No. 07- 07-651 NOV 14-2007

IN THE

Supreme Court of the United States

ENTERGY CORPORATION, ENTERGY SERVICES, INC., ENTERGY POWER, INC., ENTERGY POWER MARKETING CORPORATION, ENTERGY ARKANSAS, INC., AND ENTERGY GULF STATES, INC.,

Petitioners,

v.

DAVID JENKINS AND CINDY JENKINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003), *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), a state court may determine that the bulk power supply arrangements of an interstate power pool governed by a FERC tariff violate state tort law and may award retail customers damages based on what their electricity rates would have been if the interstate power pool operated in the manner that the state court jury finds prudent?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those appearing in the caption to this petition.

Pursuant to Rule 29.6, Petitioners Entergy Services, Inc., Entergy Power, Inc., Entergy Power Marketing Corporation, Entergy Arkansas, Inc., and Entergy Gulf States, Inc. are each wholly-owned subsidiaries of petitioner Entergy Corporation. Petitioner Entergy Corporation has no parent corporation. No publicly traded company owns more than 10% of the stock of Entergy Corporation.

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SCHOLARLY AUTHORITY

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Petitioners Entergy Corporation, Entergy Services, Inc., Entergy Power, Inc., Entergy Power Marketing Corporation, Entergy Arkansas, Inc., and Entergy Gulf States, Inc. respectfully request that a writ of certiorari issue to review the judgment of the Texas Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, Appendix ("App.") 2a-36a, is reported at 187 S.W.3d 785 (Tex. App. 2006). The Order of the Texas

Supreme Court denying review of that decision, App. 1a, and the Order denying a petition for rehearing, App. 42a, are unreported. The decision of the District Court of Chambers County, Texas, 334th Judicial District, App. 37a-39a, is unreported.

JURISDICTION

The opinion and judgment of the Texas Court of Appeals was entered on March 2, 2006. Entergy's timely petition for review was denied by the Texas Supreme Court on February 2, 2007, and the Texas Supreme Court denied Entergy's timely petition for rehearing on August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution and the Federal Power Act, 16 U.S.C. §§ 791a-828c, are reprinted at App. 45a-58a.

STATEMENT OF THE CASE

In this case, the Texas Court of Appeals held that state courts have jurisdiction to apply state tort law to review and second guess the bulk power supply arrangements of interstate electric systems that are governed by tariffs approved by the Federal Energy Regulatory Commission ("FERC"). In particular, the Texas court held that a jury may determine that the power purchase and supply decisions made by the operator of the multistate Entergy system violated various provisions of state tort law. It thus also held that a jury may award damages to the retail customers of the Entergy operating company that serves Texas—Entergy Gulf States Inc. ("EGSI")—

based on the difference between the power costs that this retail utility in fact incurred under the FERC tariff and those that it would have incurred if the Entergy System operator had acted in the manner that the jury finds to have been prudent.

This decision is squarely contrary to *Entergy Louisiana, Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39 (2003) ("*ELI*"), *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988) ("*MP&L*") and their many precursors. *ELI* and *MP&L* hold that FERC has exclusive jurisdiction to review wholesale power supply arrangements and cost allocations within interstate power pools, and that a complaint at FERC is the exclusive remedy for any persons who assert that the power pool has acted imprudently. *ELI,* 539 U.S. at 49-50; see *MP&L,* 487 U.S. at 374-75. Both decisions thus also hold that costs that are imposed under a FERC tariff must be included in retail rates and recovered from retail ratepayers, unless and until FERC determines the wholesale costs are unreasonable. Contrary to the Texas court's decision, *ELI* expressly holds that these preemption principles apply even if the FERC tariff delegates discretion to a system operator to make determinations that establish the wholesale rates and cost allocations. *ELI,* 539 U.S. at 49-50.

These principles also squarely bar state courts from exercising state tort law jurisdiction over any putatively discretionary decisions of the "wholesale" operator of an interstate power pool. Just as state utility commissions must include wholesale power costs incurred under FERC rate schedules in the retail rates, state courts cannot nullify FERC's jurisdiction by directly reviewing the power supply arrangements of the power pool, finding that they

resulted in "excessive" wholesale charges, and awarding the amount of the excessive wholesale charges to retail ratepayers as tort damages. Contrary to the Texas court's conclusion, a claim cannot fall outside the jurisdiction of a state utility commission on the ground that it concerns wholesale rates yet be within the jurisdiction of a state court to apply generally applicable tort or other state law. The grant of exclusive jurisdiction to FERC over wholesale transactions preempts *any* tribunal from applying any state standards to these arrangements. Indeed, lay jurors have far greater potential to base decisions on parochial interests and to disrupt the operation of interstate electrical systems than do state utility commissions.

The Texas court's decision squarely conflicts with two recent decisions of the Ninth Circuit that have held that wholesale rates and cost allocations under FERC tariffs cannot be challenged under generally applicable state laws. In addition, the Texas court's decision conflicts with the decisions of numerous state supreme courts and with decisions of the federal courts of appeals for the District of Columbia, First, and Fourth Circuits.

Review of the Texas court's decision, and resolution of these conflicts, is critical to the efficient operation of the nation's electrical system and to the protection of the Congressional scheme for regulation of the generation, transmission, and wholesale sale of electricity in interstate commerce.

1. The Multi-State Entergy System. This case arises in the same "integrated power pool" that was involved in *MP&L,* 487 U.S. at 357, and *ELI,* 539

U.S. at 48: the Entergy System (formerly known as the Middle South System).

The Entergy System provides electric service to over 2.6 million retail customers located in four different states. Petitioner Entergy Corporation is a holding company. It owns five Operating Companies: petitioner EGSI (which serves parts of Texas), Entergy New Orleans Inc., Entergy Louisiana Inc., Entergy Mississippi Inc., and petitioner Entergy Arkansas Inc. Entergy Corporation also owns petitioner Entergy Services, Inc. ("Entergy Services"), which performs centralized management, administrative, and other services for the Entergy System.[1]

Entergy Corporation, its five Operating Companies, and Entergy Services are all parties to the Entergy System Agreement ("ESA"), the relevant portions of which are reproduced at App. 59a-84a. This agreement provides for the integrated "planning, construction, and operation of the electrical generation, transmission and other facilities of the Companies," and it governs the allocation of costs of these facilities among the Operating Companies. App. 61a (ESA § 3.01). The System Agreement has been filed with FERC and is a FERC-approved tariff. See *ELI*, 539 U.S. at 42.

The System Agreement is administered by a System-wide Operating Committee comprised of representatives of Entergy and each of its Operating Companies. App. 71a (ESA § 5.01). Under the System Agreement, the System Operating Committee is

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[1] Petitioner Entergy Power, Inc. operates certain generating facilities, and petitioner Entergy Power Marketing Corporation sells electricity at wholesale to unaffiliated utilities.

charged with developing a "generation addition plan" to assure that the Operating Companies will have sufficient capacity to "furnish reliable service to customers at the lowest cost consistent with sound business practice." App. 64a (ESA § 4.01). Thus, in addition to determining when Operating Companies may construct new generating units, the System Operating Committee determines whether or when electric capacity or energy is purchased from outside sources. App. 64a-65a (ESA § 4.02). The System Agreement requires the System Operating Committee to coordinate purchases "from external sources as may be required or will result in savings to the Companies." App. 75a (ESA § 5.06(p)).

Under the System Agreement, each generating unit that is owned by or under contract to an Entergy Operating Company is available to meet the load of each of the Operating Companies. The System Operating Committee is responsible for the "dispatch" of the System's Capability: that is, scheduling the particular owned or contracted units that will be used to supply the System's load at each second, minute, or hour of each day. The System Agreement establishes an explicit standard to govern these dispatch decisions:

> The System Capability shall be operated as scheduled and/or controlled by the System Operator to obtain the lowest reasonable cost of energy to all the Companies consistent with the requirements of daily operating generation reserve, voltage control, electrical stability, loading of facilities and continuity of service to the customers of each Company.

App. 77a (ESA § 30.02). In addition, the System Agreement provides that, under the general direction

of the Operating Committee, Entergy Services will operate a centralized operations center that is equipped with such computers, other equipment, and staff that is necessary "to dispatch the capacity and energy capability of the Companies in the efficient, economical, and reliable manner as provided in this Agreement." App. 68a, 76a (ESA §§ 4.08, 6.02).

The System Agreement also allocates the costs of generating and transmitting electricity among the five Entergy Operating Companies. These allocations are achieved through a series of Service Schedules, which are used to calculate monthly inter-system payments that are made among the individual Operating Companies. The Service Schedule that was at issue in *ELI* was MSS-1, Reserve Allocation, which is designed to assure that each Company bears financial responsibility of its share of the System's generating capacity.

The Service Schedule that is directly at issue in this case is MSS-3, Exchanges of Energy Among the Companies. App. 9a. It allocates the fuel and other costs of operating the generating facilities that have been centrally dispatched to meet the System's load, regardless of whether the generating facilities are owned by an Entergy Operating Company or are a third party's facilities from which electricity has been purchased under contract. App. 77a-83a (ESA §§ 30.01-30.10). Under MSS-3, determinations are made hourly, on an after-the-fact basis, of whether each Operating Company is providing energy for use by the System (from facilities it owns or controls) that is in excess of that company's load. App. 80a-83a (ESA §§ 30.08, 30.09, & 30.10). If it is, the company is entitled to be paid for that excess energy under the rate formula set forth in ESA § 30.08. If it is not and is instead receiving energy in excess of its load, the

company is required to make payments under that same formula.

Under MSS-3 (and the other Service Schedules), Entergy Services makes monthly determinations of the obligations of each of the Operating Companies. It then renders an "inter-System" bill directing individual companies to make payments. Under the System Agreement, an Operating Company is required to pay the charges that are properly assessed by Entergy Services.

MSS-3 and the other service schedules in the System Agreement thus do not contain specific rates or cost allocations. Rather, they establish formulas that prescribe how the wholesale charges are to be calculated and allocated among the Operating Companies based on decisions made by the System Operating Committee under the standards of the System Agreement. FERC has specifically approved these "automatic adjustment clauses" under its authority under Section 205(c) of the Federal Power Act. *ELI*, 539 U.S. at 49-50. It has found that the Entergy service schedules are proper because they allow upward or downward adjustments of costs based on actual costs and conditions within an integrated electric system and because inclusion of "any questionable costs" could be remedied in a complaint proceeding under Section 306 of the Federal Power Act. *Middle South Servs. Inc.*, 30 FERC ¶ 63,030 at 65,131-32 (1985).

As respondents have here conceded, the payments that EGSI and other Energy Operating Companies make under MSS-3 (and the other service schedules) are wholesale power costs that are required to be treated as "reasonable operating expenses" by retail ratemaking bodies and included in the retail rates paid by retail consumers. See *ELI,* 539 U.S. at 47-48.

2. This Lawsuit. On September 20, 2004, Respondents filed a putative class action on behalf of all retail customers of EGSI in Texas state district court. This action was brought against all of the petitioners *except* EGSI (which was identified as an unnamed co-conspirator over which the Texas Public Utility Commission had exclusive jurisdiction).

In this action, respondents claimed that petitioners had engaged in a course of conduct which artificially inflated the wholesale power costs that were allocated to EGSI under the System Agreement and that were then passed on to retail ratepayers in the rates approved by the Texas Public Utility Commission. In particular, they alleged that the Entergy System had inflated EGSI's wholesale power costs by selling inexpensive system-generated power to third parties on the wholesale market, by refusing to purchase cheaper power that could have been purchased from market sources outside the Entergy System, and by dispatching higher-cost system-generated power to meet the needs of EGSI and other system Operating Companies. App. 4a. In these regards, respondents alleged that the computers used to make dispatch decisions had been improperly programmed to base decisions on fictitious costs, and not the actual costs of generating electricity. *Id.*

At the same time, respondents stated that they were not challenging the hour-by-hour and day-by-day dispatch decisions of the System Operator or contending that Entergy Services had improperly applied the MSS-3 formula to these dispatch decisions. Rather, respondents asserted that they were challenging discretionary "generate or purchase" decisions that the System Operating Committee had made prior to dispatching power.

Respondents contended that these discretionary actions were unlawful and actionable under various provisions of Texas tort law, both common law and statutory.[2] They claimed a right to recover damages calculated as the difference between the retail rates they actually paid, and the retail rates they would have paid if Entergy had behaved prudently and not engaged in the alleged manipulation of power supplies that inflated EGSI's wholesale costs.

After EGSI intervened in the action, all petitioners moved to dismiss the action for lack of jurisdiction.[3] They contended that plaintiffs were challenging bulk power supply arrangements of an interstate power pool that is governed by a FERC rate schedule and that FERC has exclusive jurisdiction over all such claims. In this regard, they asserted that, if respondents' allegations were true, the Entergy System would have violated the express requirements of the System Agreement that generating capacity be acquired and dispatched in order to produce reliable service at the lowest possible cost for the Entergy System as a whole. In support of these claims, petitioners submitted the Entergy System Agreement and an affidavit identifying the relevant provisions.

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[2] Respondents relied on the Texas common law of conspiracy, breach of fiduciary duty, constructive fraud, and disgorgement of wrongful profits and also on the Texas Theft Liability Act (Texas Civ. Prac. & Rem. Code, §§ 134.001 *et seq.*).

[3] Petitioners had removed the case to federal district court on the basis of federal question jurisdiction, but the federal district court remanded after concluding that respondents' state tort claims did not depend on proving a violation of a FERC tariff and that whether or not the Entergy System Agreement governs the conduct at issue, federal preemption could only be asserted as a defense to the action. App. 5a-6a; see *Pan Am. Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 664 (1961).

In addition, Entergy also sought dismissal on the ground that the relief that was sought—a refund to retail ratepayers of the amounts by which the wholesale charges to EGSI had allegedly been unlawfully inflated—violated the filed rate doctrine and was also within the exclusive jurisdiction of the Texas Public Utility Commission.

3. The Texas Courts' Decisions. The Texas District Court agreed with petitioners and granted the motion to dismiss for want of jurisdiction. It held that the challenged conduct was within the exclusive jurisdiction of FERC and that the relief respondents sought was within the exclusive jurisdiction of the Texas Commission. App. 37a-39a.

Respondents appealed to the Texas Court of Appeals, which reversed and remanded for further proceedings.

First, the Court of Appeals held that no aspect of this case is within the exclusive jurisdiction of the Texas Public Utility Commission. It reasoned that the challenged conduct involves wholesale power sales in interstate commerce that are matters over which state utility commissions cannot exercise jurisdiction, under *MP&L* and other such decisions. App. 19a-21a, 23a. It further stated that the application of state tort laws "is inherently judicial in nature." App. 23a.

Second, the Court of Appeals held that *MP&L*, *ELI*, and other such decisions do not preempt state courts from applying state tort law to these same wholesale power transactions. The Court concluded that state court tort jurisdiction will be preempted only when the plaintiff challenges a "cost allocation" that is "FERC-mandated" or that involves "discretionary

decisions that would impact or impair FERC's flexibility in approving cost-allocation arrangements." App. 30a. The Court determined that neither standard is met here. App. 31a-32a.

The Court noted that FERC does not assert exclusive jurisdiction over all issues arising under all power supply contracts, App. 28a, and relied on FERC's statement that the setting of reasonable wholesale rates normally will not require determinations whether a retail utility "has prudently chosen from among available supply options." App. 30a-31a (quoting *Central Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,975 (1998)). The Court further noted that the power generation, dispatch and cost allocations at issue "are not mandated by FERC, but instead are delegated to the operating committee, to which the participating companies must defer." App. 31a-32a. Relying on FERC's *Central Vermont* decision, it concluded that the "fact that the operating committee has such discretion granted in the System Agreement does not mandate that FERC oversee" the bulk power supply and dispatch decisions. App. 34a. It further concluded that the "discretionary decisions in issue" are "the type that do not impact or impair FERC's flexibility in approving cost-allocation arrangements" and purported to distinguish *ELI* on this ground. App. 32a.

In addition, the Court of Appeals rejected petitioners' claims under the filed rate doctrine. It stated that this doctrine is not violated because respondents stated that they were not challenging the rates set forth in the System Agreement and would use those rates in calculating damages. App. 32a-33a. Having rejected petitioners' federal

preemption defense, the Texas Court of Appeals remanded the case to the trial court for further proceedings.

Petitioners filed a petition for review with the Texas Supreme Court. After respondents filed a response, the Texas Supreme Court ordered the submission of full briefs by both parties. The Texas Supreme Court denied the petition for review on February 2, 2007. Petitioners then filed a petition for rehearing, which was supported, *inter alia,* by an *amicus curiae* brief of the Texas Public Utility Commission. After ordering a response, the Texas Supreme Court denied rehearing on August 17, 2007.

Thus, the Texas Court of Appeals is the "highest court of [the] State in which a decision could be had" and its decision is a "final judgment" on the question whether the Federal Power Act preempts the state court proceedings. 28 U.S.C. § 1257(a); see *MP&L*, 487 U.S. at 370 n.11 (although the state supreme court ordered further proceedings on remand, "[t]he critical federal question—whether federal law pre-empts such proceedings ... however, has already been answered by the State Supreme Court and its judgment is therefore ripe for review"); see also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-77 (1975); *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-56 (1989).

REASONS FOR GRANTING THE PETITION

This case presents a recurring question under the Federal Power Act that has immense national importance. Interstate power pooling arrangements are commonplace in the electric industry, and allocations of wholesale power supplies and their costs inherently affects the rates of citizens located in

multiple states and involves tens or hundreds of millions of dollars. Ratepayers in individual states and their representatives have incentives to pursue any remedies that would allow these allocations to be challenged in a forum that shares their parochial interests rather than before FERC—the neutral forum established by Congress to address these issues.

In this case, Texas courts established a broad and indeterminate exception to FERC's exclusive jurisdiction over wholesale electricity rates and cost allocations under the Federal Power Act. While recognizing that state utility commissions cannot seek to nullify these allocations, it held that juries may do so in tort actions when it is alleged that the allocations are the product of discretionary decisions of the operators of interstate power pools. Under this holding, class action state tort suits may do what this Court held to be preempted in *ELI, MP&L, Nantahala,* and their various precursors: relitigate FERC-approved rates and cost allocations and "trap" or otherwise prevent the recovery of wholesale costs that FERC tariffs allocated to retail ratepayers in particular states. The result would be a patchwork of parochial rulings that is the antithesis of what Congress intended in the Federal Power Act.

The Texas court decision is manifestly worthy of this Court's review. It conflicts with the decisions of this Court. It conflicts with decisions of other lower courts. And it raises issues that are critically important to a vital national industry and to the administration of the federal statute that governs it.

1. State regulation of the transmission and sale of electricity at wholesale in interstate commerce "can patently interfere with broader national interests." *Arkansas Elec. Co-op. Corp.* v. *Arkansas Pub. Serv.*

Comm'n, 461 U.S. 375, 377 (1983). It would allow the reasonableness of wholesale rates and of interstate cost allocations to be litigated in multiple states. Because each state would seek to "protect its respective local interests," it can lead to inconsistent determinations that impair commerce vital to the nation. *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) (holding state regulation of wholesale power transactions violates the Commerce Clause); *accord Massachusetts Dep't of Pub. Utils.* v. *United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) (each state would seek to "benefit[] its residents to the detriment of its neighbors").

In the Federal Power Act, Congress thus gave a neutral federal forum—FERC—exclusive jurisdiction over the "transmission" and "sale of [electric] energy at wholesale in interstate commerce." 16 U.S.C. § 824, App. 45a. Under Section 205 of the Act, each utility must file with FERC a rate schedule that contains the utility's rates for wholesale sales of electricity, and all contracts and arrangements affecting those rates, and FERC is required to assure that the schedules, and the resulting charges, are just, reasonable, and nondiscriminatory. 16 U.S.C. § 824d(a) & (c), App. 49a. The Act protects the interests of states, municipalities, and retail ratepayers by giving them the right to participate in FERC proceedings and to file complaints at FERC. 16 U.S.C. §§ 824d, 824e & 825e, App. 49a-58a. If FERC finds a wholesale rate or cost allocation to be excessive and makes other related determinations, it has the authority to order a refund, which can then be flowed through to retail ratepayers. 16 U.S.C. § 824e(c), App. 55a-56a.

As this Court has repeatedly held, FERC's jurisdiction is "exclusive" and "applies not only to rates but also to power allocations that affect wholesale rates." *MP&L*, 487 U.S. at 371; *accord, Nantahala Power & Light* v. *Thornburg*, 476 U.S. 953, 956 (1986). The Act gives FERC "plenary" jurisdiction to regulate all aspects of wholesale transactions, regardless of their "impact" on state regulation, and thus draws a "bright line easily ascertained" that divides federal and state authority. *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964); see also *MP&L*, 487 U.S. at 377 (Scalia J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over that subject."). State laws are preempted to the extent that their "effect" is to interfere with FERC's interstate "allocation of costs." *Maryland* v. *Louisiana*, 451 U.S. 725, 749-50 (1981).

The "filed rate doctrine" was developed to "enforce the exclusive jurisdiction vested by Congress in FERC," for this doctrine requires states to give effect to wholesale rates and power allocations contained in FERC tariffs unless and until they are disapproved by FERC. *Nantahala*, 476 U.S. at 966. This Court has thus held that state action that would have the effect of preventing the recovery of these rates is preempted, even if the state law challenge is based on grounds that have not been previously decided by FERC. *MP&L*, 487 U.S. at 375. "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission [FERC] or a court reviewing the Commission's Order." *Id.*

In *ELI*, the Court held that state commissions and tribunals are equally foreclosed from collaterally

attacking the wholesale charges that are imposed on retail utilities under automatic adjustment clauses that are administered by a system's operating committee and that depend on decisions committed to its "discretion." *ELI,* 539 U.S. at 49-50. Automatic adjustment clauses are authorized by the Federal Power Act, and MSS-1, MSS-3 and the other Service Schedules in the Entergy System agreement were approved by FERC. *ELI* held that, under the filed rate doctrine, "[i]t matters not whether FERC has spoken to the precise classification ... but only whether the FERC tariff dictates how and by whom that classification should be made." *Id.* at 50. *ELI* thus held that, unless and until disapproved by FERC, the charges that the Entergy System imposes on Entergy Operating Companies pursuant to Service Schedule MSS-1 must be treated as reasonable operating expenses by state tribunals and that they cannot seek to "trap" or otherwise prevent recovery of these costs. *ELI,* 539 U.S. at 49-51.

2. In this case, the Texas Court of Appeals violated these principles. It held that state courts may determine that the wholesale power costs that were assessed on Entergy's Texas affiliate (EGSI) under a different service schedule of the Entergy System Agreement (MSS-3) were excessive under state tort law. It similarly held that a state court may order the Entergy System to pay EGSI's retail ratepayers the full amount of whatever portion of these wholesale charges are found excessive by a jury. The Texas Court of Appeals concluded that this case fell within certain purported exceptions to the rules of *MP&L* and *ELI* and to FERC's exclusive jurisdiction.

First, the Court of Appeals concluded that, under *ELI,* Texas courts are not required to treat the charges that EGSI incurred under MSS-3 as

reasonable because these charges purportedly resulted from "discretionary decisions" that are the "type" that "do not impact or impair FERC's flexibility in approving cost-allocation arrangements." App. 32a. The Texas Court here has misconstrued *ELI*. It does not provide that state courts are to consider, on a case-by-case basis, whether state review of the operation of automatic adjustment clauses would "impact or impair FERC's flexibility." This Court has "long rejected this sort of 'case-by-case analysis of the impact of state regulation on the national interest.'" *MP&L*, 487 U.S. at 374, (quoting *Nantahala*, 476 U.S. at 966 (quoting *Southern California Edison*, 376 U.S. at 215-216)).

Thus, *ELI* rejected precisely the "exception to the filed rate doctrine" that the Texas court adopted. *ELI*, 539 U.S. at 49-50. *ELI* held that *all* charges imposed pursuant to congressionally authorized automatic adjustment clauses in tariffs should be treated the same as charges that are fixed by the tariff, for a different rule "would substantially limit FERC's flexibility in approving cost allocation arrangements." *ELI*, 539 U.S. at 49-50. Regardless of whether the tariff imposes charges that are fixed or adjustable, retail ratepayers and their representatives have a right to file a complaint at FERC if they believe that the wholesale rates and cost allocations are unreasonable, and FERC has exclusive jurisdiction to make this determination. *MP&L*, 487 U.S. at 375.

Second, the Court of Appeals concluded that the issues are outside FERC's exclusive jurisdiction because the operating company purportedly has "broad discretion" over bulk power supply arrangements under the System Agreement and that there is no "mandate that FERC oversee" these discretionary bulk power supply decisions. App. 34a.

But that is simply wrong. Respondents have raised issues involving the reasonableness of wholesale rates that are committed to FERC's exclusive jurisdiction, and the FERC tariffs at issue thus adopt standards to govern power supply and dispatch decisions within the Entergy System. FERC would be statutorily required to review respondents' claims if they filed a complaint at FERC under § 306 of the Federal Power Act, 16 U.S.C. § 825e. Indeed, when FERC approved MSS-3, it expressly stated that "any customer who believes that costs were imprudently incurred ... may file a complaint with the Commission," *Middle South Servs., Inc.*, 30 FERC at 65,131, and FERC has previously resolved complaints that challenged the design of MSS-3, the manner in which it was implemented by the Operating Committee, and specific cost allocations that have resulted from it.[4]

Respondents' allegations, too, are at the heart of FERC's exclusive jurisdiction. In particular, they allege that the Entergy System artificially inflated EGSI's power costs (and the Entergy System's profits) by selling the System's low-cost electricity to third parties, by failing to purchase cheap electricity that was available in wholesale markets, and by instead relying upon higher cost System-generated power to meet the needs of EGSI's Texas customers.

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[4] *Louisiana Pub. Serv. Comm'n* v. *Entergy Servs., Inc.*, 106 FERC ¶ 63,012, at 65,132 (2004) (rejecting claims of Louisiana Public Service Commission that MSS-3 imposed charges on Louisiana that are unjust, unreasonable, and discriminatory and that the System Operating Committee had violated the provisions of the System Agreement in its implementation of MSS-3), *aff'd in part, rev'd in part on other grounds by* 111 FERC ¶ 61,311 (2005).

If these allegations were proven, it would establish that the Entergy System was providing electricity to EGSI at wholesale rates that are "unjust, unreasonable, [and] unduly discriminatory" within the meaning of Section 206 of the Federal Power Act. 16 U.S.C. § 824e(a), App. 53a-54a. Thus, in other proceedings challenging the lawfulness of actual or proposed wholesale rates, FERC has routinely addressed allegations that a "prudent" utility would have lowered its costs by engaging in off-system power purchases (or sales),[5] and FERC would be required to review respondents' allegations if a complaint were filed challenging the reasonableness of the rates imposed on EGSI under MSS-3 on such grounds. Section 206 of the Federal Power Act imposes a duty on FERC to review all such claims. 16 U.S.C. § 824e, App. 53a-57a. Contrary to the Texas Court of Appeals suggestion, App. 28a, FERC has thus asserted "exclusive jurisdiction" over all matters

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[5] *See, e.g.*, *Connecticut Light & Power Co.*, 43 FERC ¶ 63,029 at 65,228, 65,231 (1988) (deciding claims that prudent utility would have sold off entitlements to Millstone nuclear plant and instead obtained lower-cost power from Canadian utilities and cogeneration), *aff'd in part, rev'd in part on other grounds by* 48 FERC ¶ 61,139 (1989); *Arizona Pub. Serv. Co.*, 25 FERC ¶ 63,025 at 63,055-57 (1983), *aff'd*, 27 FERC ¶ 61,185 (1984) (deciding claims that a prudent utility should sell-off part of plant); see *AEP Generating Co.*, 36 FERC ¶ 61,226 at 61,549 (1986); *AEP Generating Co. and Kentucky Power Co.*, 38 FERC ¶ 61,243 (1987) (reviewing prudence of participating utility's decision to purchase output of system plant in light of the availability of alternate power sources); *Northern States Power Co.*, 17 FERC ¶ 61,196 (1981) (rejecting claim that it was imprudent to cancel the Tyrone nuclear plant and to obtain coal-fired power instead), *aff'd sub nom.*, *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982).

affecting wholesale rates and their reasonableness.[6] As *MP&L* holds, allegations that a utility system acted imprudently in choosing to acquire power from a particular source is a matter that is within FERC's exclusive jurisdiction, for they relate to whether the resulting wholesale rates and cost allocation are just and reasonable. *MP&L*, 487 U.S. at 375.

In addition, if respondents' allegations were true, it would also establish that the Entergy System had violated the provisions of the System Agreement that require electric capacity to be obtained and dispatched to achieve the "the lowest reasonable cost" for the System as a whole, consistent with the provision of safe and reliable service. See *supra* at 5-7 (discussing ESA §§ 3.01, 4.01, 4.02, 5.06, 30.02). Respondents allegations thus state claims that FERC is statutorily obligated to review for a second reason, and FERC has asserted exclusive jurisdiction over claims that violations of tariffs inflated wholesale charges incurred by retail utilities. See *supra* at 21 n. 6 (and cases cited).

The Texas court also erroneously relied on the ground that FERC has elsewhere stated that "wholesale ratemaking does not, *as a general matter*, determine whether a *purchaser* has prudently chosen from among available supply options." App. 31a, 34a, (emphasis added) (quoting *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,975 (1998)). As the Court of Appeals elsewhere states, the "prudence" of "EGSI's *purchasing* decisions" is not at issue in this case. App.

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[6] *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995) (asserting exclusive jurisdiction over reasonableness of rates and claims of tariff violations affecting rates); *Northern States Power Co.* v. *Southern Minnesota Power Agency*, 55 FERC ¶ 61,101, at 61,343-44 (1991) (same); *Southern Co. Servs.*, 37 FERC ¶ 61, 256, at 61,652 (1986) (same).

18a (emphasis added). Rather, the allegation here is that the Entergy System manipulated energy purchasing and dispatch decisions and thereby inflated the wholesale rates that were charged under MSS-3 (and that EGSI was required to pay under the terms of the System Agreement). The reasonableness of the power supply choices of the Entergy System is a matter committed to FERC's exclusive jurisdiction, for these decisions determine the wholesale rates that are charged for electricity that is exchanged among the members of the Entergy power pool. Thus, regardless of whether the Entergy System has "discretion" in making these choices under the System Agreement, they affect wholesale rates and interstate cost allocations within the Entergy System and may only be reviewed by FERC.

In addition, even if respondents were challenging the prudence of EGSI's purchases, this Court has repeatedly held that FERC's reasoning in *Central Vermont* has no application to the Entergy System and other such power pooling arrangements. EGSI and its sister Operating Companies "exchange" power as part of an interstate power pool, and EGSI and the other System Operating Companies effectively act as both a "wholesaler-as-seller" and a "wholesaler-as-buyer." *MP&L*, 487 U.S. at 372. FERC exercises exclusive jurisdiction over claims that it was imprudent for members of power pools to receive electricity at particular wholesale rates as a "wholesaler-as-buyer." *Id.*; see *AEP Generating Co.*, 36 FERC ¶ 61,226 at 61,550-51 (1986); *MP&L*, 487 U.S. at 378 (Scalia, J., concurring).

This Court has thus held that the Federal Power Act preempts state law claims that a purchaser was imprudent where, as here, it is a member of an interstate power pool and the FERC rate schedule

mandated that it incur the wholesale power costs at issue. *MP&L,* 487 U.S. at 373-74; see *ELI,* 539 U.S. at 49-50; *Nantahala,* 476 U.S. at 972. The only situation in which a state can review the prudence of a buyer's power purchases is when the buyer could legally have chosen to obtain power from other sources at other rates, but EGSI and the other System Operating Companies have no such choice. See *MP&L,* 487 U.S. at 373-74.

The error of the Texas Court of Appeals is dramatically illustrated by the peculiar result it produces. The court held that the Texas state utility commission lacks jurisdiction over this case because it concerns wholesale rates that are committed to FERC's jurisdiction under federal law. But the lower court nonetheless held that state courts can review under state tort law principles the prudence of the system operator's generation, purchase and dispatching decisions and of the resulting wholesale rates that EGSI pays under the System Agreement (and that are passed through to retail ratepayers by the state utility commission). *Compare* App. 16a-21a (holding *MP&L* bars state commission jurisdiction over respondents' allegations), *with* App. 23a-36a (holding state tort claims are not preempted) & App. 23a (holding "state law tort claims based on [ ] interstate purchasing and allocation decisions" are "inherently judicial"). That result is contrary to the decisions of this Court and lower courts alike.

While *ELI, MP&L,* and *Nantahala* each rejected attempts by state commissions to use their authority over retail rates to subvert FERC's jurisdiction, the decisions rest on the broader proposition that FERC's jurisdiction over wholesale rates and cost allocations is exclusive. Other decisions of this Court have thus held that states are preempted from applying state

tort, contract, tax, or anti-fraud laws if the "effect" of the action would be to change FERC-regulated rates, *Arkansas Louisiana Gas. Co.* v. *Hall,* 453 U.S. 571 (1981), alter FERC's interstate "allocations of costs," *Maryland,* 451 U.S. at 749-50 (1981), or impose sanctions on conduct that federal agencies have jurisdiction to "to declare unlawful or unreasonable," *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 324-27 (1981).

3. As the Ninth Circuit has recognized, the Federal Power Act thus equally preempts all such claims that are based on state laws of general applicability and are brought in state (or federal) courts of general jurisdiction. In particular, it has held that the Act preempts state law claims that wholesale costs incurred under FERC rate schedules were artificially inflated and that seek to recover the difference between those costs and the lower costs that would have been incurred if the utilities had complied with the purported state law standards. It has held that such allegations are within the exclusive jurisdiction of FERC, and plaintiffs exclusive remedy is to file a complaint at FERC. *Public Util. Dist. No. 1* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760-62 (9th Cir. 2004) (holding state antitrust and consumer protection law claims preempted), *cert. denied*, 545 U.S. 1149 (2005); *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 851-53 (9th Cir.) (holding state unfair business practice and fraud claims are preempted), *amended by* 387 F.3d 966 (9th Cir. 2004), *cert denied*, 544 U.S. 974 (2005). Contrary to the Texas Court of Appeals' suggestion, App. 25a-26a, these decisions establish that FERC has exclusive jurisdiction of all such claims, regardless of whether they partially rest on federal tariffs or are pled solely under state law standards.

The decision below also conflicts with the decisions of other federal courts of appeals and of numerous state supreme courts. At least five state supreme courts have held that FERC's jurisdiction preempts states from attempting to bar recovery of FERC-mandated costs on prudence or any other state law grounds.[7] The courts of appeals for the First, Fourth, Eighth, Ninth and District of Columbia Circuits, too, have each upheld FERC's exclusive jurisdiction over the reasonableness and lawfulness of bulk power supply arrangements and cost allocations within integrated, multi-state power systems governed by FERC rate schedules. See *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987); see also *Public Serv. Co.* v. *Patch*, 167 F.3d 15, 27 (1st Cir. 1998); *Transmission Agency* v. *Sierra Pac. Power Co.*, 295 F.3d 918, 930 (9th Cir. 2002); *Middle S.*

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[7] *See, e.g., General Motors Corp.* v. *Illinois Commerce Comm'n*, 574 N.E.2d 650, 655-58 (Ill. 1991) (filed rate doctrine applies to costs associated with procurement of gas and state commission has no authority to conduct prudence review of such costs); *Maine Yankee Atomic Power Co.* v. *Maine Pub. Utils. Comm'n*, 581 A.2d 799, 803-04 (Me. 1990) (FERC has exclusive jurisdiction to determine utility's plant decommissioning expense and state commission could not assess the prudence of that expense); *Eastern Edison Co.* v. *Department of Pub. Utils.*, 446 N.E.2d 684, 688 (Mass. 1983) (FERC has exclusive jurisdiction to determine whether utility system was imprudent in failing to take greater steps to minimize risks in construction of plant); *Northern States Power Co.* v. *Minnesota Pub. Utils. Comm'n*, 344 N.W.2d 374, 381-82 & n.17 (Minn. 1984) (FERC has exclusive jurisdiction to assess the prudence of system's decision to cancel a nuclear plant and obtain coal-fired power instead); *Northern States Power Co.* v. *Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) ("it would undermine the supremacy clause and the preemption doctrine for the [state] to indirectly assert jurisdiction over the wholesale rates by investigating the reasonableness of underlying costs in a proceeding involving retail rates").

Energy, Inc. v. *Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985); *South Dakota Pub. Utils. Comm'n* v. *FERC*, 690 F.2d 674 (8th Cir. 1982) (per curiam); *Anaheim, Cal.* v. *FERC*, 669 F.2d 799 (D.C. Cir. 1981).

The only circumstances in which either FERC or the lower courts have permitted states to bar recovery of costs under FERC rate schedules is where—as is not the case here—FERC regulation has *not* allocated costs to a particular *retail* utility and the retail utility had the legal right to obtain the power from one of many other sources. *Pike County Light & Power Co.* v. *Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983); see also *Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir. 1988); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 703 (N.H. 1985); cf. *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). Petitioners are aware of no decision that has upheld the authority of state tribunals to review rates for the sale of electricity at wholesale.

Contrary to the decision below, both the Fourth Circuit and the Illinois Supreme Court have ruled that this *Pike County* exception to FERC's exclusive jurisdiction does not apply to the purchasing, generating and dispatching decisions at the wholesale level in an interstate power pool. *Appalachian Power*, 812 F.2d at 903-04 (rejecting application of *Pike County* exception to FERC's exclusive jurisdiction in case involving cost equalization provision of integrated power pooling agreement); *General Motors Corp.* v. *Illinois Commerce Comm'n*, 574 N.E.2d 650, 658 (Ill. 1991) (rejecting application of *Pike County* exception to FERC's exclusive jurisdiction in context of proposed

state prudence review of natural gas cost allocations imposed on retailers by FERC approved order). Such state regulation was held to violate the Commerce Clause before the Federal Power Act was passed, *Attleboro Steam & Elec. Co.*, 273 U.S. at 89-90, and clearly violates the "bright line" that divides state and federal authority under the Federal Power Act. *Southern California Edison*, 376 U.S. at 215-16.

4. Resolution of the conflicts described above is a matter of great national importance. Under its authority to regulate the wholesale sale and transmission of electricity in interstate commerce to foster the public interest, FERC has approved an array of different mechanisms that are designed to assure that electricity is provided at wholesale rates that are just, reasonable, and not unduly discriminatory. Each of these FERC-approved arrangements would be nullified if retail customers or their representatives could recover alleged overcharges as tort damages by bringing state-law actions claiming that the resulting wholesale rates or cost allocations are excessive due to arrangements FERC has chosen to leave to "discretionary" or other decisions of wholesale utilities.

Foremost, in the Federal Power Act, Congress directed FERC to "promote and encourage" "voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" in the interest of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." 16 U.S.C. § 824a(a). The Act has led to widespread use of different types of interstate power pooling arrangement in which different retail utilities and other suppliers interconnect to ensure a reliable, economic supply of power and also agree on

mechanisms to distribute costs. It is commonplace for these pooling arrangements to commit generating and dispatch decisions to the operator of the pool, and as this Court has held, the Federal Power Act gives FERC the flexibility to approve these arrangements. *ELI,* 539 U.S. at 50.

Power pooling arrangments serves Congress' purpose in enacting the Federal Power Act. As one commenter has explained:

> It is universally accepted that interconnection and coordination of the facilities of separate electric companies is in the public interest. Among the most obvious benefits of such coordination are (1) the exploitation of economies of scale in building generating and transmission facilities; (2) the avoidance of unnecessary duplication of facilities; (3) the ability to place generating facilities at the most advantageous sites, regardless of ownership; (4) increased reliability because of the availability of emergency support from interconnected systems; and (5) operating economies which can be achieved by dispatching the lowest cost generation, regardless of ownership, to serve demands on the interconnected and coordinated systems.

K. Duffy, *Will the Supreme Court Lose Patience With Prudence*? 9 Energy L.J. 83, 98-99 (1988).

But the utility of all kinds of power pooling arrangements will be severely impaired if state courts and juries can review power supply and dispatch decisions and require power pools or their operators to refund any wholesale charges that are found "excessive" to retail ratepayers in a particular state. The entire purpose of power pooling

arrangements is to enable decisions to be made to maximize benefits for the pool as a whole, and "[a] pooling arrangement simply will not work if each participant continually seeks to maximize its own benefits or minimize its own costs at the expense of the other participants." *Id.* at 99.

For that same reason, a class of retail ratepayers in a state can always claim that an interstate power pool could have taken steps to reduce the costs that were allocated to that state by, for example, purchasing lower-cost power from outside its system. Prior to the decisions in *Nantahala* and *MP&L,* similar claims were routinely brought in local fora by retail ratepayers and their representatives. Suits like the one brought by respondents will be encouraged unless the Texas court decision is reviewed and this Court holds that, under *ELI, MP&L, Nantahala,* and their various precursors, such claims may only be brought in the neutral federal forum established by Congress: FERC.

Further, while power pooling arrangements are common in the electric industry, FERC has also established alternative "market-based" mechanisms for providing electricity at wholesale. It has granted wholesale utilities authority to sell electricity through auctions subject to particular FERC regulations and market-based tariffs that have been found by FERC to be sufficient to assure that the resulting rates are reasonable. See, *e.g., Grand Council of Cress* v. *FERC,* 198 F.3d 950, 953 (D.C. Cir. 2000). The two recent Ninth Circuit decisions, see *supra* at 24-25, held that state law challenges to these rates are preempted. But under the rationale of the Texas Court of Appeals, the lawfulness of these wholesale rates, too, can be challenged in state tort actions because FERC regulations do not prescribe every

detail of an auction. Indeed, since the issuance of this decision, state law class actions have elsewhere been brought in which retail ratepayers claim that rates set forth in FERC market-based tariffs are excessive and seek to collect the amount of the alleged overcharges as tort damages. See, *e.g.*, *Wexler* v. *Commonwealth Edison Co., et al.*, No. 1:07-CV-02318 (N.D. Ill.).

In short, the decision of the Texas courts threatens widespread interference with the operation of the nation's electrical system and with the Congressional scheme for assuring the provision of electricity at wholesale rates that are reasonable. Under the Federal Power Act, it is critical that determinations of the reasonableness of wholesale electric rates and cost allocations continue to be the exclusive province of the neutral forum that Congress established for this purpose, FERC, whose flexibility to authorize various mechanisms that economically and reliably ensure the provision of power can only be preserved by its exclusive jurisdiction over wholesale rates and cost allocations. "Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the [Federal Power Act.]" *Appalachian Power Co.*, 812 F.2d at 905.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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