No. 12-852

In The Supreme Court of the United States

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

Petitioners,

versus

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

REPLY BRIEF OF THE LOUISIANA PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITION

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ARGUMENT

1. In responding to the petition for certiorari, FERC acknowledges that its ruling and that of the court of appeals are based on a determination that only the System Agreement, and not the Federal Power Act, required remedies for unduly discriminatory cost allocations among the Entergy affiliates. FERC defends that position, asserting that "[t]he requirement for equalization payments arises from the System Agreement itself, not from any independent duty imposed by the Federal Power Act." [FERC Br. at 9]. FERC points to an "understanding that the remedy arises from the System Agreement" as justifying its refusal to consider unrefuted evidence that undue cost disparities resulting from central planning will be reimposed upon the withdrawal of Entergy Arkansas from the rough equalization remedy. FERC conceded in the court of appeals that the unduly discriminatory disparities will be reimposed. [FERC App. Br. 39].

The System Agreement may have been *intended* at one time to achieve rough equalization, but its terms did not accomplish that purpose. [FERC Br. 3 (System Agreement equalization payments "do not succeed in equalizing overall production costs.")]. Entergy opposed any attempt to alter its as-filed terms and, in particular, opposed the rough equalization remedy FERC enacted in 2005. *Louisiana Public Service Commission v. Entergy Services, Inc.,* 106 F.E.R.C. ¶ 63,012 (2004), ¶¶ 30, 34, 73-79. The presiding judge in that case determined that "the

System Agreement does nothing to equalize benefits and burdens on an annual basis except by accident." *Id.,* ¶ 38 (quoting an Entergy witness). FERC imposed remedies both times it found the cost allocations unduly discriminatory pursuant to the requirements of the Federal Power Act.

The *remedies* FERC imposed are "rooted" in the Federal Power Act and were required because Entergy's central planning, in which Entergy subordinated the needs of operating companies to those of the System, led to undue cost disparities. *Mississippi Power & Light v. Miss. Ex Rel. Moore,* 487 U.S. 354, 361 n.6, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) ("§ 206 of the FPA imposed on FERC an obligation to fix terms that would render the contract 'just and reasonable.' "); *Mississippi Industries v. FERC,* 808 F.2d 1525, 1542-43 (D.C. Cir. 1987) ("[T]he Commission decided that the affiliated operating companies' arrangement for sharing of capacity costs – as set forth in the UPSA and the 1982 System Agreement – was unjust, unreasonable and unduly discriminatory. Under these circumstances, sections 205 and 206 of the FPA plainly provide FERC with authority to modify the Grand Gulf allocation agreed to by the operating companies."). If the System Agreement's equalization provisions for excess capacity and energy required and achieved rough equalization, there would have been no need for FERC to impose remedies under the statute.

The System's central planning regime is the reason that remedies were required, not the contract

the holding company adopted for cost-sharing. That regime has now put in place unduly discriminatory cost differences that cannot and will not be rectified within the eight-year notice period through the addition of new units. FERC acknowledged that fact in the court of appeals. [FERC App. Br. 39]. FERC had an obligation to examine the consequences that carry forward from decades of central planning and to eliminate the undue discrimination despite the withdrawal provision, but it did not do so.

2. FERC holds out the suggestion that it will examine successor arrangements upon the Entergy Arkansas withdrawal to ensure rates are just and reasonable. [FERC Br. at 11]. But FERC and the court of appeals have ruled that the only requirement to eliminate unduly discriminatory cost disparities caused by the central planning regime is rooted in the System Agreement, from which Entergy Arkansas is permitted to withdraw. FERC has promised to review the "successor arrangements," which Entergy has filed to distribute costs only among the *remaining* operating companies. [App. 80a]; *Entergy Services, Inc.,* FERC Docket No. ER13-432. In the absence of any indication of an intent to address unduly disparate costs among all the operating companies that were caused by Entergy's central planning, the promised review does not address the issue raised in the petition.

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CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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