No. _____

In The
Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As this Court has twice held, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to determine the just and reasonable cost allocations among the operating companies that comprise the Entergy Corp. electric system. Additionally, the Court has twice ruled that this jurisdiction preempts the authority of retail agencies to adjust the cost allocations in setting retail rates. In 2005, FERC ordered Entergy to file a formulaic "Bandwidth Tariff" to ensure that each company's cost of generating electricity, termed "production costs," would not vary by more than 11 percent from the System average. The questions are:

1. May FERC interpret the tariff to vest absolute discretion in retail agencies in the Entergy jurisdictions to set the depreciation allowances for the companies they regulate, for any reason and without regard to federal statutory and regulatory requirements, so that a retail agency in one state may directly affect the wholesale cost allocation to a company in another state?

2. May FERC interpret the tariff to prevent itself from reviewing the costs Entergy includes in the accounting data entering the formula, to ensure they are just, reasonable and not unduly discriminatory, thus preventing any enforcement of the ratemaking requirements of the Federal Power Act?

PARTIES IN PROCEEDINGS ON REVIEW

The following are the parties and intervenors in the proceedings before FERC and/or the court of appeals.

Arkansas Public Service Commission

Council of the City of New Orleans, Louisiana

East Texas Electric Cooperatives

Entergy Services, Inc.

Federal Energy Regulatory Commission

Louisiana Public Service Commission

Mississippi Public Service Commission

NRG Companies

Occidental Chemical Corporation

Public Utilities Commission of Texas

Sam Rayburn G&T Cooperative, Inc.

Tex-La Electric Cooperative of Texas, Inc.

Texas Industrial Energy Consumers

Union Electric Company d/b/a Ameren UE

CORPORATE DISCLOSURE STATEMENT

The Louisiana Public Service Commission is a state agency that regulates retail utility rates in the State of Louisiana. No Corporate Disclosure Statement is required.

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PETITION FOR A WRIT OF CERTIORARI

The Louisiana Public Service Commission, petitioner, hereby petitions for a writ of certiorari to review two judgments of the United States Court of Appeals for the Fifth Circuit. In both cases the court of appeals affirmed rulings of the Federal Energy Regulatory Commission ("FERC") that interpreted the Entergy Bandwidth Tariff, a FERC-approved rate schedule, as preventing FERC from exercising its jurisdiction to ensure that Entergy's wholesale cost allocations are just and reasonable.

OPINIONS UNDER REVIEW

The following decisions of the United States Court of Appeals for the Fifth Circuit are under review:

1. *Louisiana Pub. Serv. Comm'n v. FERC*, 761 F.3d 540 (5th Cir. 2014) [App. 1-47]. That decision affirmed the following Orders of FERC:

    a. *Entergy Services, Inc., Opinion No. 514,* 137 F.E.R.C. ¶ 61,029 [App. 116-254]; *Order Denying Rehearing, Opinion No. 514-A,* 142 F.E.R.C. ¶ 61,013 (2013) [App. 255-302].

    b. *Arkansas Pub. Serv. Comm'n v. Entergy Corp., et al.,* 128 F.E.R.C. ¶ 61,020 (2009) [App. 48-62]; *Order Denying Requests for Rehearing,* 137

F.E.R.C. ¶ 61,030 (2011) [App. 63-81]; *Order on Rehearing,* 142 F.E.R.C. ¶ 61,012 (2013) [App. 82-115].

2. *Louisiana Public Serv. Comm'n v. FERC,* ___ F.3d ___, 2014 WL 6153699 (5th Cir. 2014) [App. 303-340]. That decision affirmed the following Orders of FERC: *Entergy Services, Inc., Opinion No. 518,* 139 F.E.R.C. ¶ 61,105 (2012) [App. 341-401]; *Order on Rehearing and Clarification,* 145 F.E.R.C. ¶ 61,047 (2013) [App. 402-439].

JURISDICTION

This Court has jurisdiction to review the decisions of the court of appeals pursuant to 28 U.S.C. §1254(1).

The court of appeals decided *Louisiana Pub. Serv. Comm'n v. FERC,* 761 F.3d 540 (5th Cir. 2014) on August 1, 2014 [App. 1-47]. A timely petition for rehearing was denied on September 26, 2014 and a copy of the Order denying rehearing appears at App. 440. The court of appeals decided *Louisiana Pub. Serv. Comm'n v. FERC,* ___ F.3d ___, 2014 WL 6153699 (5th Cir. 2014) on November 14, 2014 [App. 303-340]. No petition for rehearing was filed.

STATUTORY PROVISIONS

Relevant portions of Sections 205 and 206 of the Federal Power Act are the following:

16 U.S.C. §824d(a)-(e):

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take

effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change or rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order

require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

16 U.S.C. §824e(a):

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust,

> unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

STATEMENT OF THE CASE

1. ***Introduction.*** The Federal Power Act provides FERC with exclusive jurisdiction over wholesale transactions in electricity, and vests FERC with the responsibility to ensure that wholesale rates are just, reasonable and not unduly discriminatory. This case presents the issue of whether FERC may abdicate that obligation by interpreting a tariff to prevent itself from ensuring that wholesale rates meet the statutory requirement. In both decisions on review, the court of appeals upheld the tariff interpretation without addressing how it can be reconciled with

FERC's statutory obligation. This Court should review the decisions to determine that issue.

The Louisiana Public Service Commission ("LPSC") seeks review of two decisions of the court of appeals, which affirmed Orders in which FERC precluded itself from ensuring that the wholesale cost allocations on the multi-state Entergy Corp. ("Entergy") electric system ("System") are just, reasonable and not unduly discriminatory. FERC has asserted exclusive jurisdiction to determine the just and reasonable cost allocations pursuant to the Federal Power Act. This Court has twice affirmed FERC's exercise of jurisdiction and determined that it preempts any attempt by a retail agency to adjust the cost allocations for retail ratemaking. But after holding that it must exercise this authority to ensure that the cost allocations under the Entergy "Bandwidth Tariff" are just and reasonable, FERC reversed course and determined: a) that the tariff provides state agencies, rather than FERC, the absolute discretion to establish depreciation cost inputs to the tariff for the company or companies they regulate, for any reason and regardless of FERC ratemaking and accounting requirements; and b) the tariff precludes FERC from examining whether the costs Entergy reports to FERC, which in turn establish the wholesale cost allocations, are just and reasonable.

This Court has twice held that only FERC can determine the just and reasonable wholesale cost allocations for the Entergy System. *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354, 108 S.Ct.

2428, 101 L.Ed.2d 322 (1988) ("*MP&L*"); *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n,* 539 U.S. 39, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003). The Court held that state regulators may not adjust the wholesale cost allocations for retail ratemaking, but must go to FERC to ensure that the costs are just and reasonable. *MP&L,* 487 U.S. at 375 ("The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order."). Here, the LPSC did just that, showing in one proceeding that inconsistent and outdated retail depreciation decisions grossly distort the cost allocations, and, in the other, that the Bandwidth Tariff in 2009 billed for costs not incurred in the relevant test year. In both instances, FERC interpreted the tariff to preclude itself from reviewing the costs.

FERC's decisions eviscerate the principles underlying the Court's preemption decisions. In holding that FERC's authority is exclusive and preemptive, the Court assumed that FERC would not abdicate its decisionmaking role. But FERC's depreciation ruling subdelegated FERC's authority, permitting a retail regulator in Arkansas to directly affect the wholesale cost allocation to Louisiana when the Arkansas regulator established a depreciation allowance for retail ratemaking, with no FERC review and with preemptive effect. FERC's ruling that it will not review the justness and reasonableness of any cost input blocked *any* path to a remedy for unjust and unreasonable cost allocations under the wholesale tariff. State agencies cannot adjust the wholesale cost

allocation in setting retail rates and cannot obtain relief at FERC. Given FERC's reinterpretations, a retail commission can only seek a prospective change in the tariff itself, which can have effect only after the wholesale charges have been assessed.

The court of appeals' rulings fail to consider FERC's obligations under the Federal Power Act, focusing instead on rules of tariff interpretation. This Court should review these decisions to ensure that FERC does not abdicate the interstate ratemaking role that the Court endorsed in its preemption decisions. *See MP&L,* 487 U.S. at 383 (Scalia, J., concurring): "What goes along with the jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one state subsidize those of another.").

2. ***FERC regulation of Entergy cost allocations.*** Entergy sells electricity in Arkansas, Louisiana, Mississippi and Texas through six operating companies ("companies"). Entergy historically planned its production facilities as a single System and the Entergy System Agreement governed planning decisions and allocated production costs among the companies. The System Agreement is a tariff filed with FERC pursuant to the requirements of the Federal Power Act. That statute authorizes FERC to regulate wholesale electricity transactions and ensure that they are just and reasonable, and not unduly discriminatory. *LPSC I,* 761 F.3d at 542-43 [App. 3]; 16 U.S.C. §§824d, 824e.

Twice in the System's history, FERC enacted remedies to ensure that production costs among the Companies remain at least "roughly equal." In the first, FERC determined that the nuclear investment costs borne by the companies were unduly discriminatory, and reallocated Entergy's Grand Gulf nuclear plant to equalize the responsibility for nuclear investment. *See MP&L,* 487 U.S. at 362-64. When the Mississippi Supreme Court ruled that the Mississippi Public Service Commission ("MPSC") could review the prudence of Entergy's investment in Grand Gulf for retail ratemaking, this Court reversed. It held that the MPSC was required to treat the "FERC-mandated payments for Grand Gulf costs as reasonably incurred operating expenses for the purpose of setting MP&L's retail rates." *Id.* at 370. The Court determined that a state agency could only challenge the reasonableness of the cost allocations before FERC. *Id.* at 375. The Court followed that preemption ruling in *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n,* 539 U.S. 39, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003), holding that the LPSC could not disallow costs for certain reserve generating units billed through the System Agreement.

Beginning in 2000, the production cost allocations among the companies again became unduly discriminatory. In response to a complaint filed by the LPSC, FERC determined that the outer bound of "due" discrimination on the Entergy System is plus-or-minus 11 percent from the System's average production cost. It established a "bandwidth" tariff to

ensure that the companies' production costs remain within the +/- 11% bandwidth ("Bandwidth Tariff"). *Louisiana Pub. Serv. Comm'n v. Entergy Corp., Opinion No. 480,* 111 F.E.R.C. ¶ 61,311 ("*Opinion No. 480*"), *on reh'g, Opinion No. 480-A,* 113 F.E.R.C. ¶ 61,282 (2005). The bandwidth determination was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Louisiana Pub. Serv. Comm'n v. FERC,* 522 F.3d 378 (D.C. Cir. 2008).

3. ***Bandwidth Tariff.*** FERC ordered Entergy to make a compliance filing to incorporate the Bandwidth Tariff into the System Agreement. FERC required Entergy to prepare a formula tariff, following the methodology Entergy used to compare production costs in the underlying proceeding. *Opinion No. 480,* 111 F.E.R.C. ¶ 61,311, ¶ 33. In 2006, FERC ordered Entergy to make annual filings under the Bandwidth Tariff, which would "provide the Commission and all interested parties the opportunity to analyze all production-related costs of each of the Entergy Operating Companies to make sure all such costs are just and reasonable and prudently incurred." *Arkansas Pub. Serv. Comm'n v. Entergy Corp.,* 119 F.E.R.C. ¶ 61,223 (2007), ¶ 47.

FERC often approves algebraic formula tariffs to serve as rates. A formula rate specifies sources of cost data that may enter the formula, usually accounting data reported in FERC Form 1 reports; as cost inputs change periodically, the charges assessed pursuant to the formula change without the need for new rate filings. This procedure is permissible despite the

notice and filing requirements of the Federal Power Act because FERC only approves the formula. *Transwestern Pipeline Co. v. FERC,* 897 F.2d 570, 578 (D.C. Cir. 1990). It does not approve the changing cost inputs or the resulting wholesale charges.

FERC policy for other formula tariffs ensures that it can always review the justness and reasonableness of charges produced by cost inputs to the formulas. The policy provides that the approval of a formula only constitutes approval of the "algebraic equation used to calculate the rates," not the cost inputs that enter the equation. *American Elec. Pow. Serv. Corp.,* 124 F.E.R.C. ¶ 61,306 (2008), ¶ 34. Under FERC's "long standing precedent," parties have the right to challenge unjust and unreasonable inputs before FERC whenever they are discovered. *Id.,* ¶ 35. But FERC departed from that policy in interpreting the Bandwidth Tariff.

4. ***FERC's Interpretations of the Bandwidth Tariff.*** As noted, FERC established the annual bandwidth proceedings to allow all parties to make sure that the cost inputs were just and reasonable. When Entergy made the first filing in 2007, FERC set the case for hearing and said its "determination necessarily will be based on underlying cost inputs and the reasonableness thereof. . . ." *Entergy Services Inc.,* 120 F.E.R.C. ¶ 61,094 (2007), ¶¶ 11, 16.

The Bandwidth Tariff provides that the depreciation inputs entering the formula shall be these determined by retail regulators, "*unless the FERC*

determines otherwise" or "*unless the jurisdiction for determining the depreciation and/or decommissioning rate is invested in the FERC under otherwise applicable law*." *LPSC I,* 761 F.3d at 547 & n.5 (emphasis by court). [App. 15]. In the first bandwidth proceeding, an administrative law judge ("ALJ") ruled that the nuclear depreciation rates established by the APSC for retail ratemaking were unjust and unreasonable because the APSC failed to recognize service life extensions approved by the Nuclear Regulatory Commission ("NRC"). *Initial Decision,* 124 F.E.R.C. ¶ 63,026 (2008), ¶ 449. FERC policy requires setting a nuclear depreciation allowance based on the NRC license life of the unit. The ALJ ruled that "the APSC's failure to readjust the depreciation expenses when the NRC granted the license extension does not comport to any reasonable accounting standard or established FERC precedent. . . ." *Id.,* ¶ 483.

The APSC left the erroneous depreciation rates in place at Entergy's suggestion. Entergy opposed the enactment of a bandwidth remedy for the unduly discriminatory cost allocations on the System. When FERC's enactment of the remedy became final, Entergy permitted or caused Entergy Arkansas, Inc. ("Entergy Arkansas") – the System's lowest cost Company – to give notice that it would withdraw from the System Agreement under a provision allowing withdrawal on eight years' notice. Then, Entergy studied the impact on Entergy Arkansas of leaving the erroneously high depreciation allowances in place until the withdrawal. The study showed that Entergy

Arkansas could transfer about $500 million of capital costs to other companies through the Bandwidth Tariff over the eight-year period. [Ex. LC-53 at 18; LC-56 (internal Entergy e-mails)]. Entergy Arkansas thus informed the APSC Staff that it would not revise its nuclear depreciation rates and the APSC accepted that decision. [Ex. LC-53 at 18].

Entergy and the APSC argued in the first bandwidth proceeding that the tariff language prevented FERC from adjusting retail-set depreciation rates. The ALJ rejected that argument, holding that FERC was required to exercise its wholesale jurisdiction and the "unless" clauses confirmed that authority. 124 F.E.R.C. ¶ 63,028, ¶¶ 481, 484. The APSC then filed a complaint, requesting that FERC remove the "unless" clauses from the tariff and require the use of retail depreciation rates. FERC denied the complaint, holding: "In order for the bandwidth calculation to provide a just and reasonable result under the FPA, the Commission must ensure that the inputs used to calculate the bandwidth are also just and reasonable." *Arkansas Pub. Serv. Comm'n v. Entergy Corp.,* 128 F.E.R.C. ¶ 61,020 (2009), ¶ 25. [App. 61].

FERC changed course, however, when the first bandwidth proceeding came before it on review. *LPSC I,* 761 F.3d at 548. [App. 17]. FERC took "no issue" with the ALJ's determination that adjusting the nuclear depreciation allowance "would be more equitable for ratepayers," but declined to do so in an annual bandwidth proceeding. *Entergy Services, Inc.,* 130 F.E.R.C. ¶ 61,023 (2010), ¶ 173. Although FERC ruled that the

tariff permitted adjusting the depreciation inputs, it found that it could not consider the reasonableness of depreciation rates in an annual proceeding, holding instead that the issue was a matter "solely for a future Section 205 or 206 proceeding. . . ." *Id.,* ¶ 173. That decision is currently pending before the United States Court of Appeals for the District of Columbia Circuit, after a stay pending a rehearing before FERC on an unrelated issue.

5. ***FERC's abdication of its regulatory responsibility in decisions below.*** The second bandwidth proceeding was conducted while the first was pending before FERC. In that case, the ALJ found that Entergy failed to show that any of its retail-set depreciation inputs were just and reasonable. The ALJ found that the depreciation rates were established based on service life assumptions in studies performed decades in the past. *Entergy Services, Inc.,* 128 F.E.R.C. ¶ 63,015 (2009), ¶ 213. He ordered that depreciation rates be established based on new depreciation studies, to be performed by Entergy. *Id.,* ¶ 228. With respect to the argument that the tariff barred FERC from adjusting the depreciation rates, the ALJ held that FERC is required to exercise its statutory jurisdiction. He ruled: "There is nothing in the Act which allows the Commission to delegate this responsibility to any person or body politic." *Id.,* ¶ 211.

On review, FERC reversed the ALJ's ruling. It found that the Bandwidth Tariff is "ambiguous" and interpreted it to preclude the exercise of its own

jurisdiction to adjust the depreciation allowances for wholesale ratemaking. *Entergy Services, Inc., Opinion No. 514,* 137 F.E.R.C. ¶ 61,029 (2011), ¶ 54 ("*Opinion No. 514")*. [App. 152-153]. FERC acknowledged that its earlier rulings supported a contrary conclusion, but said that they "'did not benefit from experience in addressing these annual bandwidth filings.'" *Id.,* ¶ 53. [App. 151-152]. On rehearing, FERC confirmed that the only way to address the depreciation inputs would be to change the formula through a Section 205 or 206 filing, which could only apply prospectively. *Entergy Services, Inc., Opinion No. 514-A,* 142 F.E.R.C. ¶ 61,013 (2013) ("*Opinion No. 514-A*"), ¶¶ 18-19. [App. 272-273].

FERC also noted that it had rejected the LPSC's 2010 complaint, which sought to change the tariff pursuant to Section 206 after FERC's decision in the first bandwidth proceeding. *Id.,* ¶ 18; *see also, LPSC I,* 761 F.3d at 552. [App. 27]. In that case, however, FERC again refused to address the distorting impact on the wholesale cost allocation of the grossly erroneous depreciation allowances, holding that the LPSC was required to show that "circumstances or conditions have changed since the rate was originally accepted or new evidence is available. . . ." *Louisiana Pub. Serv. Comm'n v. Entergy Corp.,* 139 F.E.R.C. ¶ 61,107 (2012), ¶ 120. FERC ruled that its own depreciation policy and its accounting regulation, which requires depreciation to be based on accurate service lives, were irrelevant. *Id.,* ¶¶ 112-113; 18 C.F.R. Pt. 101, *Gen'l Instr.* 22. FERC held that for the

Bandwidth Tariff, "the Commission's ratemaking practices should not apply in all instances." *Id.,* ¶ 112. The ruling in the LPSC complaint case has been on rehearing at FERC since June, 2012.

In the third bandwidth proceeding, the LPSC and FERC Staff identified cost inputs that had been reported by Entergy in the companies' annual Form 1 reports to FERC, but were not incurred in the test year used to set the cost allocations. The inputs included refunds and surcharges for a period in 1995-96 that were required pursuant to a separate FERC Order. Entergy booked the refunds as revenues and expenses for 2008, even though they were unrelated to test year service. Additionally, Entergy's filing calculated the return on generating units acquired during the test year, and owned for only part of that period, as if they were owned the entire year. This practice thus included costs that were never actually incurred. *LPSC II,* 2014 WL 6153699 at *5. [App. 313-314].

In *Entergy Services, Inc., Opinion No. 518*, 139 F.E.R.C. ¶ 61,105 (2012), FERC held that the Bandwidth Tariff precludes FERC from adjusting for reasonableness any data reported by Entergy and included in the rate. [App. 358-360]. The Bandwidth Tariff provides that inputs "shall be based on the actual amounts on the Company's books for the twelve months ended December 31 of the previous year as reported in FERC Form 1 or such other supporting data as may be appropriate for each Company." *Id.,* ¶ 43. [App. 370]. FERC ruled that this

provision requires using what Entergy reports, regardless of justness and reasonableness. *Id*.

6. ***Rulings on review.*** The LPSC sought review of both FERC rulings in the Fifth Circuit, which had jurisdiction pursuant to 16 U.S.C. §825l(b). The Fifth Circuit affirmed the decisions.

LPSC I – Depreciation. The court of appeals upheld FERC's decision to vest jurisdiction in retail regulators to set the depreciation inputs in the Bandwidth Tariff. *LPSC I*, 761 F.3d at 551-52. [App. 23-24]. Responding to the LPSC's argument that FERC unlawfully subdelegated its wholesale ratemaking authority, the Fifth Circuit held there is "no unlawful subdelegation." *Id.* at 552. [App. 26]. It relied on two grounds: 1) "FERC exercised its role when it initially reviewed and accepted the bandwidth formula incorporating the state agencies' depreciation rates," and 2) "FERC has clarified that it will continue to exercise oversight of the state rates in a Section 206 complaint proceeding" to change the Bandwidth Tariff. *Id.* The court recognized that there can be no consumer relief for any unjust and unreasonable consequences while the tariff is in effect, but ruled that "the absence of retroactive relief is a function of the filed rate doctrine." *Id.* at 556. [App. 36]. The court of appeals focused primarily on the reasonableness of FERC's tariff interpretation, did not consider whether that interpretation was consistent with FERC's statutory responsibilities, and did not mention FERC's formula rate policy. *Id.* at 552-56.

LPSC II – Justness and reasonableness of cost inputs. The court of appeals also upheld FERC's decision that the tariff bars FERC from reviewing the justness and reasonableness of cost inputs into the formula rate. *LPSC II*, 2014 WL 6153699 at *6-*9. [App. 316-328]. The court recognized that FERC's "rulings are not simply a procedural inconvenience, because even if LPSC's underlying grievances are rectified in a complaint proceeding, the inputs will be modified only prospectively." *Id.* at *6. [App. 316]. Because the cost inputs change each year and FERC precludes retroactive relief for the Bandwidth Tariff, FERC's ruling means that the LPSC can never achieve a remedy for unjust and unreasonable inputs at FERC. *Id.* The LPSC does not obtain evidence concerning the reasonableness of costs until it is too late to obtain relief for the year in which they affect the rate.

Again, the court of appeals focused primarily on the reasonableness of FERC's interpretation of the tariff language. *Id.* at *6-*9. [App. 316-328]. Although the LPSC argued that FERC departed without explanation from its formula rate policy, the court did not mention that policy. *Id.* Nor did it discuss how FERC, consistent with its statutory duties under the Federal Power Act, could bar any consumer path to a remedy for unjust and unreasonable cost inputs. The court noted that FERC has said it will review other issues in bandwidth proceedings, but not whether a cost is just and unreasonable. The court did not explain how the tariff may permit review of some issues, but not a

review to ensure that the wholesale charges comply with the statutory requirement that rates be "just and reasonable." *Id.* [App. 316-328]; 16 U.S.C. §§824d, 824e.

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning FERC's role in the federal system of electric rate regulation. FERC has asserted exclusive authority to establish cost allocations among the multi-state jurisdictional operating subsidiaries of Entergy, a holding company that coordinates wholesale power transactions among the subsidiaries, and this Court has upheld that determination. The Court barred retail regulators from adjusting the federal wholesale cost allocations for retail ratemaking. But now, FERC has interpreted the Bandwidth Tariff to vest absolute discretion in retail regulators to establish inconsistent depreciation allowances to be used in the Bandwidth Tariff for the companies they regulate, which in turn determine the FERC-regulated wholesale allocations to other jurisdictions.

In this case, FERC allowed the APSC's decision not to recognize the NRC license life extensions to increase the wholesale cost allocation to the Louisiana companies, with preemptive effect. Further, FERC abdicated its responsibility to ensure that the cost inputs entering the formula rate, which determine the cost allocations, are just and reasonable

under the Federal Power Act. The court of appeals affirmed both abdications of FERC's statutory obligation.

The Federal Power Act confers on FERC the power and the duty to regulate rates for electric power sold at wholesale and to ensure those rates are "just and reasonable." 16 U.S.C. §§824, 824d, 824e. FERC abdicated this duty by unlawfully subdelegating to state agencies the authority to determine depreciation expense for the Bandwidth Formula, a FERC tariff that governs wholesale power transactions among the companies. Depreciation expense is a significant cost component of the Bandwidth Formula. FERC also ruled that the tariff precludes reviewing the justness and reasonableness of costs reported by the utilities. Here, the costs did not relate to the relevant test year, or did not exist at all, but were used to set the rates.

FERC has a policy to use the NRC license life of nuclear units to determine depreciation for those units. 18 C.F.R. Pt. 101 *Gen'l Instr.* 22 (A) and (B); *Boston Edison Co.,* 59 F.E.R.C. ¶ 63,028 (1992) at 65,238. Entergy's state regulators do not follow that policy and use different lives to determine depreciation for retail rates. In this case, FERC interpreted the Bandwidth Formula to require use of retail depreciation expense, regardless of whether the retail expense is consistent with FERC policy, and to preclude FERC review of the expense for justness and reasonableness.

FERC's depreciation decisions constitute an unlawful subdelegation and abdication of FERC's duty under the Federal Power Act. *See United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 566 (D.C. Cir.), *cert. denied,* 543 U.S. 925 (2004). Federal agencies may not subdelegate statutory authority to state regulators because the state agencies "may pursue goals inconsistent with those of the agency and the underlying statutory scheme" and contribute to "policy drift." [*Id.*]. Here, the subdelegation allows FERC cost allocations to be based on different local methodologies, which prevent achieving the goals of the Bandwidth Tariff. FERC's refusal to review the utilities' other cost inputs is simply an abdication.

Having recognized FERC's authority to serve as supreme arbiter of just and reasonable cost allocations among the companies, the Court should determine whether FERC may abdicate that responsibility. As the Court recognized in *MP&L*, "§206 of the FPA imposed on FERC an obligation to fix terms that would render the contract 'just and reasonable.'" 487 U.S. at 361 n.6. FERC has held that production cost deviations of more than +/- 11% constitute undue discrimination under the Federal Power Act, but the distorting impact on the calculations of unjust and unreasonable inputs prevents enforcing that rule. With respect to the APSC's determination concerning nuclear depreciation, FERC's ruling effectively allows the APSC to directly impact a wholesale cost allocation to Louisiana that preempts retail ratemaking. FERC's abdication cannot exist in the regulatory framework envisioned by the Court.

FERC's decisions, and the Fifth Circuit's approval of those decisions, create a conflict with rulings of the D.C. Circuit. That court held that an agency may not subdelegate its ratemaking authority to retail agencies in *United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004). Further, the D.C. Circuit rejected "out of hand" the position that FERC "need not regulate antecedent wholesale transactions among [Entergy's] operating companies." *Louisiana Public Service Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). This Court should resolve the conflict concerning FERC's duty to exercise its own jurisdiction.

A. The Court Should Determine Whether FERC, After Claiming Exclusive Authority to Ensure Just and Reasonable Cost Allocations for the Entergy Companies, May Interpret a Tariff to Bar the Exercise of That Jurisdiction.

The Court should review the court of appeals' decisions, which approved FERC's tariff interpretations that abdicate its statutory responsibilities. Instead of exercising its own jurisdiction, FERC vested absolute discretion in retail agencies to establish the depreciation allowances for the companies they regulate in the FERC wholesale tariff. This Court's affirmation of FERC's exclusive jurisdiction over Entergy's production cost allocations is frustrated if FERC does not faithfully fulfill its duty. FERC's subdelegation creates cross-preemption,

where one retail regulator's decision to change a Company's depreciation allowance, and in turn the bandwidth payments or receipts, has preemptive effect in other jurisdictions. FERC's abdication also allows Entergy to affect bandwidth allocations by including out-of-period costs, or costs that never existed at all, in the formulaic calculation.

The Federal Power Act provides FERC the authority to ensure that wholesale rates are "just," "reasonable," and not "unduly discriminatory." 16 U.S.C. §824d; 16 U.S.C. §824e. In its capacity as wholesale regulator, "FERC must ensure that wholesale rates are just and reasonable." *Entergy Louisiana*, 539 U.S. at 41. The "only appropriate forum" for a challenge to the reasonableness of rates regulated by FERC is "before the Commission or a court reviewing the Commission's order." *MP&L*, 487 U.S. at 375. Since the Entergy cost allocation is a FERC-filed tariff, "§206 of the FPA impose[s] on FERC an obligation to fix terms that would render the contract 'just and reasonable.'" *Id.* at 361.

In its depreciation rulings FERC vested absolute discretion in retail regulators to establish depreciation allowances in the Bandwidth Tariff. According to FERC, the tariff "mandates the use of depreciation rates that, in part, reflect state regulator-approved depreciation rates. . . ." *Opinion No. 514-A,* 142 F.E.R.C. ¶ 61,013 (2013), ¶ 17. [App. 271]. In "light of this interpretation of the depreciation variables in *Opinion No. 514*, it is unnecessary for Entergy to make a section 205 filing in order to seek approval to

include revised depreciation rates adopted by any of its retail regulators in the bandwidth formula. . . ." *Entergy Services, Inc.,* 139 F.E.R.C. ¶ 61,103 (2012), ¶ 48 n.84. Retail depreciation rates even trump FERC's depreciation accounting rules, which purportedly apply to all utilities. *Louisiana Public Service Comm'n v. Entergy Corp.,* 139 F.E.R.C. ¶ 61,107 (2012), ¶ 113. FERC delegated *total* discretion to retail agencies, and that will not change unless FERC changes the tariff.

Because the Bandwidth Formula uses cost entries to build up to a rate, the depreciation allowances directly affect the wholesale rate. The rate here is designed to eliminate undue discrimination, but it cannot do so if five different retail agencies are permitted to establish non-uniform depreciation cost allowances, based on different locally-determined methods, which are entered into the formula. FERC's exercise of jurisdiction is essential to ensure that costs are calculated in a uniform manner so that the cost allocation is not distorted.

Similarly, for the rate to be just and reasonable, other cost inputs that set the rate must be just and reasonable. FERC cannot perform its statutory duty if it refuses to review the entries the utilities make to their Form 1 reports. FERC's abdication here permitted costs that *did not exist* in the test year to affect the cost allocation. FERC disclaimed its own regulatory role and left consumers with no path to relief for unjust and unreasonable test year costs.

Having asserted jurisdiction to establish the production cost allocations for the Entergy System, FERC should not be permitted to abstain from exercising that authority. As Justice Scalia's concurring opinion stated in *MP&L,* FERC must "protect against allocations that have the effect of making the ratepayers of one State subsidize those of another." 487 U.S. at 383. This finding accords with the majority's view in *MP&L* that FERC had a "duty" to establish a just and reasonable allocation of system nuclear costs. 487 U.S. at 360 n.6.

Before it changed course, FERC found that it could not abdicate its jurisdiction. FERC determined that it established the Bandwidth Tariff "pursuant to its authority under the FPA" and in order "for the bandwidth calculation to provide a just and reasonable result under the FPA, *the Commission must ensure* that the inputs used to calculate the bandwidth are also just and reasonable." *Arkansas Pub. Serv. Comm'n v. Entergy Corp.,* 128 F.E.R.C. ¶ 61,020 (2009), ¶ 25 (emphasis added). [App. 60-61]. FERC previously rejected an Entergy request that it accept the prudence determination of retail regulators for the Bandwidth Tariff. It said:

> The Commission's ratemaking obligations under the FPA cannot be delegated to a state commission. Similarly, as a general matter, a state commission cannot set Commission-jurisdictional rates nor direct the filing of Commission-jurisdictional rates. . . .

Entergy Services, Inc., 120 F.E.R.C. ¶ 61,020 (2007), ¶ 28.

FERC's "filed rate" interpretations block any practical path to a consumer remedy for unjust and unreasonable cost inputs in a formula rate. FERC interpreted the tariff to prohibit any review in an annual Section 205 proceeding. FERC limited Section 206 review to proposals for changes in the tariff, which can apply only prospectively. The cost entries in the formula tariff change each year and as they do, the rate changes. As the Fifth Circuit recognized, FERC's interpretation means that consumers can have no remedy for unjust and unreasonable cost inputs in a given year. *LPSC II,* 2014 WL 6153699 at *6. [App. 317-319].

The Court should determine whether FERC can interpret a formula rate in a way that cuts off any consumer remedy. The Federal Power Act requires notice of changes in rates, but FERC has enacted formula rates, in which the annual charges may change as cost inputs change. To ensure consumer protection, FERC has a policy that cost inputs may always be reviewed for justness and reasonableness, either in annual cases or retroactively, in subsequent Section 206 reviews. *Public Serv. Elec. and Gas Co.,* 124 F.E.R.C. ¶ 61,303, ¶¶ 17-20; *See Public Util. Comm'n of California v. FERC,* 254 F.3d 250, 253, 258 (D.C. Cir. 2001). But here, FERC interpreted the "filed rate" to preclude any review of cost entries. The court of appeals did not, in either of its decisions, address FERC's departure from its own policy.

The decision to cut off regulatory review is inconsistent with the core purpose of the Federal Power

Act. That Act and its counterpart, the Natural Gas Act, were "so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Serv. Comm'n of New York,* 360 U.S. 378, 388 (1959); *Municipal Light Bds. v. FPC,* 450 F.2d 1341, 1348 (D.C. Cir. 1971). FERC's decisions break that bond and cannot be reconciled with the statute.

B. The Court of Appeals' Holdings Conflict With Decisions of the United States Court of Appeals for the District of Columbia Circuit.

This Court should review the court of appeals' decisions, to resolve a conflict between them and rulings of the D.C. Circuit. The D.C. Circuit has held that FERC may not abdicate its regulatory authority to ensure just and reasonable cost allocations among the Entergy Companies, and that an agency may not subdelegate its authority to retail regulators. This Court should determine whether FERC may refuse to perform its statutory duties.

In *Louisiana Pub. Serv. Comm'n v. FERC,* 184 F.3d 892 (D.C. Cir. 1999), the D.C. Circuit reviewed a FERC decision dismissing an LPSC complaint that Entergy's cost allocations had become unjust and unreasonable. FERC suggested that "because the Entergy system may be viewed as a single seller at retail, the Commission need not regulate antecedent wholesale transactions among the operating companies." *Id.* at 897. The court rejected that contention

"out of hand," stating: "And as to matters within its jurisdiction, the Commission has the duty – not the option – to reform rates that by virtue of changed circumstances are no longer just and reasonable." *Id.* The Court noted its previous observation that retail commissions may go to FERC to protect the interests of their consumers, and said: "In making that observation, however, we presumed the Commission would not abdicate its exclusive jurisdiction over wholesale rates." *Id.* at fn.

The D.C. Circuit has also held that a federal ratemaking agency cannot subdelegate its responsibility to state agencies, absent Congressional authorization. *United States Telecom Ass'n v. F.C.C.,* 359 F.3d 554, 565-568 (D.C. Cir. 2004). In that case, the F.C.C. vested authority in retail regulators to determine whether telecommunications carriers should be required to unbundle charges for users of their networks. The court held that the F.C.C.'s subdelegation was unlawful, even though the same two factors relied on by the Fifth Circuit were present in *U.S. Telecom*: 1) The F.C.C. Order determined it was reasonable to vest authority in retail regulators; and 2) the F.C.C. retained authority to modify its rate rule prospectively pursuant to a future filing. *U.S. Telecom*, 359 F.3d at 565; 5 U.S.C. §553; 47 C.F.R. Pt. 1.401. The Court should resolve the conflict regarding an agency's authority to subdelegate.

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CONCLUSION

The Court should grant the writ of certiorari, to determine whether FERC may abdicate its role as arbiter of just and reasonable wholesale cost allocations.

Respectfully submitted,

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