No. 06-1438

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IN THE
Supreme Court of the United States

PAUL HUDSON, *et al.*,

Petitioners,

v.

AEP TEXAS NORTH COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AEP TEXAS NORTH COMPANY

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QUESTION PRESENTED

Whether the court below correctly applied this Court's analytic framework for federal preemption in state retail ratemaking in a multi-state power system, as set forth in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003), *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

RULE 29.6 STATEMENT

Respondent AEP Texas North Company is a wholly-owned subsidiary of AEP Utilities, Inc., which in turn is a wholly-owned subsidiary of American Electric Power Company, Inc. No publicly held company owns 10% or more of American Electric Power Company.

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ADMINISTRATIVE CASES

The petition raises the question of whether a state regulatory body, in seeking to lower retail rates, can overrule the allocation decisions made by an agent of a multi-state holding company pursuant to a federal tariff. This Court recently answered that question in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003). This petition does not raise any circuit conflict, and it rests on a legal theory — primary jurisdiction — that was not raised below. For these and other reasons discussed more fully in this opposition, Respondent AEP Texas North Company submits that the petition should be denied.

STATEMENT

A. AEP Multi-State System

AEP Texas North Company (TNC) is one of nine public utilities owned by the American Electric Power Company, Inc. (AEP), a multi-state power system. Appendix (App.) 2. TNC provides retail electric service in the State of Texas, but it shares in certain benefits of generation capacity owned and operated by its affiliates in ten other states. App. 2, 11.

When the AEP system has an excess of generating capacity, AEP Service Corporation (AEPSC) sells the power at wholesale to other utilities. App. 2. AEPSC then allocates the profits (called TMRs) derived from these sales between the two zones in the AEP system, AEP-East and AEP-West. App. 2, 12.[1] Such allocations are governed by the System Integration Agreement (SIA), a rate schedule filed with and

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[1] TMR is the acronym for Trading and Marketing Realization. Generally speaking, TMRs represent the net revenues from off-system sales to a non-AEP company. App. 2.

approved by the Federal Energy Regulatory Commission (FERC). App. 2-3, 11.[2]

The SIA designates AEPSC as the "agent" and prescribes a formula for AEPSC to use in making the allocations. App. 2-3, 12. The first stage is based on the ratio of AEP-West margins to AEP-East margins in the "Base Year" (July 1999 to June 2000). Transactions are allocated on this ratio until the "Base Year" level of margins is reached. The second tier consists of all TMRs after the "Base Year" margins are reached. Under the second tier, all additional margins are divided between the AEP-East and AEP-West zones according to their relative ownership of generating capacity. App. 3.

AEPSC's allocations are subject to review by FERC. Under the Federal Power Act, FERC is charged with regulating the sale of electricity at wholesale in interstate commerce. 16 U.S.C. § 824(b). In this capacity, FERC is to ensure that wholesale rates and practices are reasonable. *See* 16 U.S.C. § 824d. It has investigation and refund powers. 16 U.S.C. § 824e.

B. The Texas Retail Rate Proceeding

The Public Utility Commission of Texas (PUCT) did not file a complaint with FERC. The PUCT also has no jurisdiction over AEPSC. App. 20. Nevertheless, the PUCT

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[2] *See Am. Elec. Power Co. & Cent. & S.W. Corp.*, 90 FERC ¶ 61,242, at 61,799 (2000) ("We find that the SIA . . . [is] just and reasonable."), *aff'd, Wabash Valley Power Ass'n v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001).

decided to examine AEPSC's allocations under the SIA when fixing TNC's state-jurisdictional retail rates.[3]

TNC argued that the state's inquiry was preempted under the Federal Power Act. Resp. App. 4a-5a. The PUCT, however, adopted the finding of the Administrative Law Judges (ALJs) that there was no federal preemption here because the PUCT retains jurisdiction to evaluate the "prudence" of all transactions subject to accounting under the SIA. Resp. App. 12a-15a, 17a.

TNC alternatively presented expert testimony in support of AEPSC's allocations. TNC's expert explained that AEP's books and records were kept in accordance with FERC's Uniform System of Accounts and with generally accepted accounting principles (GAAP).[4] AEPSC had recorded the value of open energy trades using the mark-to-market (MTM) methodology set out in the guidance of the Financial Accounting Standards Board (FASB) applicable at the time. In particular, a FASB task force — consisting of representatives of public accounting firms and the chief accountant of the SEC — had reached a consensus that energy trading contracts should be marked to market, with

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[3] The PUCT no longer has exclusive authority to regulate retail rates in most parts of Texas. In 2002, Texas moved to a deregulated electricity market. *See* Tex. Util. Code Ann. §§ 39.001 – 39.910 (Vernon 2007). Thus, the rate review procedures followed in this case no longer apply to retail rates today in most of Texas including the territory served by TNC. App. 3.

[4] This testimony of Timothy Trumpler is available at http://www.puc.state.tx.us/interchange/index.cfm, Control No. 26000, Item No. 219 (Nov. 5, 2002).

gains and losses included in earnings and separately disclosed in the financial statements. AEP had adopted mark-to-market accounting to comply with GAAP, and had used this measure of revenues — as reflected on its books — as the basis for the Base Year allocation.

The PUCT initially found that AEPSC correctly calculated the allocations in accordance with the SIA. App. 3; Resp. App. 18a. In this respect, the PUCT agreed with the panel of Administrative Law Judges (ALJs) in this case. The ALJs had reasoned that the allocation of realizations under the SIA was "quite generalized" and thought that the "rather loose structure of the SIA" gave them warrant to examine the margins. Resp. App. 11a-12a. The ALJs acknowledged that TNC had presented "evidence that [AEPSC's] inclusion of the market values of 'open positions' and its use of MTM methodology in calculating Base Year margin levels was an accepted industry practice, supported by contemporary guidance from the Financial Accounting Standards Board, at the time the calculations were performed." Resp. App. 14a. Other parties had "provided no actual evidence to rebut" TNC's position. *Id.* "The record thus supports a finding that [AEPSC] adequately calculated the applicable Base Year margin levels." *Id.*

On rehearing, however, the PUCT reversed itself and adopted a different interpretation of the SIA. The PUCT "found that [TNC's] affiliate American Electric Power Service Company (AEPSC) inappropriately included the 'mark-to-market' based value of open transactions in determining the energy trading margins contributed by the AEP East operating companies in the base year of July 1, 1999-June 30, 2000." Resp. App. 20a. The PUCT found that AEPSC, by including the mark-to-market value, had overstated AEP-East's share of TMRs and under-stated AEP-West's portion. *Id.*[5]

The PUCT then forced TNC to bear the financial consequences of AEPSC's alleged error. Because, in the PUCT's view, AEPSC should have allocated approximately $7.9 million more in TMRs to TNC, TNC's recovery of eligible fuel costs would be reduced by this amount. App. 32. In reality, TNC had not received the $7.9 million. Thus, the PUCT forced TNC to absorb the difference between what AEPSC actually allocated to it under the SIA and what the PUCT believed should have been allocated.

TNC sought rehearing, repeating its argument that state jurisdiction over the SIA's allocations was preempted. The PUCT denied the rehearing requests in November 2004. App. 4.

C. District Court Proceeding

TNC filed a complaint against the Commissioners of the PUCT in federal court pursuant to 28 U.S.C. § 1331 (2000). App. 4. TNC alleged, *inter alia*, that the PUCT's attempt to re-allocate TMRs violated the Supremacy Clause and the Federal Power Act in several different ways. TNC explained that the PUCT had interfered with FERC's exclusive authority to interpret and enforce a federal tariff, and also unlawfully "trapped" TNC's costs. The PUCT filed an Answer; several Texas cities and an association of large industrial consumers intervened.

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[5] *See also* App. 30-31 (Order on Rehearing). Contrary to the order below, petitioners and their amicus seem to suggest to this Court that it was TNC, rather than AEPSC, who made the allocations. *E.g.,* NARUC Amicus Br. 6. This is incorrect. *See* Resp. App. 20a.

The parties filed cross motions for summary judgment. App. 16. The PUCT never mentioned the doctrine of primary jurisdiction. Instead of arguing that FERC has "primary jurisdiction," the PUCT acknowledged that FERC has "exclusive jurisdiction" to regulate interstate wholesale power rates. App. 17.[6] The PUCT's theory was that it had to apply the SIA's "plain language" under the filed-rate doctrine. The PUCT argued that AEPSC's use of mark-to-market accounting was contrary to the SIA's plain language and barred by the filed rate doctrine.[7] However, the PUCT conceded in supplemental briefing and at oral argument that the SIA "says nothing about AEP's use of a particular accounting methodology" to account for these TMRs.[8]

D. The District Court's Decision

The district court granted summary judgment in favor of TNC. *AEP Texas North Co. v. Hudson*, 389 F. Supp. 2d 759 (W.D. Tex. 2005) (App. 10-23). The district court applied the preemption analysis set forth in *Entergy*.

The district court observed that, under *Entergy*, "'[i]t matters . . . only whether the FERC tariff dictates how and by whom that classification should be made.'" App. 19 (*quoting Entergy*, 539 U.S. at 50). The court found that the two-prongs of this test were satisfied here. The "SIA designates AEPSC to centrally calculate TMRs" and "also sets forth a process for making such allocations." App. 19.

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6 *See also* Commissioners' Response and Cross-Motion for Summary Judgment, at 2, 6, 8 (filed Apr. 1, 2005).

7 *See id.* at 8-10.

8 Commissioners' Supplemental Brief, at 3 (filed Nov. 1, 2002).

The district court rejected the PUCT's "plain language" argument. "[T]he omission of AEPSC's use of a particular accounting methodology must be interpreted to grant deference to AEPSC to choose the accounting methodology it will use to allocate the TMRs." App. 20. The court separately found that the "plain language" argument failed because "the PUC has no jurisdiction over AEPSC that makes the calculations under SIA" and the SIA itself "expressly grant[s] jurisdiction to review AEPSC's allocation methodology with FERC." App. 20 nn.6 & 7. "Therefore, the Commissioners must accept AEPSC's allocation . . . unless and until FERC says otherwise." App. 20.

E. The Fifth Circuit's Decision

On appeal, the PUCT still did not mention the doctrine of primary jurisdiction. The PUCT recognized that this Court's decisions "prohibit second-guessing of FERC-filed rates" but claimed that no such "second-guessing" occurred here because the tariff's plain language compelled only one reading.[9] The PUCT argued that this case was different from *Entergy* because "the utility in that case had not deviated from the allocation method specified in its tariff, as TNC has in this case."[10]

A unanimous Fifth Circuit panel affirmed the district court. *AEP Texas North Co. v. Texas Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006) (Reavley, Stewart, Clement, J.J.) (App. 1-9).

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[9] Brief of Appellants Commissioners of the Public Utility of Texas, at 10-11 (filed Apr. 19, 2006).

[10] *Id.* at 11.

The court began by recognizing that FERC has "exclusive jurisdiction" over wholesale rates. App. 4. It was the need to enforce FERC's "exclusive jurisdiction" over all elements of wholesale ratemaking that led this Court to develop the "filed rate doctrine" and to hold that states are preempted from "second-guessing FERC's allocations . . . conducting prudence inquiries, . . . [and] 'trapping costs' . . . ." App. 4-5 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986) (*Nantahala*) and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (*MP&L*)).

The Fifth Circuit then found that this Court recently applied the same principles to preempt state review of cost allocations within a multi-state system in *Entergy*, 539 U.S. at 49-50. App. 5-7. The court recognized *Entergy* did not address a state's power to interpret the federal tariff. App. 7. However, the court found that the PUCT's "plain language" argument failed under earlier precedent for three different reasons.

First, the Fifth Circuit quoted the Court's ruling in *MP&L* that "'States may not regulate in areas where FERC has properly exercised jurisdiction . . . .'" App. 8 n.16. Accordingly, the Fifth Circuit ruled that "states are bound to implement a FERC-approved agreement, and the agreement authorizes only AEPSC to implement the formula." App. 7-8.

Second, and again relying on *MP&L*, the Fifth Circuit recognized that "FERC, not the state, is the appropriate arbitrator of any disputes involving a tariff's interpretation." App. 8. The Federal Power Act gives FERC exclusive jurisdiction to regulate wholesale rates, and "it is FERC's duty under the FPA to make an assessment of the broad public interest involved in determining interstate rates." App. 8 (*citing* 16 U.S.C. § 824(a)). Congress designed the

FPA to have these multi-state disputes settled by one national arbiter (FERC) with exclusive jurisdiction — not by different states, each of which could claim that its own interpretation is correct. "If each state could enforce its own findings as to the meaning of the filed rate, in opposition to the conclusion of a FERC-approved agent, the conflicting interpretations would undermine FERC's ability to ensure that a filed rate is uniform across different states, and intrude upon its exclusive jurisdiction over interstate power transactions." App. 8-9.

Third, the Fifth Circuit recognized an independent problem with the PUCT's position: "the FPA gives FERC exclusive jurisdiction to remedy tariff violations by providing refunds." App. 9 (*citing* 16 U.S.C. § 824e). The states have authority over retail rates and the local utility only, and they cannot effectuate the change in allocations across the entire system. Conflicting state orders result in the same trapping of costs that the Supreme Court's decisions prohibit. "If states could remedy perceived violations by setting retail rates based on their own calculations, states could potentially 'trap' costs by prohibiting the utility from passing on the price of FERC-mandated rates to consumers." App. 9 (*citing MP&L*).

The PUCT filed for rehearing and rehearing en banc, raising the same arguments but not mentioning the doctrine of primary jurisdiction. On January 26, 2007, the Fifth Circuit denied the rehearing request. App. 26. No panel member nor judge in regular active service requested that the court be polled. *Id.*

REASONS FOR DENYING THE PETITION

The unanimous opinion of the Fifth Circuit was in complete accord with this Court's most recent decision on federal preemption in *Entergy*. The Fifth Circuit's decision is not in conflict with any decision of this Court or any lower court. The theories presented in this petition, such as primary jurisdiction, were not presented to or adopted by the PUCT below and in any event do not warrant a different result here. Review by this Court is not warranted.

I. The Decision Below Does Not Conflict With This Court's Decisions

A. The Court Below Correctly Applied *Entergy*, *MP&L*, and *Nantahala*

The petition raises a question that has been soundly answered by the Fifth Circuit on the basis of existing precedent. In a series of cases decided over three decades, this Court has held that state regulators may not overrule allocations made pursuant to multi-state federal tariffs.[11] This Court has applied this principle to allocations of both burdens and benefits.[12] The Court has reasoned that state review would frustrate FERC's exclusive jurisdiction by trapping costs at the retail level.[13] The Court has insisted on

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[11] *See Entergy*, 539 U.S. at 41-42 ("FERC-approved cost allocations between affiliated energy companies may not be subjected to reevaluation in state ratemaking proceedings."); *see also MP&L*, 487 U.S. at 371; *Nantahala*, 476 U.S. at 962-73.

[12] *See Entergy*, 539 U.S. at 47-50 (allocation of cost equalization payments); *MP&L*, 487 U.S. at 360 (allocation of power costs); *Nantahala*, 476 U.S. 956 (allocation of low-cost power).

[13] *Entergy*, 539 U.S. at 49-50; *MP&L*, 487 U.S. at 372-73; *Nantahala*, 476 U.S. at 970 ("Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand.").

federal preemption both when FERC has spoken to the precise issue and when it has not.[14] Most recently, in the *Entergy* case, this Court has held that state regulators may not even exercise their powers over prudence at the retail level to upset an allocation made by a designated agent exercising discretion under a multi-state tariff. *See Entergy*, 539 U.S. at 49-50.

In the retail rate proceeding, the PUCT relied upon the same "prudence" theory that was rejected in *Entergy*. Resp. App. 13a-15a, 17a. In federal court, the PUCT developed a different preemption theory. It has argued that the impact of *Entergy* can be avoided through a claim that it was interpreting or enforcing the federal tariff. App. 7; Petition at 6. The PUCT notes that, in *Entergy*, this Court said: "we have no occasion to address the question of the exclusivity of FERC's jurisdiction to determine whether and when a filed rate has been violated." *Entergy*, 539 U.S. at 51.

The Court, however, remarked that it was "curious[]" for the state regulators to advance this argument because their order below reached the exact opposite conclusion. *Id.* at 50. The order below found the state regulators were "'pre-empted from determining whether the terms of a FERC tariff have been met, for the issue of violation of or compliance with a FERC tariff is peculiarly within FERC's purview.'" 539 U.S. at 45 (*quoting* the state commission decision).[15] In

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[14] *See Entergy*, 539 U.S. at 50 ("It matters not whether FERC has spoken to the precise classification of ERS units . . . ."); *MP&L*, 487 U.S. at 375-77.

[15] The Louisiana Public Service Commission also said: "Any allegation of a violation of a FERC-tariff should therefore be brought before the FERC." *Re: Louisiana* (Continued ...)

other words, the state commission in *Entergy* recognized that it had no jurisdiction under governing law to interpret a federal tariff.

Here, the Fifth Circuit held that the PUCT's theory was foreclosed by existing law. The court distilled three fundamental principles from this Court's earlier opinions. The petition in this case does not address any of these principles.

The first principle is that a "bright line" exists between state and federal jurisdiction, making a case-by-case analysis unnecessary. *Nantahala*, 476 U.S. at 986 (*quoting Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 214-16 (1964)). "There can be no divided authority over interstate commerce . . . ." *MP&L*, 487 U.S. at 377 (quotations and citation omitted). The interpretation of a federal tariff is a quintessential function of FERC, which must understand the meaning of a tariff in order to judge its reasonableness. "A tariff is not an abstraction . . . . Complex and technical cost allocation and accounting problems must be solved in setting the tariff initially." *United States v. W. Pac. R.R.*, 352 U.S. 59, 66 (1956). It is precisely the province of FERC to ensure that the resulting rate or allocation is just and reasonable, and it may take into account any competing policy interests of the FPA when choosing between permissible constructions. "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *MP&L*, 487 U.S. at 371. Here, the PUCT argues for concurrent regulatory jurisdiction and ignores altogether the bright line approach adopted by this Court.

Power & Light Co., Docket No. U-20925, 1998 WL 1285300, at *18 (La. P.S.C. Dec. 22, 1998).

The second principle is that the assignment of exclusive authority to FERC is essential to protect the interests of all States. Congress enacted the FPA because it recognized that the "production and transmission of energy" is "particularly likely to affect more than one State," and that "uncontrolled [state] regulation" can "patently interfere with broader national interests." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The FPA prevents this interference with interstate commerce by centralizing all decisions about wholesale power arrangements in a single federal forum — FERC — and by establishing a uniform, orderly procedure in which all legitimate state interests in such arrangements can be raised and considered. In the case of allocations of costs or revenues under a multi-state tariff, the need for a neutral forum is self-evident. The Court has accordingly upheld exclusive federal jurisdiction in such cases. *See Entergy*, 539 U.S. at 42-43; *MP&L*, 487 U.S. at 371; *Nantahala*, 476 U.S. 962-73. Again, the petition does not explain how any single state could provide a neutral forum for resolution of disputes arising under such tariffs.

The third principle is that the only way to assure the utility recovers a hundred percent of its costs is for all states to adhere to a uniform interpretation. This Court's decisions in *Nantahala*, *MP&L* and *Entergy* recognize that costs will inevitably be trapped when each state imposes its own allocation in a multi-state system. *Entergy,* 539 U.S. at 49-50; *Nantahala*, 476 U.S. at 966-70; *MP&L*, 487 U.S. at 377. No state can effectuate its own change in allocations across the entire system. As applied here, the AEP operating system could be caught in a squeeze where each state allocates more profits or TMRs to its own jurisdiction, thereby preventing the AEP system from fully recovering its costs. Again, the petition does not address the Fifth Circuit's concern with the lack of a complete remedy in an individual state and consequent risk of trapped costs under the controlling federal tariff.

Petitioners recognize that "[d]etermining prudence or reasonableness is a matter inherent in the setting of [federal] rates." Petition at 15. Petitioners fail to recognize, however, that the exercise of state retail jurisdiction to find a "violation" of a federally-approved, multi-state wholesale tariff raises all the same concerns as the exercise of "prudence" jurisdiction to overrule a cost allocation in similar circumstances. In either case, the individual state commission acts with regard to the interests of its own retail customers; its interpretation can easily conflict with those of other states, having opposing interests. The individual state commission is not in a position to grant a complete remedy, because it does have the other subsidiaries and regulators before it. Thus, its direction can easily compel the regulated entity to "trap costs" between wholesale and retail rates or, as here, lower its retail prices to reflect revenues that it does not really have.

This kind of parochial state regulatory action is no more justifiable when cast in terms of finding a "violation" of the federal tariff than in terms of finding a "prudence" violation. State regulators have no identifiable mandate to enforce federal tariffs, to find violations of them, or to provide remedies for violations of federal tariffs. The federal tariffs govern wholesale, interstate transactions, where States have no jurisdiction. FERC has the authoritative role in interpreting and enforcing federal tariffs, at least where they touch multiple states. "'[W]hether one characterizes the questions as related to prudence, interpretation [of the basic system agreements], or cost allocation, they are clearly matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement all applicable wholesale rate schedules.'" *MP&L*, 487 U.S. at 378 (Scalia, J., concurring in the judgment) (alternation in original) (*quoting AEP Generating Co.*, 36 FERC ¶ 61,226, at 61,550 (1986)).

Petitioners do not address the Fifth Circuit's reasons for finding no state jurisdiction to interpret federal tariffs, but they do challenge that court's reliance on *Entergy*. Petitioners argue that AEPSC, unlike the allocation agent in *Entergy*, had no discretion in making the allocations that are the subject of this case. In the view of petitioners and their *amici*, the language of the SIA is so plain and precise that any interpretation other than their own current interpretation — forbidding mark-to-market accounting — is a "violation" of the tariff.

This "plain meaning" argument is surprising, in that the use of mark-to-market accounting to calculate Base Year revenues was approved first by the panel of ALJs who heard the evidence, and then by the PUCT itself in its initial decision, which adopted the ALJs' reasoning. Resp. App. 14a, 18a. The PUCT's own change of mind demonstrates that the language of the SIA — which the ALJs saw as "quite generalized" (Resp. App. 11a) — is sufficiently ambiguous to permit this approach.

Further, this point has already been decided against Petitioners in the courts below. The district court observed, "[T]he omission of AEPSC's use of a particular accounting methodology must be interpreted to grant deference to AEPSC to choose the accounting methodology it will use to allocate the TMRs." App. 19. The court of appeals did not disagree. The court of appeals emphasized the parallel to the *Entergy* case, where this Court faced a different question of interpretation under a tariff — whether certain units could be classified as "available" when those units were actually shut down, but could be activated in emergencies. *See* App. 6 (*discussing Entergy* decision). This Court treated the ambiguity in the agreement as "leav[ing] the classification of

ERS units to the discretion of the operating committee . . . ." *Entergy*, 539 U.S. at 49.

By the same token, AEPSC was free to decide what accounting methodology best reflected the revenues associated with off-system trading. A holding company must make a whole range of decisions in allocating burdens and profits among subsidiaries. Under the SIA, those decisions included not only out of pocket costs and revenues, but also the ratio of owned generating capacity of each member of the system at a given point in time — precisely the issue before this Court in *Entergy*. If multiple state agencies were free to overrule holding company decisions on each such issue based on what they viewed as "plain" language, this Court's *Entergy* decision would become essentially meaningless. In any event, the question of whether this particular agreement vested the AEPSC with discretion to decide the accounting methodology is not a sufficiently broad one for this Court to decide.[16]

B. The Decision Below Does Not Conflict With This Court's Earlier Decisions

Seeking to avoid the compelling logic of this Court's decisions dealing directly with multi-state, multi-party tariffs, the petitioner reaches back to an older set of decisions dealing with tariffs as contracts between two parties. These cases do not involve state regulatory agencies setting retail rates on the basis of their views of appropriate wholesale rates or allocations. Rather, they arise from the judicial

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[16] An alleged misapplication of a correct legal standard to a particular case does not ordinarily merit review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

enforcement of tariffs as contracts. Since the courts may play a role in such enforcement, they have retained jurisdiction over the contract claims, but have acknowledged the primary jurisdiction of the federal Commission with respect to any issues of tariff interpretation that implicate administrative discretion, specialized knowledge or concerns about uniformity.

Thus, in the 85 year-old *Great Northern Railway v. Merchants' Elevator Co.*, 259 U.S. 285 (1922), the Court held that a state court hearing a contract claim could hear an issue of tariff interpretation when it presented "a question solely of law." *Id.* at 291. However, the Court recognized that "preliminary resort to the [ICC] Commission" would be required in cases where the "inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission." *Id; see also id.* at 295 n.2 (collecting cases in which the "question presented either was one of fact or called for the exercise of administrative discretion.").

The Court confirmed this analysis in *United States v. Western Pacific Railroad*, 352 U.S. 59 (1956). There, although neither party had raised any jurisdictional issue, the Court raised the question of primary jurisdiction sua sponte and concluded that the ICC should decide in the first instance the question of tariff interpretation raised there. The Court explained that the *Great Northern* case had made clear that "where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application . . . then the issue of tariff application must first go to the Commission." *Id.* at 66.

This framework for the exercise of primary jurisdiction in contract cases was not modified, but reaffirmed in *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961), cited in the Petition at 12. There, the applicable rate had been established in prior litigation before this Court.

Cities Serv. Gas Co. v. State Corp. Comm'n., 355 U.S. 391 (1958). The Court therefore allowed suits for overcharges on the contracts to proceed in state court. It reaffirmed the criteria used in the *Great Northern* Case for identifying issues to be sent to the Commission.

In light of these and other precedents, FERC has announced a three-part test for primary jurisdiction:

> (1) whether [FERC] possesses some special expertise which makes the case peculiarly appropriate for [FERC] decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of [FERC].

Arkansas Louisiana Gas Co. v. Hall, 7 FERC ¶ 61,175, at 61,322 (1979). It is this test that FERC has applied in the decisions cited by PUCT, when it has allowed relatively simple issues of contract interpretation between two parties to be addressed in court. *City of Glendale v. Portland Gen. Elec. Co.*, 115 FERC ¶ 61,231 (2006); *Kentucky Utils. Co.*, 110 FERC ¶ 61,285 (2005).

None of this primary jurisdiction case law cited by the PUCT provides any reason to grant this petition. In the first place, the question of primary jurisdiction was not raised before the PUCT, in the district court, or even in the court of appeals. The use of a primary jurisdiction framework to resolve this case is therefore waived. *See TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (issue waived "because it was not raised or briefed below"). At a minimum, given the lack of consideration of this point in the various tribunals below, this case provides an extraordinarily poor vehicle in which to consider jurisdictional options.

Second, the primary jurisdiction case law cited by the PUCT demonstrates exactly why FERC must have exclusive jurisdiction over this issue. This is not simply a contract dispute between two parties, but a question of allocation under a regional tariff in which multiple subsidiaries in multiple states are implicated. Most of those subsidiaries, including the subsidiary serving as the designated agent for making the allocations, are not subject to PUCT jurisdiction and are not even before the Court. Thus, relief cannot be fashioned for all the parties to the contract unless FERC exercises its jurisdiction. In addition, the issue turns on a highly specialized question of accounting — measurement of revenues for open energy contracts. It is not a pure question of law, but one on which there is already evidence introduced in the proceeding — evidence showing that the regulated entity followed regulatory guidance. It is within the special competence of FERC. Perhaps most important, there is an indisputable need for uniformity, lest each state seek an advantage for its retail customers by imposing a different interpretation of the tariff. This case falls directly within the regulatory responsibility of FERC.

Third, there is no reason to accept this case to investigate the use of primary jurisdiction case law when it would result in a similar resolution. In the end, petitioners appear to recognize that the issue raised here requires the uniform resolution that only FERC can provide. They make no attempt to argue that different allocations under the SIA should obtain in different states. Rather, they argue that "a state agency's improper refusal to refer an issue within FERC's special competence could be reversed." Petition at 14; *see also id.* at 18 ("In the event that a State proceeds without seeking necessary FERC review, that decision could be reversed."). It is hard to see what is gained by accepting review in this case to determine whether the Fifth Circuit should have called this an issue for FERC's primary jurisdiction rather than its exclusive jurisdiction.

It is easy to see, however, what is lost. The PUCT would inject needless confusion and delay into the ratemaking process as the parties litigate over whether particular issues of tariff interpretation would be within FERC's primary jurisdiction. Since utilities may have legal and practical difficulties imposing higher rates retroactively,[17] the delay jeopardizes their ability to obtain a reasonable return, even if their legal rights are ultimately vindicated.

The PUCT argues that it may consider interpretive issues concerning a multi-state tariff because "the ultimate availability of resort to this Court [is] sufficient to ensure the needed uniformity." Petition at 12. This is an utterly impractical solution. As the PUCT's own brief demonstrates, the electrical industry today conducts its business on a regional basis. Hundreds of multi-state tariffs underlie the wholesale markets for the sale and transmission of power. If every dispute requiring a uniform resolution were brought to this Court, this Court would have time for little else. FERC has the staff, the expertise and the statutory mission to perform this function. There is no point in accepting certiorari to establish some sort of parallel regime in state agencies and this Court.

II. The Decision Below Does Not Conflict With Decisions Of Other Courts

The petition does not attempt to demonstrate a conflict in the circuits. It cites no circuit that has reached a view contrary to the Fifth Circuit. Similarly, it cites no recent decisions of the state courts adopting an interpretation of this Court's decision in *Entergy* contrary to that of the Fifth

[17] *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 198-99 (Tex. 1994) (retroactive ratemaking prohibited).

Circuit. In essence, it asks this Court to review a decision of a single court of appeals in splendid isolation.

On closer inspection, there are some other relevant decisions — which come out exactly the same way as the Fifth Circuit. The petition cites *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987), which arose in the context of the same AEP multi-state system. There, the Public Service Commission of West Virginia, acting pursuant to a state statute, sought to examine the prudence of an apportionment agreement of transmission investment between utilities in the AEP system. *Id.* at 900-01. The Fourth Circuit rejected the West Virginia Commission's assertion of state statutory authority, holding that such authority was preempted by the FPA because FERC "has exclusive jurisdiction to consider the merits of the interstate agreement." *Id.* at 900. "Lodging exclusive authority in FERC to consider the merits of the [agreement] thus forecloses the potential for differing state pronouncements regarding an agreement involving utilities regulated by various states." *Id.* at 905.

Other circuits have relied upon the same fundamental principles. "Cases are legion affirming the exclusive character of FERC jurisdiction where it applies . . . ." *Public Utils. Comm'n v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) ("[I]f there be [FERC] jurisdiction over some component of the transaction, it is exclusive over that component."); *see also California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 850-52 (9th Cir. 2004) ("[R]emedies for breach and non-performance of FERC approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC."); *Transmission Agency of N. California v. Sierra Pac. Power Co.*, 295 F.3d 918, 929 (9th Cir. 2002) ("FERC has approved the construction and operation of the Alturas Intertie, and FERC alone (subject to court review of its final decision) can modify that decision, or deal with any party who operates the Alturas Intertie improperly."); *Massachusetts Dep't of Pub. Utils. v. United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) ("Massachusetts' interpretation threatens confusion, possibly chaos. What is to prevent each state in a multistate service area from requiring the utility to file a *different* set of "reasonable" rate practices with FERC?").[18]

While these cases support the decision of the Fifth Circuit in this case, it is worth noting that there has been relatively little litigation of the same kind since this Court's decision in *Entergy*. The question presented here is not a frequently recurring issue in reported cases. Despite the participation of the National Association of Regulatory Utility Commissioners (representing 50 states), and the assistance of eight specific State Commissions, neither the PUCT nor these *amici* have been able to come forward with examples of cases in which this Court's decision in *Entergy* has been a stumbling block to the retail ratemaking process.

The absence of any precedent on the issues raised here cautions against any grant of certiorari at this time. Petitioners and their *amici* have argued, in essence, that, notwithstanding their obligations to their several subsidiaries, the holding companies will abuse their allocation authority by making arbitrary interpretations of their tariffs. That might be demonstrated — or disproved — through a large number of litigated cases. Petitioners and their *amici* have none. Petitioners also argue that state commissions can

[18] *See also AEP Generating Co. & Ky. Power Co.*, 38 FERC ¶ 61,243, at 61,823 (1987) ("stat[ing] that the matters raised by [the utility] lie within our exclusive jurisdiction, insofar as they concern the allocation of costs and rates among the members of an integrated, interstate system.").

utilize the concept of primary jurisdiction to entrust more subtle issues to FERC, and can be subject to reversal in court for erroneous decisions. A series of agency and judicial decisions applying this doctrine would show its limits and consequences. Again, petitioners and their *amici* have none.

This case is also a poor vehicle to consider the issue raised in the petition because of the multiple changes in position and theory by the PUCT. The PUCT initially followed the recommendation of the ALJs who received the evidence and approved the method of accounting for revenues used by AEPSC. Resp. App. 18a. On rehearing, the PUCT changed its mind but failed to address the intervening decision in *Entergy*. In the district court and court of appeals, the PUCT acknowledged that FERC's jurisdiction was "exclusive" but argued that it was merely enforcing the plain language of the tariff. App. 16-17. In this Court, petitioners do not explicitly advance the plain language position but instead presented a theory of primary jurisdiction never presented below. Because primary jurisdiction was never addressed in either the administrative orders or in the decisions of the federal courts below, this proceeding does not furnish an appropriate record for analysis of that approach.[19]

Thus, apart from its other defects, the petition raises an issue that is not ripe for decision by this Court. The *Entergy* case was decided only four years ago. There has been relatively little litigation of the same kind in its wake, and no

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[19] Indeed, this case bears a striking resemblance to *Entergy*, in that the administrative agency here never discussed in the administrative record any reason for avoiding preemption other than its prudence powers — just as the state commission did in *Entergy*.

other reported decisions raising the particular issue decided here. The absence of a conflict is not only a weakness in the petition, but a loud warning that the issue here is not ready for review.

III. The Petition Raises No Issues of Exceptional Importance

The Petition should be denied for the further reason that it raises no issues of exceptional importance. The petition seeks to have this Court consider whether FERC's jurisdiction should be primary rather than exclusive when tariff interpretation issues arise in the context of a multi-state tariff. This issue was not even addressed in the proceeding below. The petition cites no other example of cases where the two approaches have been compared. It cites no secondary commentary identifying a problem in this area. There has been relatively little experience in applying this Court's decision in *Entergy*, and no cause for complaint.

The PUCT seeks to magnify the impact of the Fifth Circuit's decision by arguing that "Forty-two of the forty-eight contiguous States are served by subsidiaries of interstate public-utility holding companies." Petition at 7. This hardly helps, for it raises the obvious question of why the PUCT fails to present any cases of this kind from other jurisdictions. At the same time, it underlines precisely why the Commission must interpret the tariffs of these holding companies — because they typically operate in more than one state, and each state will have its own interests to protect. The exercise of jurisdiction by the Commission is essential to assure both impartiality and uniformity in interpretation of such tariffs.

The petition suggests that the decision of the Fifth Circuit might give the utilities too much leverage. The PUCT says that utilities might assert interpretive issues even when "the appropriate allocation was hardly disputable." Petition at 14.

This is an entirely hypothetical argument. The PUCT does not shown that *this* allocation was "hardly disputable." Nor could the PUCT advance that view. It initially found that the AEPSC correctly made the allocations under the SIA. App. 3. The PUCT also has conceded that "the SIA says nothing about the use of MTM accounting to value open transactions." App. 31. Thus, this case does not in any respect test the limits of FERC's exclusive jurisdiction. There is no cause for this Court to take up the question of FERC's jurisdiction to resolve a purely hypothetical problem regarding abuse of the administrative process not presented here.

The PUCT and its supporters argue that "if utilities adopt erroneous interpretation of their own tariffs, States might acquiesce in those interpretations rather than face the delays accompanying federal review." Petition at 9. The PUCT and its supporters present no evidence of that phenomenon. Nor does this allegation make much sense. Had the PUCT sought clarification from FERC when its administrative law judges first rejected its interpretation in 2003 (or before), it would certainly have obtained an answer long ago. Moreover, the procedure that it advocates — where (1) the state commission initially decides whether it should exercise jurisdiction; (2) a state or federal court then reviews that decision to determine whether FERC has primary jurisdiction; and (3) FERC then decides the substantive tariff interpretation issue — has the potential to create much longer systemic delays, arising from three layers of review.

In contrast, the Fifth Circuit's decision used a bright-line test. That bright-line test not only comports with the strict approach taken by this Court in *Entergy* and prior cases, but also minimizes delay by eliminating uncertainty. It would require the parties to go to FERC in every case where a question of allocation arises under a multi-state holding company tariff filed with FERC. The parties would know it.

The state agency would know it. There would be no reason to delay seeking a determination from the one institution with both the expertise and the mandate to give an authoritative answer. In the end, this would be a faster solution.

In fact, when there is disagreement over the meaning of a tariff, there need not be any delay in the state commission proceedings at all. A state regulator may proceed to final order in compliance with the federally-designated agent's allocation, yet make its order subject to whatever refunds FERC orders in the event FERC agrees with the state regulator's position. Accordingly, the state proceedings are not slowed down, the federal tariff does not get interpreted and enforced by a dozen different states with different interests, and the sky — instead of falling — stays firmly ensconced in the heavens.

The Fifth Circuit applied this Court's decision in *Entergy* in a straightforward fashion. There is no judicial experience showing that the issue is recurring or that the solution chosen is unworkable. The PUCT's effort to reframe the issue as one of primary jurisdiction, instead of exclusive jurisdiction, would contribute nothing on the facts of this case and would likely not be helpful in other cases. This Court need not expend its resources in analyzing an issue that does not even relate to a problem.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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