No. 12-852

In the Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION AND COUNCIL OF THE CITY OF NEW ORLEANS,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF IN OPPOSITION FOR ENTERGY SERVICES, INC., ARKANSAS PUBLIC SERVICE COMMISSION AND MISSISSIPPI PUBLIC SERVICE COMMISSION

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QUESTION PRESENTED

The proceedings below addressed a straightforward question of contract interpretation. Entergy Arkansas, Inc. and Entergy Mississippi, Inc. gave notice of their intent to withdraw from the Entergy System Agreement—a contract with their affiliated Entergy Operating Companies in neighboring states that is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Federal Power Act ("FPA"). The Louisiana Public Service Commission ("Louisiana Commission") and the Council of the City of New Orleans, Louisiana ("New Orleans") objected that the withdrawal would be unfair and unlawful unless FERC required the departing utilities to provide post-withdrawal cost equalization payments and exit fees for the loss of access to any low-cost generation resources. FERC rejected those claims as beyond the terms of the Agreement, which requires only that a departing utility provide written notice ninety-six months prior to withdrawal and contains no other withdrawal obligations. The court of appeals held that FERC's interpretation of the Agreement was reasonable. The question presented is:

Whether the court of appeals correctly affirmed FERC's determination that the Entergy System Agreement does not require a withdrawing Operating Company to pay exit fees or make perpetual cost equalization payments to other Operating Companies, when the Agreement includes no such requirements.

CORPORATE DISCLOSURE STATEMENT

Entergy Services, Inc. ("Entergy Services") is the services company for Entergy Corporation, a registered public utility holding company, organized under Delaware law and with its principal office in New Orleans, Louisiana. No other company owns ten percent or more of Entergy Corporation's stock. Entergy Corporation owns all of the outstanding shares of Entergy Services' stock. Entergy Corporation also owns all of the outstanding shares of common stock of six utility operating subsidiaries: Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy Texas, Inc.; and Entergy New Orleans, Inc. (the "Entergy Operating Companies"). The Entergy Operating Companies are engaged in the generation, transmission, distribution, and sale of electric energy in portions of Arkansas, Louisiana, Mississippi, and Texas. Entergy Services acts as the Entergy Operating Companies' agent with respect to the execution and administration of certain contracts and in proceedings at the Federal Energy Regulatory Commission.

The Arkansas Public Service Commission ("APSC") regulates utilities operating in the State of Arkansas. The Mississippi Public Service Commission ("MPSC") similarly regulates utilities operating in the State of Mississippi. As state government agencies, the APSC and MPSC are not required to provide a corporate disclosure statement under Rule 29.6 of the Rules of this Court.

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STATEMENT OF THE CASE

I. The Entergy System Agreement

The Entergy System Agreement is a contract that "establishes the operating framework for the six Entergy companies servicing Arkansas, Louisiana, Mississippi, and Texas (the Operating Companies)." Pet. App. 2a. The Agreement is subject to FERC jurisdiction under the FPA because it governs the transmission and sale of energy at wholesale in interstate commerce. See 16 U.S.C. § 824(a). FERC accepted the Agreement for filing in 1982. *Id.* at 3a, 43a & n.3. Since then, the meaning and scope of the Agreement have been litigated in scores of proceedings before state commissions and state courts, FERC, and federal courts.[1] Three of those disputes were resolved by this Court in its decisions defining the contours of federal preemption and abstention in cases arising under the FPA. See *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39

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[1] The complete body of precedent relating to the construction and modification of the Entergy System Agreement is too extensive to cite here. In addition to the decision below, federal appellate decisions relevant to the issues presented in this petition include the following: *Mississippi Indus.* v. *FERC*, 808 F.2d 1525, 1528 (D.C. Cir.), *vacated in part and remanded*, 822 F.2d 1104 (D.C. Cir. 1987) (per curiam); *City of New Orleans* v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989) (per curiam); *Louisiana Pub. Serv. Comm'n* v. *FERC*, 174 F.3d 218 (D.C. Cir. 1999) (*Louisiana I*); *Louisiana Pub. Serv. Comm'n* v. *FERC*, 522 F.3d 378 (D.C. Cir. 2008) (*Louisiana IV)*; *Louisiana Pub. Serv. Comm'n* v. *FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (*Louisiana V*); *Entergy Servs., Inc.* v. *FERC*, 568 F.3d 978 (D.C. Cir. 2009).

(2003); *New Orleans Public Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 353 (1989); *Mississippi Power & Light* v. *Miss. ex rel. Moore*, 487 U.S. 354 (1988).

Although other parts of the Agreement have been amended several times, its core provisions governing withdrawal and ownership of generation resources have remained unchanged for three decades. The first section of the Agreement states that "any Company may terminate its participation in this Agreement by ninety six (96) months written notice to the other Companies hereto." Pet App. 43a-44a & n.3 (quoting Agreement § 1.01); *id.* at 6a (same). That extraordinary eight-year notice requirement—the only withdrawal obligation in the Agreement—is designed to "provide[] sufficient time for the Operating Companies to plan for withdrawal." *Id.* at 8a; accord *id.* at 76a. This notice period allows adjustments consistent with "the long term goal of the Companies that each Company have its proportionate share of Base Generating Units available to serve its customers either by ownership or purchase." *Id.* at 95a (quoting Agreement § 3.05); see *id.* at 77a & n.25. Section 4.01 similarly provides that "[e]ach Company shall normally own, or have available to it under contract, such generating capability and other facilities as are necessary to supply all of the requirements of its own customers." *Id.* at 7a; *id.* at 30a n.29; see also *id.* at 35a & n.43.

While "the express terms of the Agreement" provide that "each Operating Company assumes responsibility for the costs of building and operating plants in its own area and retains the rights to the energy those plants produce," *id.* at 3a (citing *Louisi-*

ana IV, 522 F.3d at 383-84 and *Louisiana I*, 174 F.3d at 220), FERC and the D.C. Circuit have long "interpreted the Agreement to require that the cost of producing electricity be 'roughly equal' among the Operating Companies." *Id.* at 3a (citing *Louisiana IV*, 522 F.3d at 384); accord *Louisiana V*, 551 F.3d at 1043 (citing *Miss. Indus.*, 808 F.2d at 1554-55). This rough equalization standard rests on section 3.01, which states that the Agreement "provides a basis for equalizing among the Companies any imbalance of cost associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." *Miss. Indus.*, 808 F.2d at 1529 (quoting Agreement § 3.01). Long-term rough equalization of production costs is accomplished by rotating the construction of new generation facilities among Operating Companies under section 4.01 of the Agreement. See Pet. App. at 30a-31a. It is accomplished in the short term by providing Operating Companies a right of first refusal to the surplus generation capacity of sister Operating Companies under sections 3.05. See *id.* at 3a (citing *Louisiana I*, 174 F.3d at 220); *Miss. Indus.* 808 F.2d at 1566.

FERC has intervened twice to correct production cost disparities among the Operating Companies. In 1985, FERC reallocated responsibility for "catastrophically uneconomical" investments in certain nuclear generation facilities. *Miss. Indus.*, 808 F.2d at 1528, *vacated in part and remanded*, 822 F.2d 1104; see *City of New Orleans*, 875 F.2d at 905-06 (affirming FERC's orders on remand from *Mississippi*

Industries). [2] FERC's second intervention was prompted by a sharp increase in natural gas prices in 2000 that caused significant cost increases for Entergy Louisiana and Entergy New Orleans, which rely heavily on gas-fired generation. See Pet. App. 3a-4a. In response to a complaint filed by the Louisiana Commission, FERC adopted a "bandwidth remedy" in 2005 that required "the Operating Companies to make payments to each other to offset any difference in their respective annual production costs greater than eleven percent of the System average." *Id.* at 4a; see *La. Pub. Serv. Comm'n* v. *Entergy Servs., Inc.*, Opinion No. 480,111 F.E.R.C. ¶ 61,311, *reh'g denied*, Opinion No. 480-A, 113 F.E.R.C. ¶ 61,282 (2005), *aff'd in relevant part*, *Louisiana IV*, 552 F.3d at 391-94. As a result, Entergy Arkansas would be "required to pay hundreds of millions of dollars annually to the other Operating Companies." Pet App. 4a.

II. The Notices of Withdrawal and the Louisiana Commission's Complaint

On December 19, 2005—the same day FERC denied rehearing of the bandwidth remedy—Entergy Arkansas formally notified the other Operating Companies that it would withdraw in eight years as provided in section 1.01 of the Agreement. *Ibid.*

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[2] FERC's nuclear cost reallocation orders on review in *Mississippi Industries* were *Middle South Energy, Inc.*, Opinion No. 234, 31 F.E.R.C. ¶ 61,305, *reh'g denied*, Opinion No. 234-A, 32 F.E.R.C. ¶ 61,425 (1985). The orders on remand affirmed in *City of New Orleans* were *System Energy Resources, Inc.*, Opinion No. 292, 41 F.E.R.C. ¶ 61,238 (1987), *reh'g denied*, Opinion No. 292-A, 42 F.E.R.C. ¶ 61,091 (1988).

Entergy Mississippi tendered its notice of withdrawal to the other Operating Companies two years later on November 8, 2007. *Ibid.*

Between those two notices, the Louisiana Commission filed a complaint at FERC on December 16, 2006, arguing "that Entergy Arkansas may not terminate its participation in the System Agreement without ensuring the continued rough equalization of production costs" among the Operating Companies. *Id.* at 87a. The Louisiana Commission further argued that the notice of withdrawal by Entergy Arkansas was "not enforceable" under the FPA "because the facilities of the System were planned and constructed for all the System's customers" and thus "the failure of Entergy Arkansas to share access to low-cost generating capacity and associated energy pursuant to the System Agreement would be unjust, unreasonable, and unduly discriminatory." *Ibid.*

FERC dismissed the Louisiana Commission's "complaint in part based on the merits and in part because it [wa]s premature." *Id.* at 109a. With respect to the merits, FERC found "no basis to support the Louisiana Commission's request for what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity." *Ibid.*

III. The Proceedings Below

A. The FERC Proceedings

On February 2, 2009, Entergy Services, Inc.—which provides non-utility administrative services for all of the Operating Companies—filed a formal notice with FERC on behalf of Entergy Arkansas and Entergy Mississippi to cancel their respective

participation in the System Agreement effective December 18, 2013 and November 7, 2015. See Pet. App. 4a. New Orleans and the Louisiana Commission protested Entergy's notice of cancellation, resurrecting their previously-rejected arguments that, regardless of the Agreement's actual language, the Operating Companies' history of cooperative planning makes it unfair and unlawful under the FPA for a utility to withdraw from the Agreement without continued cost equalization payments and compensation for any resources taken. See *id.* at 49a-57a (summarizing protests); *id.* at 14a-25a (summarizing rehearing requests). FERC rejected each of those arguments.

First, FERC held that the "System Agreement contains no restrictions on Operating Companies' ability to withdraw, nor does it place any further conditions on withdrawal beyond the 96 month notice requirement" set forth in section 1.01. *Id.* at 74a.

Second, FERC held that "the System Agreement contains no provisions requiring withdrawing Operating Companies to pay a fee or otherwise compensate other remaining Operating Companies prior to withdrawing from the System Agreement." *Id.* at 75a. FERC's orders imposing exit fees in other cases of withdrawal from multi-utility agreements were, by contrast, based on explicit exit fee provisions found in those agreements. *Ibid.* FERC again emphasized "that the 96 month notice period should provide all of the Operating Companies time to adjust their long-term plans and to acquire any needed capacity." *Id.* at 76a.

Third, FERC held "that the System Agreement requires no continuing obligation on the part of the

withdrawing Operating Companies" and that its "provisions apply only when an Operating Company is a party to the System Agreement." *Ibid.* Nor does the Agreement "convey any rights to the generation capacity of withdrawing Operating Companies." *Id.* at 77a & n.25 (citing sections 3.05 and 4.01). Moreover, "the rough production cost equalization remedy only applies when an Operating Company is part of the System Agreement." *Ibid.* Thus, "Entergy Arkansas and Entergy Mississippi will be obligated to abide by the bandwidth remedy until the effective date of their withdrawal from the System Agreement," *id.* at 78a, after which their obligations would end. *Id.* at 77a.

Finally, FERC clarified "that Entergy has an obligation to ensure that any future operating arrangement is just and reasonable." *Ibid.* FERC expressly required Entergy to make a filing "under section 205 of the FPA to reflect the arrangements to be in place after the withdrawal," explaining that "any interested party will be able to comment on the successor arrangements at the time they are filed with the Commission." *Id.* at 80a.

FERC reaffirmed each of its rulings on rehearing, finding nothing to "refute[] the Commission's analysis of the terms of the System Agreement itself," and rejecting "claims of historical exigencies and other extrinsic evidence to suggest additional conditions on withdrawal not present in the System Agreement itself." *Id.* at 27a. The text and "history of the System Agreement demonstrates [that] generation in the Entergy system is, and was intended to be, owned by the individual Operating Companies, rather than by the system as a whole or shared among the

various Operating Companies." *Id.* at 30a & n.29 (quoting Agreement § 4.01). Therefore, FERC rejected the notion "that the Operating Companies are entitled to bandwidth payments in perpetuity, regardless of whether the Operating Companies making the payments are still parties to the Entergy System Agreement," reiterating its prior holding "that there is no basis to suggest that bandwidth payments should continue indefinitely even if an Operating Company is no longer a member of the Entergy System Agreement." *Id.* at 38a & n.50 (quoting *id.* at 109a).

B. The D.C. Circuit Opinion

The court of appeals unanimously affirmed FERC's orders as a reasonable interpretation of the Agreement. The court agreed—as New Orleans and the Louisiana Commission conceded—that section 1.01 of the Agreement "places no explicit conditions on the withdrawing Companies save this requirement of notice." *Id.* at 6a. The court also agreed that the text of the Agreement contradicts any argument "that the System as a whole has claims to individual assets built by each Operating Company." *Id.* at 7a (construing Agreement § 4.01). The Court found that "FERC reasonably concluded that the Agreement's purpose is central planning, not central ownership," and that finding was consistent with the court's own precedent holding "that each Operating Company 'is responsible for the costs of the generation plants in its jurisdiction.'" *Ibid* (quoting *Louisiana IV*, 522 F.3d at 384).

Second, the court rejected the petitioners' claim that FERC had reneged on an alleged commitment to require some form of compensation from Entergy

Arkansas and Entergy Mississippi when it denied the Louisiana Commission's complaint in 2007. See *id.* at 7a-8a (examining *id.* at 109a-110a). As the court explained, "[t]he fact that FERC put the Operating Companies on notice that it *might* impose additional conditions on withdrawal does not mean it *must* do so now." *Id.* at 8a (emphasis in original) (citing *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). On the contrary, "FERC reasonably concluded that ninety-six months provided sufficient time for the Operating Companies to plan for withdrawal." *Ibid.*

Third, the court rejected petitioners' "claim that 'rough equalization' payments must continue after withdrawal" because "Entergy's history of single-System planning" requires FERC to correct "disparate consequences" of withdrawal between the Operating Companies regardless of the language in the Agreement. *Id.* at 9a (quoting from the petitioners' brief). The court was not persuaded "that the payments must continue, potentially forever" , finding, as it had previously, that "rough equalization is rooted in the Agreement," and thus "it was reasonable for FERC to conclude that once a Company leaves the Agreement, it need not continue to make the payments." *Id.* at 10a (quoting *Louisiana V*, 551 F.3d at 1043 ("We have long viewed the System Agreement as requiring that affiliates share the costs of power generation in roughly equal proportion.")).

Finally, the court emphasized that its decision "reaches only the obligation of withdrawing Companies under the Agreement." *Ibid.* The court noted that FERC had required Entergy to make

subsequent filings "under section 205 of the FPA to reflect the arrangements to be in place after the withdrawal of Entergy Arkansas and Entergy Mississippi from the System Agreement." *Ibid* (quoting *id.* at 80a). And the court acknowledged FERC's commitment to "review the post-withdrawal arrangements to ensure that they are just, reasonable, and not unduly discriminatory." *Ibid.*

On October 11, 2012, the merits panel denied rehearing, *id.* at 125a, and the court of appeals denied rehearing en banc in "the absence of a request by any member of the court for a vote." *Id.* at 123a.

REASONS FOR DENYING THE PETITION

The petition should be denied because there is no conflict among federal courts of appeals or state courts of last resort, nor is there any question of exceptional importance presented.

I. There Is No Conflict Among United States Courts of Appeals or Among State Courts of Last Resort

Petitioners do not claim that any conflict exists—whether among United States Courts of Appeals or among state courts of last resort. Nor could they. The same court of appeals, the D.C. Circuit, has addressed Petitioners' myriad appeals of FERC orders concerning the System Agreement over the last twenty years. See *supra* n.1.[3] That court was

[3] Judicial review of FERC orders under the FPA is generally available in the D.C. Circuit, but that venue is not mandatory. FPA section 313(b) authorizes judicial review "in the Circuit Court of Appeals of the United States wherein the licensee or public utility to which the

therefore uniquely well-positioned to determine whether its own decisions affirming and applying FERC's bandwidth remedy were undermined, or otherwise in conflict with, FERC's instant decisions on withdrawal. Indeed, two members of the panel below—then-Chief Judge Sentelle and Judge Griffith—were also on the panel that affirmed the bandwidth remedy in *Louisiana IV*, 522 F.3d at 391-94.

II. The Petition Does Not Present an Important Question of Federal Law

Petitioners contend that "[t]his case has exceptional importance because it clears the path for the reinstitution of unduly discriminatory rates in a large region of the country for years to come." Pet. 12. With equally expansive vigor, Petitioners contend that "[t]he decision of FERC and the court of appeals effectively restores the situation that existed prior to 1935, when interstate holding companies abused consumers through 'contracts' among subsidiaries that regulators could not effectively control." *Id.* at 11.

These hyperbolic assertions have no substance. FERC's orders about how the System Agreement operates have no relevance outside the region served by the Entergy Operating Companies. No other region has been affected by litigation associated with the System Agreement. The decisions do no more than forestall Petitioners' ability to continue that

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order relates is located or has its principal place of business, or in the Unites States Court of Appeals for the District of Columbia." 16 U.S.C. § 825*l*(b).

litigation "in perpetuity." Pet. App. 109a ("We find no basis to support the Louisiana Commission's request for what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity."). This ameliorative outcome hardly merits review.

Even as applied to the specific circumstances of the Operating Companies, FERC's decisions did not, as Petitioners assert, "clear the path" to undue discrimination. Rather, they applied the plain language of a termination provision that has existed without change for over thirty years. Moreover, as both FERC and the court of appeals stated, FERC will continue to ensure that rates and any "successor agreements" among the remaining Operating Companies are just, reasonable, and not unduly discriminatory. *Id.* at 77a. (noting "that Entergy has an obligation to ensure that any future operating arrangement is just and reasonable"); *id.* at 10a ("As FERC noted, it must still review the post-withdrawal arrangements to ensure that they are just, reasonable, and not unduly discriminatory.").

There is also no merit to the suggestion that FERC's orders deprive Louisiana customers of access to adequate or economic generation supplies. See Pet. 10-11 ("Consumers and regulators in different states are stuck with the long-term disparate costs produced through six decades of central planning"). Rather, as FERC held: "To the extent the remaining Operating Companies are concerned with their own mix of capacity, we note that the 96 month notice period should provide all of the Operating Companies

time to adjust their long-term plans and to acquire any needed capacity." Pet. App. 76a.

Finally, nothing in the decisions below expands the scope of the *Mobile-Sierra* doctrine. Petitioners contend that FERC and the D.C. Circuit "elevat[ed] affiliate contracts to *Mobile-Sierra* status," thereby "eliminat[ing] effective regulation" of such contracts Pet. 17. There is utterly no basis for this contention. FERC has repeatedly reformed the System Agreement over the past three decades in response to meritorious complaints and proposed amendments. Here, Petitioners' arguments simply fell short on the merits. FERC did not mention, let alone reject Petitioners' arguments as barred by, the heightened standard of review under the *Mobile-Sierra* doctrine. Rather, FERC looked beyond the four corners of the System Agreement and found Petitioners' request for relief in conflict with the plain language of the Agreement as well as its history and purpose. See Pet. App. 26a-39a; *id.* at 74a-79a; see *supra* 6-8 (quoting key passages of FERC's orders). The D.C. Circuit denied the petition for review for the same reasons. See Pet. App. 6a-10a; see *supra* 8-10 (quoting key passages of the D.C. Circuit's opinion).

III. The Decisions Below Correctly Rejected Each of Petitioners' Arguments

Petitioners offer no credible basis for upsetting FERC's determinations. Petitioners' argument that FERC should have imposed post-withdrawal equalization obligations on Entergy Arkansas and Entergy Mississippi "in perpetuity" conflicts with the general rule that "parties to an agreement are relieved of their mutual obligations upon termination of the agreement, and neither party is liable after

termination for further transactions thereunder." 17B C.J.S. *Contracts* § 610 (2011) (citations omitted). Therefore, "[c]ourts are reluctant to interpret contracts providing for some perpetual or unlimited contractual right unless the contract clearly states that that is the intention of the parties." *Int'l Union* v. *ZF Boge Elastmetall LLC*, 649 F.3d 641, 648 (7th Cir. 2011) (quoting *William B. Tanner Co.* v. *Sparta–Tomah Broad. Co.*, 716 F.2d 1155, 1159 (7th Cir. 1983) (citing, *inter alia*, 3 A. Corbin, *Corbin on Contracts* § 553 (1960)); accord, e.g., *Chapman* v. *New York State Div. for Youth*, 546 F.3d 230, 237 (2d Cir. 2008) (citing cases). The absence of any language concerning post-withdrawal obligations does not render the System Agreement ambiguous; rather, that "silence" reflects a clear purpose to prohibit any such additional obligations, which depend for their validity, not on silence, but on "unequivocal language" allowing them. 17B C.J.S. *Contracts* § 602 & nn.4-7 (2011) (gathering authorities).

Louisiana's theory also conflicts with the "cardinal principle" of construction "that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrew*s, 534 U.S. 19, 31 (2001) (statutes) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)); accord, e.g., *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (contracts) (listing authorities). The Petitioners' theory violates that principle because it deprives the eight-year notice period of any purpose. The act of withdrawing would be meaningless if a departing Operating Company must make cost equalization payments not only during the entire notice period, but also indefinitely after withdrawal.

FERC and the court of appeals also correctly found that the System Agreement does not convey a perpetual right to cost allocation based on inclusion of the withdrawing utilities' centrally planned assets. Louisiana ratepayers have no property interest in the generation assets owned by Entergy Arkansas or Entergy Mississippi. Under the FPA, "it is well-settled that customers pay only for service; they do not obtain, by their payments, an entitlement in a utility's assets." *Southern Co. Servs., Inc.*, 69 F.E.R.C. ¶ 61,437 at 62,560 (1994) (citing *Bd. of Pub. Util. Comm'rs* v. *New York Tel. Co.*, 271 U.S. 23, 32 (1926)); *accord, e.g.*, *Consumers Power Co.*, 52 F.E.R.C. ¶ 61,023 at 61,142 (1990) ("[T]he issue appears to be whether Consumers' ratepayers have any property rights in the jurisdictional facilities. It is well established that they do not; ratepayers pay for service, not the property used to render service.") (citing cases). Here, FERC correctly held that the provisions of the System Agreement, "individually and collectively, fail to convey any rights to the generation capacity of withdrawing Operating Companies." Pet App. 76a-77a (citing Agreement §§ 3.05 & 4.01). On the contrary, "generation in the Entergy system is, and was intended to be, owned by the individual Operating Companies, rather than by the system as a whole or shared among the various Operating Companies." *Id.* at 30a & n.29; accord *id.* at 30a-32a & nn.30-38 (explaining that "cost equalizations do not represent a sharing of ownership of generation facilities"); *id.* at 33a ("If parties within Entergy had intended to share ownership of new or existing generation facilities, it would have been simple enough either to write such requirements into the System Agreement, or to decide to share

ownership through the Operating Committee planning process.").

Neither FERC nor the court of appeals charted new territory in rejecting Petitioners' notion that they have a perpetual entitlement to Arkansas and Mississippi generation resources on grounds that those generation resources must be treated as if they were owned by a single entity. Rather, the Operating Companies have "first call on the power and energy produced by units which *they own*" and "to the greatest extent possible . . . retain the benefits of units which *they have been responsible for constructing*." *Middle S. Energy, Inc.*, Opinion No. 234-A, 32 F.E.R.C. ¶ 61,425 at 61,955 (1985) (emphasis added), *aff'd sub nom. Miss. Indus.*, 808 F.2d at 1564, *vacated in part on separate grounds and remanded*, 822 F.2d 1104. This structure—and the related decision to reject full production cost equalization—avoids "a dramatic disruption of the System's historical operations and of the states' settled interests and expectations." *Miss. Indus.*, 808 F.2d at 1565, *vacated in part on separate grounds and remanded*, 822 F.2d 1104.; see also *Entergy Servs., Inc.*, Opinion No. 385, 65 F.E.R.C. ¶ 61,332 at 62,506 (1993) (construing *City of New Orleans*, 875 F.2d at 905-06, to reject the notion that "existing Operating Companies . . . will have a guaranteed level of Arkansas Power energy always at their disposal").

Lacking any support from the System Agreement itself, Petitioners nonetheless contend that perpetual bandwidth payments are required by the FPA outside the confines of the System Agreement. See Pet. 12 ("[T]he statute mandates some form of

continuing cost reallocation to correct unduly discriminatory differences."). That position is extreme by any measure and was properly rejected by FERC. The bandwidth payment remedy was designed to enforce the Agreement's requirement for rough equalization by ensuring that rates charged under the System Agreement were not unduly discriminatory. Consequently, the remedy no longer applies once an Operating Company departs from the System Agreement. Put another way, Louisiana's effort to divorce the contract from the remedy would require a departing Operating Company and its customers to bear the burdens of the System Agreement—*i.e.*, making bandwidth payments to offset production costs—but to receive none of the benefits the System Agreement provides in terms of centralized planning and dispatch.

FERC therefore correctly rejected Petitioners' request to continue production cost equalization—and the litigation it has engendered—"in perpetuity." Pet. App. 109a ("We find no basis to support the Louisiana Commission's request for what in effect would be involuntary continuation of the existing integrated system arrangements, or the virtual equivalent, in perpetuity."); see *id.* at 76a ("Finally, we find that the System Agreement requires no continuing obligation on the part of the withdrawing Operating Companies."); *id.* at 38a & n.50 ("[T]he Commission has already indicated that there is no basis to suggest that bandwidth payments should continue indefinitely even if an Operating Company is no longer a member of the Entergy System Agreement.") (citing Pet. App. 109a). The court of appeals likewise rejected Petitioners' argument "that the payments must continue, potentially forever,"

instead affirming FERC's thrice-ratified holding and the court's own precedent finding that "rough equalization is rooted in the Agreement." *Id.* at 10a (citing *Louisiana V*, 551 F.3d at 1043).

For the same reasons, Petitioners are wrong to contend that "FERC abandoned the role that this Court envisioned in its preemption rulings" (Pet. Br. at 13), including the "responsibility, where the issue is properly raised, to protect against allocations that have the effect of making the ratepayers of one state subsidize those of another," as noted by Justice Scalia's concurrence in *Mississippi Power & Light*. Pet. at 5, 14 (quoting *Mississippi Power & Light*, 487 U.S. at 383 (Scalia, J., concurring)). FERC did not "abandon" any "responsibility" below, but, rather, as the court of appeals held, carefully considered each of Petitioners' claims and found that nothing in the plain language, purpose, or history of the System Agreement supported them.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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