects of the opportunity sales on EAL's retail customers. EAL made the opportunity sales to defray costs associated with the excluded assets—created by settlement agreements in APSC Docket No. 84-249-U and Docket No. 96-360-U— that it was not allowed to pass through to retail customers. 2/13 Tr. 83:4–7 (Castleberry) ("So that capacity or those excluded assets in that retained share, we had to do something with them until we figured out what else we could do with them for the long term. That's when the opportunity sales came into play."). There was some testimony at trial that the opportunity sales benefitted retail customers. Kurtis Castleberry testified that the opportunity sales allowed EAL to keep its generating assets rather than selling them off and allowed EAL to enter MISO on more favorable terms. 2/13 Tr. 95–99. William Massey testified that, under the original accounting, retail customers underpaid for energy, 2/15 Tr. 462:21–463:2, while Bruce Louiselle testified that, had the opportunity sales been allocated correctly in the first place, EAL's increased production costs would have been included in the filed rate and would have been allocated in part to retail customers. 2/13 Tr. 207:8–22.

I find that, on balance, the opportunity costs provided little benefit to retail customers. Retail customers did not receive energy from the generating resources that supported the opportunity sales. 2/13 Tr. 125:19–21 (Castleberry). Retail customers did not pay costs associated with the resources used for opportunity sales. 2/13 Tr. 80:4–8 (Castleberry). EAL's shareholders bore those costs. 2/13 Tr. 111:20–23 (Castleberry). Likewise, revenues from the opportunity sales did not go to retail customers. 2/13 Tr. 112:20–113:1 (Castleberry). The capacity that EAL sold through opportunity sales was capacity for which EAL—not retail customers—was responsible. Any purported benefit that retail customers might have received had the opportunity sales been allocated correctly is speculative.

Order No. 12 is not preempted by the filed-rate doctrine. The payments EAL made to the other EOCs are unlike the costs at issue in *Nantahala*, *Miss. Power & Light*, and *Entergy Louisiana*. In those cases, state regulators prevented utilities from recovering from retail customers FERC-approved costs of acquiring energy ultimately destined for those customers. By contrast, the opportunity sales were purely wholesale sales; costs associated with acquiring power for those sales were kept separate from retail. The FERC-ordered refund is not a FERC-approved filed rate;

rather, it was a refund to the other EOCs for a misallocation of the opportunity sales in violation of the system agreement. The opportunity sales were made in good faith and not imprudent. But the way in which they were accounted nonetheless violated the system agreement and caused the other EOCs to overpay. EAL made the opportunity sales to minimize its losses; essentially, to lose less money than it would have absent the sales. EAL's shareholders received the revenues from those sales and bore the risk too. As it turned out, the FERC-ordered ISB rerun led to increased costs of those sales. But retail customers—who did not benefit from the opportunity sales—should not be required to pay for losses associated with the sales years after those sales concluded. The filed rate doctrine does not require APSC to allow EAL to flow through to retail customers costs from wholesale business activities that were kept separate from retail.

3. *Different Treatment of Bandwidth Offset*

EAL also argues that the filed rate doctrine requires the APSC to allow it to recover both the unadjusted refund and the bandwidth offset because they together are part of the filed rate. Recall that bandwidth payments were made to ensure that each EOC's annual costs were no more than eleven percent above or below the system average. The bandwidth offset and unadjusted refund are both products of the FERC-ordered ISB rerun. In EAL's view, the net refund cannot be disaggregated into an unadjusted refund of approximately \$80 million and bandwidth offset of approximately \$14 million. *See* Dornier Testimony at 22–23, JTX-1119 ("[I]t would be inconsistent and unreasonable to isolate selected portions of the ISB re-runs where the FERC-ordered refund required that the ISB re-runs be made to determine the cumulative effect of removing the Opportunity Sales from EAL's load and instead treat them as Sales to Others.").

The opportunity sales, as they were originally allocated under section 30.03, lowered EAL's total production costs, resulting in bandwidth payments from EAL to the other EOCs. EAL recovered the bandwidth payments from retail customers from 2005 to 2009. These bandwidth payments were flowed through to retail customers by Rider PCA. 2/14 Tr. 370:20–371:4 (Hunt). As EAL's costs increased after the ISB rerun, the bandwidth payments it owed to the other EOCs decreased. Opinion No. 565, 165 FERC ¶ 61,022 at P 75. The net refund FERC ordered EAL to pay to the other EOCs was accordingly decreased by $13,709,000, the amount that EAL was determined to have overpaid in bandwidth payments.

After EAL paid the FERC-ordered refund to the other EOCs, those companies returned their share of the net refund to their retail customers, *see* PX-34, PX-36, PX-37, PX61, except for Entergy New Orleans, which used its share to create a relief fund for customers affected by the COVID-19 pandemic. PX-40. 2/14 Tr. 354–64 (Hunt). Unlike EAL, the other EOCs did not treat the unadjusted refund amount as separate from the bandwidth offset when passing the refund along to retail customers.

That the other EOCs did not disaggregrate the net refund does not control how APSC should treat the bandwidth offset. Recall that the D.C. Circuit determined that the allocation of the bandwidth offset between shareholders and ratepayers was a matter for state regulators. *Entergy Servs.*, 2021 WL 3082798, at *11. Order No. 12 properly directed EAL to return the bandwidth offset to its retail customers. The bandwidth payments are part of the filed rate. Retail customers were responsible for those payments. As it turns out, they overpaid due to the misallocation of costs associated with the opportunity sales. The filed rate doctrine does not prevent the APSC from requiring EAL to refund those overpayments to retail customers.

B. Does Order No. 12 Violate the Dormant Commerce Clause?

Order No. 12 does not violate the Dormant Commerce Clause because it is not overtly discriminatory and does not unduly burden interstate commerce.

The Dormant Commerce Clause prohibits the enforcement of state laws that discriminate against interstate commerce. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369–70 (2023). A state law challenged under the Dormant Commerce Clause is subject to a two-tier analysis. *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003). First, the court determines whether the challenged law discriminates against interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 99 (1994). Discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* If the law is discriminatory, it is invalid unless the state can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *S.D. Farm Bureau*, 340 F.3d at 593. Second, if the law is not overtly discriminatory, it will be struck down "only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'" *Id*. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The "crucial inquiry" is "whether the APSC's action 'is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.'" *Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 416 (8th Cir. 1985) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

"[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The state has a "clear and substantial governmental interest" in fair and efficient rates. *Middle South*, 772 F.2d at 412. But the effect of the production and transmission of energy "on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." *Ark. Elec. Coop. Corp.*, 461 U.S. at 377.

1. Overt Discrimination

Under the first tier of analysis, I conclude that Order No. 12 is not overtly discriminatory.

State law may be considered to be economic protectionism if it has either a discriminatory purpose or discriminatory effect. *Middle South*, 772 F.2d at 416. EAL argues that Order No. 12 has both. EAL contends that APSC was motivated by a concern about the economic impact of higher rates on retail customers in Arkansas. EAL also contends Order No. 12 has the discriminatory effect of excluding high-cost electricity in order to protect Arkansas retail customers, thereby forcing EAL's out-of-state shareholders to pay for those costs. EAL points out that, as a result of the FERC orders, some of the energy deemed to supply the opportunity sales came from outside of Arkansas, and by refusing to allow EAL to flow through those costs to retail customers, APSC is unconstitutionally excluding that high-cost energy from out of state.

In *Middle South*, APSC sought to prevent AP&L, EAL's predecessor, from participating in the Grand Gulf nuclear power plant, even after FERC obligated operating companies, including AP&L, to share in costs associated with the project. 772 F.2d at 408. To that end, APSC began formal inquiries into AP&L's role in the project. *Id*. The *Middle South* court found that APSC's actions had a discriminatory purpose, noting that the actions were rooted in concerns about the economic impact of AP&L's participation in Grand Gulf. *Id*. at 416. APSC also wanted to deflect rate increases from Arkansas retail customers and shift the economic burden to citizens of other states. *Id*. at 416–17. The court determined that APSC wanted "to close [the state's] borders to high-cost electricity," which would be a direct and substantial burden on interstate commerce. *Id*. at 417.

Unlike APSC's actions in *Middle South*, Order No. 12 is not economic protectionism. As APSC stated in Order No. 12, the denial of EAL's application was an "exercise of its traditional regulatory role, rather than an indication of discriminatory intent or economic protectionism." Order No. 12 at 110. APSC has the power to ensure that public utilities, including EAL, can only recover costs that are "reasonably necessary in providing utility service to ratepayers." *Id*. (quoting *Entergy Ark., Inc. v. Ark. Pub. Serv. Comm'n*, 104 Ark. App. 147, 162, 289 S.W.3d 513, 525 (2008)). The costs arising from the FERC-ordered revised accounting of the opportunity sales are not reasonably necessary to serve EAL's retail customers, and APSC acted within its traditional regulatory role in declining to allow EAL to pass those costs onto customers. Moreover, there is no indication that EAL was treated differently because its shareholders were not located in Arkansas; rather, the effects of Order No. 12 on out-of-state investors are incidental.

2. Balancing

Because Order No. 12 is not overtly discriminatory, the next question is whether the burden it imposes on interstate commerce is clearly excessive in relation to local benefits. *See Pike*, 397 U.S. at 142. I conclude that it is not.

Order No. 12 has clear local benefits. The order benefits Arkansas retail electricity customers by preventing EAL from passing approximately $135 million in increased costs associated with the opportunity sales to them and allowing them to recover approximately $13.7 million in bandwidth overpayments.

EAL argues that any benefits realized by Arkansas retail ratepayers are outweighed by negative effects on interstate commerce. At trial, Dr. John Morris testified that additional costs from the FERC-ordered accounting rerun would be borne by out-of-state Entergy investors, including pension funds. 2/15 Tr. 525:18–526:6. Dr. Morris testified that, in his opinion, Order No. 12 also created a negative incentive effect that could increase costs to ratepayers in other states. 2/15 Tr. 587:10–17. He said that Order No. 12 would discourage EAL from participating in bilateral wholesale sales, which would burden interstate commerce. 2/15 Tr. 531:20–22. But he could not quantify any potential effects on EAL's willingness to source energy from out of state, 2/15 Tr. 552:7–13, or on EAL's wholesale business. 2/15 Tr. 620:10–624:16. Dr. Morris could not identify an adverse effect of Order No. 12 on Entergy's stock value, 2/15 607:21–608:1, nor could he point to an increase in Entergy's financing costs. 2/15 Tr. 605:2–11.

William Massey testified about the impact of Order No. 12 on interstate energy markets. Mr. Massey testified that other utility companies would be less likely to participate in wholesale markets or regional power pools as a result of Order No. 12. 2/14 Tr. 392:20–23. Mr. Massey also testified that, if trapping of costs became the norm, large regional institutions like the Entergy System could not exist, and FERC's policy of encouraging regional coordination would be frustrated. 2/14 Tr. 397:4–15. But he could not identify other states trapping costs after the order. 2/15 Tr. 453:15–22.

I find the negative effects on interstate commerce identified by EAL's witnesses at trial to be largely speculative and not "clearly excessive" in relation to the benefits gained by Arkansas retail customers from not having to pay for EAL's wholesale business costs. Accordingly, I conclude that Order No. 12 does not violate the Dormant Commerce Clause.

C. Is Order No. 12 Invalid under Arkansas Law Because it is Arbitrary and Capricious, and Not Supported by Substantial Evidence?

Order No. 12 is not arbitrary and capricious and is supported by substantial evidence. As discussed above, Count III is considered solely on the administrative record.

A reviewing court must affirm an APSC order if it is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, nor discriminatory. *Entergy Ark.*, 104 Ark. App. at 154, 289 S.W.3d at 520. To prove that the APSC's order was not supported by substantial evidence, EAL must show that the proof before the APSC "was so nearly undisputed that fair-minded persons could not reach its conclusion." *Id*. To prove that APSC's order was arbitrary and capricious, EAL must show that the order "was a willful and unreasoning action, made without consideration and with a disregard of the facts or circumstances of the case." *Id*. at 154–55, 289 S.W.3d at 520.

1. Collateral Estoppel

APSC misapplied collateral estoppel in Order No. 12, but that misapplication does not matter because it went on to rule on the merits. For collateral estoppel, or issue preclusion, to apply, (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *Miss. Cnty. v. City of Blytheville*, 2018 Ark. 50, at 10, 538 S.W.3d 822, 829. The party against whom collateral estoppel is asserted must have been a party to the earlier action and must have had a full and fair opportunity to litigate the issue in that first proceeding. *Powell v. Lane*, 375 Ark. 178, 185, 289 S.W.3d 440, 444 (2008).

The APSC incorrectly applied collateral estoppel because the issue litigated in the earlier proceeding, Docket No. 10-096-TF, involved a refund under sections 206(b) and 206(c) of the FPA, which govern FERC's authority to fix rates. 16 U.S.C. § 824e(b) and (c). But this case concerns a refund under section 309 of the FPA, which relates to FERC's authority to enforce an existing rate. 16 U.S.C. § 825h. Refunds ordered under section 309 were not addressed in Docket No. 10-096-TF, so EAL did not have an opportunity to litigate that issue. In any event, after finding that collateral estoppel barred EAL's claims, APSC considered those claims on the merits anyway. So even though APSC improperly applied estoppel, it makes no difference to the outcome here.

2. Arbitrary and Capricious

APSC's finding that it was not in the public interest to permit EAL to recover the FERC-ordered refund from retail customers was not arbitrary or capricious. EAL contends that APSC takes EAL's representations that it would hold retail customers harmless out of context. At issue are two APSC proceedings: Docket Nos. 96-360-U and 03-028-U. In the settlement agreement in Docket No. 96-360-U, EAL represented that it would "take steps to hold [EAL] ratepayers harmless from unforeseen events." Order No. 31, Docket No. 96-360-U, PX-19. In Docket No. 03-028-U, an EAL witness testified that the agreement in Docket No. 96-360-U meant that "you will not have any costs or circumstances flowing over on to the retail side." Testimony of Andrew P. Frits, Docket No. 03-028-U. EAL's then-CEO also testified that EAL's wholesale business costs could "never be reallocated to retail customers." Testimony of Hugh T. McDonald, Docket No. 03-028-U. EAL argues that its representations in the 1996 docket were made regarding the transition to retail electricity competition and that the testimony in the 2003 docket concerned a modification of cost allocation between wholesale and retail customers.

I agree with EAL that APSC took EAL's representations in the prior proceedings out of context, and I find that EAL did not agree to hold retail customers harmless from all unforeseen events. But it does not follow that Order No. 12 was arbitrary and capricious. APSC did not rely solely on these purported hold-harmless representations in formulating the order.

APSC issued Order No. 12 after considering extensive testimony from EAL, the Attorney General, APSC staff, and AEEC. As explained above, Order No. 12 does not violate the filed rate doctrine or the Dormant Commerce Clause. Therefore, I conclude that Order No. 12 is not arbitrary or capricious under Arkansas law and is supported by substantial evidence.

IV. CONCLUSION

Based on the foregoing facts and law, judgment is entered for the Arkansas Public Service Commission, and this case is dismissed with prejudice.

IT IS SO ORDERED this 7th day of March, 2024.

/s/ Brian S. Miller
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1586

ENTERGY ARKANSAS, LLC

Appellant

v.

DOYLE WEBB, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*

Appellees

Appeal from U.S. District Court for the
Eastern District of Arkansas – Central
(4:20-cv-01088-BSM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 10, 2025

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

APPENDIX D

United States Code
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power
Subchapter II. Regulation of Electric Utility Companies Engaged in Interstate Commerce

16 U.S.C.A. § 824

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy

which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term “sale of electric energy at wholesale” when used in this subchapter, means a sale of electric energy to any person for resale.

(e) “Public utility” defined

The term “public utility” when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction

solely by reason of section 824e(e), 824e(f)1, 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

16 U.S.C.A. § 824a

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

(1) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall

have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(2) With respect to an order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation, the Commission shall ensure that such order requires generation, delivery, interchange, or transmission of electric energy only during hours necessary to meet the emergency and serve the public interest, and, to the maximum extent practicable, is consistent with any applicable Federal, State, or local environmental law or regulation and minimizes any adverse environmental impacts.

(3) To the extent any omission or action taken by a party, that is necessary to comply with an order issued under this subsection, including any omission or action taken to voluntarily comply with such order, results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a

violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation.

(4)(A) An order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation shall expire not later than 90 days after it is issued. The Commission may renew or reissue such order pursuant to paragraphs (1) and (2) for subsequent periods, not to exceed 90 days for each period, as the Commission determines necessary to meet the emergency and serve the public interest.

(B) In renewing or reissuing an order under subparagraph (A), the Commission shall consult with the primary Federal agency with expertise in the environmental interest protected by such law or regulation, and shall include in any such renewed or reissued order such conditions as such Federal agency determines necessary to minimize any adverse environmental impacts to the extent practicable. The conditions, if any, submitted by such Federal agency shall be made available to the public. The Commission may exclude such a condition from the renewed or reissued order if it determines that such condition would prevent the order from adequately addressing the emergency necessitating such order and provides in the order, or otherwise makes publicly available, an explanation of such determination.

(5) If an order issued under this subsection is subsequently stayed, modified, or set aside by a court pursuant to section 825l of this title or any other provision of law, any omission or action

previously taken by a party that was necessary to comply with the order while the order was in effect, including any omission or action taken to voluntarily comply with the order, shall remain subject to paragraph (3).

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person or municipality engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: Provided, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e).

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity

which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.