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IN THE SUPREME COURT OF THE UNITED STATES

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ENTERGY LOUISIANA, INC. , :

Petitioner :

v. : No. 02-299

LOUISIANA PUBLIC SERVICE :

COMMISSION, ET AL. :

- - - - -X

Washington, D. C.

Monday, April 28, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m

APPEARANCES:

DAVID W. CARPENTER, ESQ., Chicago, Illinois; on behalf of the Petitioner.

AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

MICHAEL R. FONTHAM, ESQ., New Orleans, Louisiana; on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAVID W. CARPENTER, ESQ.	
4	On behalf of the Petitioner	3
5	AUSTIN C. SCHLICK, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioner	18
8	MICHAEL R. FONTHAM, ESQ.	
9	On behalf of the Respondent	27
10	REBUTTAL ARGUMENT OF	
11	DAVID W. CARPENTER, ESQ.	52
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 02-299, Entergy Louisiana versus Louisiana
5 Public Service Commission.

6 Mr. Carpenter.

7 ORAL ARGUMENT OF DAVID W. CARPENTER

8 ON BEHALF OF THE PETITIONER

9 MR. CARPENTER: Mr. Chief Justice, and may it
10 please the Court:

11 In multistate power systems, each retail rate --
12 ratemaking body has incentives to impose cost allocations
13 that benefit its residents, and the only way to assure
14 that the power pool recovers a hundred percent of its
15 generating costs is for a neutral body to referee disputes
16 among the States and to fix the allocations.

17 This case arises in the energy system where five
18 subsidiaries provide retail service in four different
19 States, where FERC has found that Entergy's cost
20 allocations generally can't affect its net revenues and
21 where FERC has thus approved a tariff that gives Entergy
22 authority to calculate the inter-company equalization
23 payments that allocate costs with a FERC complaint as the
24 sole remedy if the rates and allocations are believed to
25 be unlawful.

1 Though we --

2 QUESTION: What is -- what is the source of the
3 rule that this is the sole remedy?

4 MR. CARPENTER: It's the sole remedy under the
5 tariff itself, Your Honor.

6 QUESTION: The -- so the tariff itself provides
7 that.

8 MR. CARPENTER: Yes. Under the tariff itself,
9 the only right that is reserved to the -- this is section
10 4.12, joint appendix 11a. The only right that is reserved
11 to the operating companies is to seek amend -- if there's
12 a dispute over the rates, is to seek amendments in the
13 tariff or changes in the rate from the regulatory body
14 that has jurisdiction.

15 There's no question here that the LPSC doesn't
16 have jurisdiction to order amendments to the service
17 schedule or changes in the rates. Their claim is only
18 that they can disallow the costs that were incurred.

19 QUESTION: Is -- is the tariff provision meant
20 to preclude any sort of a judicial remedy?

21 MR. CARPENTER: Yes, it would preclude a
22 judicial remedy. It operates as a -- as a -- as,
23 obviously, a limitation on the operating companies'
24 remedies and as a forum selection clause in the event of a
25 dispute.

1 QUESTION: Well, there would be a judicial
2 remedy if they disagreed with the -- with -- with FERC's
3 determination. They could -- they could appeal that to
4 the court.

5 MR. CARPENTER: Oh, absolutely, Your Honor. I'm
6 sorry. I --

7 QUESTION: They just couldn't go straight to the
8 court.

9 MR. CARPENTER: Yes. No, I'm sorry, Your Honor.
10 I -- I meant that they can't go -- they couldn't go
11 straight to court, and it means that -- for the same
12 reason that a State retail ratemaking body can't disallow
13 the costs because under -- under this rate schedule, the
14 rate calculated by the energy system is the filed rate and
15 binds everybody unless and until a complaint is filed with
16 FERC and FERC holds otherwise.

17 And in fact, the Louisiana commission here
18 brought a complaint for the period ending in August of
19 1997, and FERC denied relief on the ground that although
20 the tariff didn't authorize it, it was just and --
21 nonetheless just and reasonable for Entergy to calculate
22 equalization payments by including certain units that were
23 in extended reserve status because FERC found that those
24 units benefited Louisiana and the entire system.

25 QUESTION: Can I ask? The -- the section of

1 the -- of the agreement that you -- you referred us to,
2 4.12. It says each company reserves the right to
3 unilaterally seek amendments or changes from any
4 regulatory body having or acquiring jurisdiction
5 thereover. Why didn't they just say from FERC?

6 MR. CARPENTER: Well, at the time this --

7 QUESTION: I mean, if as you say it's only FERC,
8 why didn't they just say from FERC?

9 MR. CARPENTER: Well, it was -- it was fairly
10 prescient because this -- this language I think dates from
11 1953, when there was the Federal Power Commission. So,
12 it --

13 QUESTION: Oh, I see. I see. Yes.

14 MR. CARPENTER: But the -- the key thing here is
15 that it's undisputed that the LPSC can't amend the
16 service agreement.

17 QUESTION: Got you. No. I was just wondering
18 whether --

19 MR. CARPENTER: Yes.

20 QUESTION: -- that was so clear to the parties
21 at the time, and you say it is and -- and what they --
22 what they were anticipating is a change in the Federal --

23 MR. CARPENTER: Yes.

24 QUESTION: -- body that had jurisdiction.

25 MR. CARPENTER: Right.

1 QUESTION: Okay.

2 MR. CARPENTER: But -- but in the aftermath of
3 the FERC order that found that these charges were just and
4 reasonable, despite a finding of the tariff violation, the
5 Louisiana commission entered an order that said that
6 FERC's determination bound it only for the precise period
7 that FERC had addressed, and then entered an order that
8 prohibited the petitioner, Entergy Louisiana, ELI, from
9 recovering the same wholesale costs in retail rates for
10 the immediately succeeding period, beginning August 5th,
11 1977.

12 QUESTION: Could -- could you explain one thing
13 to me? And that is, why was the period so defined? Is it
14 simply that it was, with respect to that period, that
15 actual figures were introduced before FERC? .

16 MR. CARPENTER: That became the period because
17 that was the date of the FERC order.

18 QUESTION: The date of the --

19 MR. CARPENTER: Yes.

20 QUESTION: And so, in effect, that -- FERC was
21 done with it at that --

22 MR. CARPENTER: Yes. That was the -- that was
23 the -- the theory --

24 QUESTION: But -- but was there --

25 MR. CARPENTER: -- of Louisiana Public Service

1 Commission.

2 QUESTION: Was there any question in the terms
3 of the order that the order was intended to operate
4 prospectively until FERC changed it?

5 MR. CARPENTER: Oh, no. No question at all.

6 QUESTION: So the difference is unlike a filed
7 rate, which is a number, here is not a precise number.

8 MR. CARPENTER: That's right. Here the filed
9 rate is a formula that is --

10 QUESTION: And it -- and it's going to change
11 constantly.

12 MR. CARPENTER: That's right. It can change --
13 it can change I believe monthly, or the -- the rate
14 calculated under the formula can change monthly. And --
15 and FERC approves formula rates, you know, in
16 circumstances where it believes that it will better
17 promote the overall goals of -- of the act, and it imposes
18 terms and conditions that will assure that the overall
19 goals of the act are promoted.

20 And here a critical term and condition was that
21 the determinations of the amount of the payments is
22 centralized at FERC and the only remedy, if there's a
23 disagreement, is to go to FERC and file a complaint. As I
24 point out, that's clear from the terms of the tariff, and
25 that's what FERC said in each of the orders in which it

1 authorized the formula rates.

2 QUESTION: But it -- from the point of view of
3 the public service commission, they have to approve the
4 local rates periodically, and how does the timing of the
5 thing work? If the public service commission has to go to
6 FERC and then there's a proceeding, and by that time the
7 year is over.

8 MR. CARPENTER: Yes. But the -- if FERC were to
9 agree with the public service commission that we violated
10 the tariff, that the result was unjust and unreasonable
11 and a refund was appropriate, all the interests would be
12 protected because the -- they would order a refund at the
13 wholesale level with interest that the Louisiana Public
14 Service Commission could flow through to retail rate
15 papers -- rate payers.

16 QUESTION: Well, wait, wait. How would -- how
17 would the Louisiana Public Service Commission have
18 standing to come to FERC? I mean, to come back to the
19 agreement, it says each company -- the companies who are
20 parties to the agreement -- reserves the right to
21 unilaterally seek amendments or changes.

22 MR. CARPENTER: Yes. Well, they have standing
23 under the act itself. Section 305 I believe it is.

24 QUESTION: So this provision doesn't govern what
25 they can seek then.

1 MR. CARPENTER: No. But -- but they -- but --
2 but what it does mean is that they cannot premise a -- a
3 prudence disallowance on the ground that -- that ELI could
4 have refused to pay the costs or -- or required that the
5 equalization payments be calculated on a different basis.

6 QUESTION: Well, sure, they can. They could say
7 the company was at fault for not going to FERC.

8 MR. CARPENTER: Yes. But -- but -- sure, they
9 could say that. It was imprudent not to go to FERC. But
10 they can't speculate about what FERC would do in the event
11 a complaint was filed. That's clear from the Arkansas
12 Louisiana Gas case of this Court. So while it's
13 theoretically possible they could say that it was
14 imprudent not to go to FERC, no remedy could be predicated
15 on that finding of imprudence because they can't speculate
16 about what FERC would do if a complaint were filed.

17 QUESTION: But can they go to FERC as an
18 intervenor? I --

19 MR. CARPENTER: Yes.

20 QUESTION: -- I take it that was their status.

21 MR. CARPENTER: Absolutely, absolutely.

22 QUESTION: So they could go in and say, look,
23 they should have complained --

24 MR. CARPENTER: Yes.

25 QUESTION: -- and therefore you should do what

1 you would have done if they had complained.

2 MR. CARPENTER: Absolutely. They can do that.
3 And the point I was trying to make to Justice Ginsburg is
4 it -- when that procedure is followed, all legitimate
5 interests are protected because if FERC agrees and orders
6 a refund, it will be -- it can then be flowed through by
7 the Louisiana Commission to the retail ratepayers.

8 Conversely, under their procedure in which they
9 can disallow costs pending a FERC determination on the
10 precise -- on the precise issue, you have exactly the --
11 the interference with commerce that the Federal Power Act
12 was designed to prevent. You've got duplicative
13 litigation of this issue. Here in -- could be in five
14 different retail ratemaking bodies.

15 And the effect can be a trapping of costs that
16 we never get back because if FERC -- you know, they --
17 they trap the costs pending the FERC order. FERC then
18 says -- reviews it and says what we did was fine, just and
19 reasonable. Then obviously FERC doesn't do anything at
20 the wholesale level. In the meantime, our costs have been
21 trapped at the retail level, and we can't get the money
22 back under the general rule barring retroactive ratemaking
23 unless an exception were somehow made to that rule.

24 QUESTION: Well, what is the function and
25 province of the State commission's prudence review?

1 What -- what can they do that's proper? And I assume they
2 can do a number of things that increase costs and
3 therefore change rates, or am I wrong about that?

4 MR. CARPENTER: Well, what they -- what they can
5 do is they can regulate the -- the prudence of -- of
6 decisions that the -- the utility had to make. So in
7 circumstances where a FERC tariff provides a choice to
8 the -- to the retail utility, which was the situation in
9 the Pike County case, then -- then the -- the State
10 commission can find that it was imprudent to exercise the
11 choice in one fashion or another.

12 But the point here is there was no choice. The
13 equalization payment bound the -- bound ELI unless and
14 until it was found to be unlawful by -- by FERC. So this
15 is a situation where under the filed rate doctrine and
16 under this Court's decisions in MP&L and Nantahala, the --
17 the State commission was required to treat the resulting
18 expense as a retail -- as a just and reasonable expense
19 and pass it through to retail ratepayers unless and until
20 FERC ordered otherwise.

21 There's obviously a range of other issues that
22 aren't -- aren't governed by FERC rate schedules at all,
23 as to which State utility commissions can examine the
24 reasonableness of the decisions of the -- of the retail
25 body. But they can't say that -- that following your

1 duties under a FERC tariff is unjust and unreasonable.
2 That's a question for FERC.

3 QUESTION: In -- in the course of that regular
4 examination that they -- that they do, can they find
5 certain actions that require refunds to the -- to the
6 consumers?

7 MR. CARPENTER: Oh, absolutely, Your Honor.
8 Absolutely, Your Honor. They can disallow -- they
9 disallow charitable expenses. They disallow expenses all
10 the time. There's a citation --

11 QUESTION: But never if it's in violation of a
12 tariff or a FERC policy?

13 MR. CARPENTER: Right. They cannot, consistent
14 with the Federal Power Act, say that it was imprudent to
15 do -- to -- to do what the FERC tariff required the
16 utility to do. That's the clear teaching of MP&L and
17 Nantahala and -- and other decisions.

18 QUESTION: Would the State commission have
19 authority to argue that the formula was incorrectly
20 applied?

21 MR. CARPENTER: In the context of the retail
22 ratemaking proceeding?

23 QUESTION: Yes.

24 MR. CARPENTER: No, Your Honor. That's an
25 issue exclusively for FERC because, as I pointed out

1 before, if the rate is believed to be too high, under
2 the tariff, the -- the only remedy the operating company
3 would have would be to go to FERC and -- and complain,
4 and the operating company has -- has no -- no right to
5 refuse to make a payment on the ground that there's an
6 allegation that the equalization formula was improperly
7 implied.

8 But as I -- as I just said, the filed rate
9 doctrine clearly, you know, prohibited the order here, and
10 even if it didn't apply, this is an issue that -- the
11 issue of the -- the reasonableness of rates and the
12 practices affecting rates is an issue that the Federal
13 Power Act clearly allocates to FERC. So even if the
14 tariff here didn't, you know, clearly preclude ELI from
15 doing what the LPSC found a prudent company would have
16 done, the -- the filed -- the Federal Power Act preempted
17 the -- the State from addressing the issue.

18 And the facts of this case sort of illustrate
19 why States shouldn't get involved in -- in this because
20 the decision that was made here sort of exemplifies the
21 parochialism that the Commerce Clause and the Federal
22 Power Act was designed to prevent. It was acknowledged by
23 the Louisiana Public Service Commission that the -- the
24 units in question, the out-of-state units in question,
25 benefited Louisiana and the entire system, increased the

1 efficiency of the entire system. But it said that was
2 irrelevant. In fact, it said that was evidence of
3 imprudence because the effect was to increase the costs
4 that ELI incurred and thus to increase retail rates, and
5 that's a -- the kind of parochialism that the
6 Commerce Clause prevents and the Federal Power Act was
7 designed to draw a bright line that would eliminate any
8 need to even adjudicate questions whether the conduct
9 violates the Federal --

10 QUESTION: Well, what's left of public service
11 commissions then, if -- if you're right, so far as
12 policing imprudent acquisitions and that sort of thing
13 for a multi -- multistate company?

14 MR. CARPENTER: Well, they -- they can't
15 regulate issues involving, you know, the exchanges
16 of power within power pools, but there are a range
17 of other issues that, as I said in response to
18 Justice Kennedy's question, that the States can --
19 can decide.

20 QUESTION: Such as.

21 MR. CARPENTER: Well, the -- you know,
22 whether -- whether expenses not dictated by a FERC -- FERC
23 rate schedule are just and reasonable. There's a whole
24 range of other expenses that --

25 QUESTION: The cost of -- the cost of power is

1 just one of the -- one of the --

2 MR. CARPENTER: Yes, just one of the expenses
3 that a retail utility would incur. And -- and so there's
4 a range of issues that they can decide. What they can't
5 do, though, is -- is decide that it was imprudent to incur
6 a cost that a FERC rate schedule required the utility to
7 incur, and that's the issue here.

8 QUESTION: Am I -- am I correct in assuming,
9 as I have throughout the -- reading the briefs here,
10 that the -- the costs that a given operating company
11 incurs within its power pool is essentially the same
12 issue as the wholesale rate that a -- that a totally
13 independent company might pay when it -- when it bought
14 wholesale off the -- the grid? Is -- is that a -- it
15 seems to me in -- in each case, the operating company
16 is buying power at wholesale, whether it does it within
17 its group or whether it does it on an open market, and
18 that's what in each case FERC is regulating. Is -- is
19 that fair?

20 MR. CARPENTER: Well -- well, FERC regulates the
21 transactions within power pools --

22 QUESTION: And when one of those transactions
23 is the -- is the -- in effect, the acquisition of power by
24 a local operating company, that transaction is
25 economically, I guess, the equivalent of buying wholesale

1 by an independent company that is not part of a power
2 pool.

3 MR. CARPENTER: Yes, but FERC's jurisdiction
4 depends on the fact that -- jurisdiction depends on the
5 existence of wholesale sales which -- which exist in the
6 context of a power pool because each retail utility is
7 simultaneously, you know, providing power to the pool at
8 the set rate. So it's --

9 QUESTION: Oh, no, I understand that. And --
10 and -- but FERC also has general authority over wholesale
11 interstate sales.

12 MR. CARPENTER: Absolutely, Your Honor.
13 Absolutely, Your Honor.

14 QUESTION: So that -- so that in relation to
15 what a -- the reason I'm getting at it is, in relation to
16 what a State utilities commission can do, the State
17 utilities commission, I take it, is in the same position
18 vis-a-vis ELI that it would be if ELI were a totally
19 independent company buying wholesale off the grid. Is
20 that correct?

21 MR. CARPENTER: That's right. If it were -- if
22 it were subject to the identical rate schedule.

23 If there are no further questions, I'd like to
24 save the balance of my time for rebuttal.

25 QUESTION: Very well, Mr. Carpenter.

1 Mr. Schlick, we'll hear from you.
2 ORAL ARGUMENT OF AUSTIN C. SCHLICK
3 ON BEHALF OF THE UNITED STATES,
4 AS AMICUS CURIAE, SUPPORTING THE PETITIONER
5 MR. SCHLICK: Mr. Chief Justice, and may it
6 please the Court:

7 Under Nantahala and Mississippi Power & Light,
8 the regulation of wholesale rates for electric energy in
9 interstate commerce is exclusively within the jurisdiction
10 of the Federal Energy Regulatory Commission. Federal
11 jurisdiction is necessary to ensure that multistate
12 utilities, like Entergy and other utilities, are able to
13 carry out their FERC-regulated transactions, to plan and
14 carry out those transactions without the interference of
15 potentially conflicting State regulation.

16 The facts of this case highlight the need for
17 exclusive Federal regulation. The dispute in this case
18 involves the correct allocation of costs incurred for the
19 common benefit of five utilities in four different States.
20 The Louisiana commission believed that the costs allocated
21 to Entergy Louisiana were too high, but the consequence of
22 the Louisiana commission's rate decision would be to
23 reallocate those costs to ratepayers in Texas, Arkansas,
24 Mississippi or else to render them trapped and entirely
25 unrecoverable.

1 QUESTION: Well, does that -- is that a death
2 sentence, so to speak, if you find that the costs are
3 trapped and unrecoverable? May not that ever happen to a
4 utility legitimately?

5 MR. SCHLICK: That's correct, Your Honor. Under
6 this Court's decision in Nantahala, a charge that is
7 federally approved or that is within FERC's exclusive
8 jurisdiction to approve may not be trapped and disallowed
9 by the -- by the State regulatory --

10 QUESTION: You're -- you're not talking about
11 costs -- trapped costs generally. You're just talking
12 about this particular kind of trapped cost.

13 MR. SCHLICK: That's right. I'm -- I'm talking
14 about costs that contribute to the wholesale rate that --
15 that is within FERC's jurisdiction.

16 QUESTION: So the -- the problem is that -- not
17 that the costs would be trapped, but that FERC has said
18 it's not trapped. That's -- that's the point. I mean,
19 lots of utilities lose money because costs are trapped.

20 MR. SCHLICK: That is -- I -- I think that --
21 that --

22 QUESTION: So the real point is here FERC has
23 said they can do it. That's -- that's the only point that
24 you're making, isn't it?

25 MR. SCHLICK: There are two points. There --

1 there is the general prohibition on trapping, but also in
2 this case we have a FERC-approved rate schedule that
3 determines how the allocation should be carried out.
4 There's a question whether or not Entergy complied with
5 that rate schedule, but the resolution of that question
6 involves what the wholesale rate is or should be, and
7 that's a question within FERC's jurisdiction.

8 QUESTION: And that's a FERC question, period.

9 MR. SCHLICK: That's right. Only FERC can
10 decide that question.

11 Unlike the cases on which respondent relies,
12 this case does not involve a State contract action about a
13 matter that is within the State's concurrent jurisdiction.
14 In the first place, there is no contract dispute between
15 the parties in this case, the Entergy operating companies
16 and the holding company.

17 Rather, this case arose in the same context as
18 Nantahala and Mississippi Power & Light, a retail rate
19 setting. And the dispute involves the correct division
20 among the operating companies in multiple states of costs
21 of operating the system. Just like Mississippi Power &
22 Light, that's a cost -- that's a -- a question that only
23 the FERC can determine.

24 It's worth mentioning that --

25 QUESTION: Could -- could this be

1 characterized as a question of a reasonable interpretation
2 of the tariff, or you couldn't characterize the issue that
3 way?

4 MR. SCHLICK: There -- there is a -- an
5 interpretation, an underlying question of interpretation,
6 of the tariff, but beyond that, there's the question of
7 whether the resulting charge was just and reasonable. And
8 that's the important reasonableness question. That's the
9 question that only FERC can decide.

10 Here the Louisiana commission assumed both that
11 there was a procedural violation of the system agreement
12 in -- in the documentation of the operating committee's
13 decision --

14 QUESTION: But --

15 MR. SCHLICK: -- and that the resulting charge
16 was unjust and unreasonable.

17 QUESTION: But what Louisiana is saying, they --
18 they're conceding that FERC has the authority, the
19 exclusive authority, to prescribe what the division would
20 be. However, they're saying if, in fact, there's a
21 violation of that division, the States ought to be able to
22 adjudicate the violation. They're still giving FERC all
23 of -- all of its power. They're saying FERC decides what
24 the division will be, but the State agency can determine
25 that the division has not been carried out the way FERC

1 prescribed.

2 What is there in the act that -- that says that
3 FERC is the exclusive adjudicator of whether its
4 directives have been complied with?

5 MR. SCHLICK: In the context of what the
6 wholesale charge is or should be, the provision of the act
7 is section 824d and -- and 824e. The underlying principle
8 was established by this Court's decision in Attleboro,
9 which is that States are entirely disabled from regulating
10 wholesale rates. That was implemented through the Federal
11 Power Act in 1935. It was confirmed in this Court's
12 decision --

13 QUESTION: They're not regulating the
14 wholesale rates is what -- is the argument that will
15 be made by the State. They're -- they're leaving it to
16 FERC to regulate it, but they're adjudicating whether
17 the rates prescribed by -- by FERC have, in fact, been
18 the rates charged.

19 MR. SCHLICK: Justice Scalia, in fact, they
20 were regulating the wholesale charge. The necessary
21 determination of the Louisiana commission's order was
22 that the costs pass through under the Federal rate
23 schedule to Entergy Louisiana. The specific costs
24 allocated on the rate schedule were too high. It was
25 imprudent in the Louisiana commission's judgment for

1 Entergy Louisiana --

2 QUESTION: I thought the Court said in
3 Mississippi Power & Light that once FERC sets a wholesale
4 rate, a State may not conclude in setting retail rates
5 that the FERC-approved wholesale rates are unreasonable.

6 MR. SCHLICK: That -- That's correct. The --

7 QUESTION: So I guess that's the law, isn't it?

8 MR. SCHLICK: -- the only additional step that
9 need be taken in this -- in this case is to determine
10 whether the fact that there is a dispute as to whether or
11 not the FERC rate schedule was violated somehow puts the
12 case within the State's jurisdiction. That was the
13 question that only FERC can answer.

14 QUESTION: But how is that different from the
15 State determining that a retail rate is unreasonable?

16 MR. SCHLICK: We believe it's precisely the
17 same.

18 QUESTION: So then there is nothing extra.

19 MR. SCHLICK: Our -- our answer to that question
20 is there is no difference.

21 QUESTION: So I have to see what the other side
22 would say.

23 MR. SCHLICK: That's correct, Justice Breyer.

24 QUESTION: I -- I take it you agree with
25 Mr. Carpenter that the State can be heard on this issue as

1 an intervenor who may raise the issue before FERC. Is
2 that correct?

3 MR. SCHLICK: Not just as an intervenor. Under
4 section 825e of the act, the State could actually bring a
5 complaint --

6 QUESTION: I see.

7 MR. SCHLICK: -- to FERC. It could bring the
8 issue directly to FERC. And --

9 QUESTION: In any case, it can get to FERC if it
10 has a gripe.

11 MR. SCHLICK: The order 415 proceeding in
12 1997 -- that was resolved in 1997 -- shows exactly how
13 this should happen. The --

14 QUESTION: No, but the answer to my question is
15 yes, isn't it?

16 MR. SCHLICK: Oh, yes, absolutely.

17 QUESTION: That's all I'm -- that's all I'm --

18 QUESTION: Well, it seems to me it's quite a
19 different question. Question one is whether the
20 allocation was unreasonable, and the State here is saying
21 we're -- we're not questioning the reasonableness of the
22 allocation. That's up to FERC. But we don't think that
23 we were charged that allocation that -- that was given to
24 us. And that's -- that's not challenging FERC's decision
25 of what the allocation should be. It's challenging the

1 factual question of whether the allocation was carried out
2 the way FERC prescribed.

3 MR. SCHLICK: Justice Scalia, the order 415
4 proceeding shows precisely the problem with that. In that
5 case, FERC said that there was a violation of the system
6 agreement, analogous to the one that's being claimed here.
7 But it also said that the resulting charge was just and
8 reasonable. In fact, ratepayers benefited overall from
9 what was done by Entergy.

10 QUESTION: Must be a section of the FERC rules
11 or regs or tariffs which says the company may -- must --
12 or must pass over to the company that has the higher
13 number of generators a charge equal to the amount, da, da,
14 da, that this particular thing we have before it gives the
15 allocation for.

16 MR. SCHLICK: Well, the -- the rate schedule
17 has been approved --

18 QUESTION: Yes.

19 MR. SCHLICK: -- by FERC and --

20 QUESTION: All right --

21 MR. SCHLICK: -- there's a requirement --

22 QUESTION: -- it says that in the rate schedule.

23 MR. SCHLICK: -- and there's a requirement to
24 the comply with rate schedule.

25 QUESTION: So the rate schedule of FERC says

1 charge a rate --

2 MR. SCHLICK: That's right.

3 QUESTION: -- based on this allocation.

4 MR. SCHLICK: That's right.

5 QUESTION: All right. All right. I'll ask the
6 other side. I don't see any room for the question that
7 was just raised.

8 MR. SCHLICK: If the Court has no further
9 questions.

10 QUESTION: I -- I do. I mean, what -- what
11 happens if the -- the State says, they haven't charged it
12 according to that allocation?

13 QUESTION: Then Mississippi --

14 QUESTION: Well, let counsel answer.

15 (Laughter.)

16 MR. SCHLICK: Justice Scalia, what -- what
17 happens is then the question becomes was the resulting
18 charge just and reasonable. In order 415, FERC determined
19 the resulting charge after a violation of the rate
20 schedule was just and reasonable. In fact, ratepayers in
21 Louisiana benefited from what Entergy did, notwithstanding
22 that it wasn't in compliance with the terms of the rate
23 schedule at that time.

24 QUESTION: Thank you, Mr. Schlick.

25 Mr. Fontham, we'll hear from you.

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ORAL ARGUMENT OF MICHAEL R. FONTHAM

ON BEHALF OF THE RESPONDENTS

MR. FONTHAM Thank you. Mr. Chief Justice, and
may it please the Court:

The issue in this case is the following. The
FERC approved a contract amendment that established
conditions, procedures before a utility could bill an
affiliate for units in mothballs. The utility failed to
follow the procedures, failed to consider the conditions,
and failed to record the decision in its minutes, as it
was required to do, and then said to the LPSC --

QUESTION: We're -- we're within about 15 feet
of you, Mr. Fontham. You don't have to speak up.

(Laughter.)

MR. FONTHAM Thank you, Your Honor.

And then said to the LPSC, you must take the
charges anyway.

QUESTION: Yes, I think that's right under the
law, isn't it?

MR. FONTHAM No, it's not, Your Honor.

QUESTION: Because?

MR. FONTHAM Because the issue in this case is
a drastic departure from what this Court held in MP&L or
in Nantahala. In that --

QUESTION: Because? Okay, that's exactly --

1 MR. FONTHAM In those cases --

2 QUESTION: Yes. To get the question very
3 precise, that is the question. In MP&L, it said once FERC
4 sets a rate, which means, I take it, that they have the
5 terms that we've just described in the tariffs, a State
6 may not conclude in setting retail rates that the
7 FERC-approved rates are unreasonable.

8 MR. FONTHAM That's correct.

9 QUESTION: All right. Now, what's the
10 difference between that and what you just said?

11 MR. FONTHAM The -- the difference is that the
12 FERC set the rate. The utility couldn't bill for the
13 units because it hadn't gone through the procedure under
14 the FERC rate. The utility billed anyway. It says if the
15 rate said 5, the utility sends a bill for 10. 10 shows up
16 in the retail rate case.

17 The question is, can the State agency, looking
18 at the FERC tariff and looking at what the utility billed,
19 make the decision, instead of the utility making the
20 decision, in the State proceeding that it's wrong.

21 QUESTION: That's the question --

22 QUESTION: Maybe -- maybe it can if FERC has not
23 previously adjudicated that very question.

24 MR. FONTHAM And it hasn't.

25 QUESTION: I mean, here what -- what they're

1 contending is that FERC not only prescribed the formula,
2 but that in order 415, it adjudicated that the formula had
3 been properly applied or, if improperly applied, close
4 enough for Government work is what they said. And once
5 they decided that, their contention is, it's not up to the
6 State to second-guess them

7 MR. FONTHAM Well, Your Honor, I don't -- that
8 may be what they're saying, but that's not what happened
9 in the case. The -- in the case the FERC did refuse to
10 order refunds. It held that the utility had invalidly
11 exercised its, quote/unquote, discretion to violate a
12 clear and ambiguous tariff for 10 years.

13 Then it said, we're going to have a new tariff.
14 We're going to curb the utilities' discretion. We're
15 going to require the utility to have a procedure. We were
16 saying it is too -- it was too vague, but no, no. The
17 utilities said, our discretion will be curbed. The FERC
18 said, their discretion will be curbed. The Court of
19 Appeals for the D.C. Circuit said their discretion will be
20 curbed.

21 QUESTION: Didn't FERC -- didn't FERC also say
22 that the rates that had resulted during the period prior
23 to the amendment were just and reasonable rates?

24 MR. FONTHAM The FERC said that looking
25 retroactively, in effect, retroactively --

1 QUESTION: Absolutely. They're looking
2 retroactively.

3 MR. FONTHAM Yes, sir.

4 QUESTION: And having done so, and having set
5 the rate, how then is a State utilities commission, in
6 effect, able to go behind that determination?

7 MR. FONTHAM Because the costs that were
8 incurred and are at issue here -- actually, I lost that
9 issue before the LPSC. The LPSC, as to all the charges up
10 until August 1997, said since the FERC retroactively
11 effectively changed the filed rate -- I don't know how
12 they can do that, but they did -- they retroactively
13 approved a new filed rate. You -- we can't touch that.

14 Then the LPSC said, okay, now we've got a new
15 contract amendment that operates prospectively. And what
16 does it require? Take a look at what it requires. This
17 was in -- litigated issue. And the LPSC says, well, they
18 didn't follow the conditions again.

19 QUESTION: But wait. Can you please go back and
20 explain to me my question?

21 MR. FONTHAM Yes, Your Honor.

22 QUESTION: To use your example --

23 MR. FONTHAM Yes, sir.

24 QUESTION: -- we have, I mean, it sounds to me
25 that what you're saying is a revolution in rate conditions

1 or setting in the United States. I've always understood
2 it to be, because of the sentence of MPL that I read to
3 you, that if FERC says we have a piece of paper here that
4 either directly or through a formula makes clear that \$5
5 of your cost, your total cost for the consumer, is correct
6 way to determine an interstate part of it, then when the
7 local commission looks at the \$10 rate to the consumer, it
8 can do what it wants, but it has to take that \$5 as a
9 given.

10 MR. FONTHAM We did that.

11 QUESTION: Now, if the commission thinks that
12 the \$5 that the company put on its line as part of the
13 interstate payment did not comply with every condition,
14 did not satisfy the law because it was unjust and
15 unreasonable, their remedy is to go to FERC and to say,
16 FERC, they didn't comply with your conditions. They
17 let -- got an unreasonable rate. That the commission's
18 remedy -- the local commission -- is not to readjudicate
19 that itself.

20 And the -- the legal authority for what I've
21 just said I've always thought was the sentence I read to
22 you out of MP&L. Now, where am I wrong in that?

23 MR. FONTHAM You are wrong, Your Honor, in
24 this. MP&L says that the State commission has to take
25 the 5. If the tariff says 5, it has to take the 5.

1 QUESTION: That's what I said.

2 MR. FONTHAM We're dealing with the
3 extra 5 here. We're dealing with the overcharge, the
4 overbilling, the violation of the contract.

5 QUESTION: The extra 5. Now, I thought what we
6 were dealing with here was a formula set out by what I
7 used to call the FPC, which -- which formula said that
8 the 5 is made up of many things. One of those things is
9 a charge that the Louisiana company is to pay to a company
10 in a different State to reflect the fact that that company
11 in the different State has generators in reserve capacity
12 that serve everybody, and among those generators are
13 generators that were put in mothballs provided that they
14 noted in the minutes of the joint company, et cetera that
15 this is a mothballed generator available for reserve
16 capacity if necessary.

17 All right, and if I understand it correctly and
18 I've said it correctly, then the cost at issue here is
19 part of the 5, not part of the other 5.

20 MR. FONTHAM I'll give you that, Your Honor.
21 The -- but the -- but the problem and the difference is
22 that -- there was a little more in the tariff condition.
23 It said you have to have a plan to return the unit to
24 service.

25 QUESTION: Yes.

1 MR. FONTHAM Did they have that? No. It
2 said --

3 QUESTION: No, but now we're repeating because
4 I -- I just said that if you think that the minutes were
5 not filled, if you think one of the other conditions that
6 was put forth in that particular tariff, which I guess
7 is -- what is -- page 57 or something of the -- of -- but
8 if you think one of those was not fulfilled, then your
9 remedy is to go to the FPC -- the FERC rather.

10 MR. FONTHAM And then -- and that poses the
11 question beautifully because we're in a State ratemaking
12 proceeding and now we know the question. Does the State
13 get to interpret the tariff and decide what it means and
14 what it says, or does the utility? Because the FERC is
15 not here to tell us. So the question is, what goes into
16 rates today? The utility's decision based on a violation
17 of the tariff which was litigated through the Louisiana
18 courts? They got to eat the cake, but now they're back
19 because they didn't like the taste of the cake, to put
20 it --

21 QUESTION: Mr. Fontham, I'm a little confused on
22 who is the they because my understanding was that the
23 Louisiana company, ELI, had no say in this, that it was
24 the Entergy, the -- the holding company -- the -- for all
25 of these five companies, that gave the instructions. And

1 it wasn't as though ELI could say, well, we think you
2 allocated too much to us. You're making us pay too much.
3 The -- each unit is bound by what Entergy says. So the
4 they seems to me to be Entergy, but the Louisiana Public
5 Service Commission has only ELI before it.

6 MR. FONTHAM That's true, Your Honor.

7 QUESTION: So how can it say that ELI was at
8 fault for something that ELI is locked into by virtue of
9 being part of this multistate --

10 MR. FONTHAM What -- what the commission says
11 is that ELI is at fault in the sense of any utility, going
12 back to -- to Justice Souter's reference to two
13 independent companies in a wholesale power transaction.
14 Now, we all know you can go to court to enforce a
15 wholesale tariff, and that's where most people go.

16 In the case of a parent-subsidary relationship,
17 well, obviously the parent gets to tell the subsidiary
18 what to do. That's true in everything. It's true of many
19 cost allocations that we see. We see hundreds of millions
20 of dollars of cost allocations coming into Louisiana based
21 on Entergy's decisions under innumerable types of
22 allocation schemes, including the Federal tariff.

23 And ELI has an obligation, even though it's
24 owned by a parent, to make sure the parent follows the
25 terms of the tariff, just as the wholesale buyer of

1 power --

2 QUESTION: I'm beginning to understand your
3 argument. Is this what it is? That you'd -- imagine we
4 have a Federal FERC rule, and it says you can include in
5 your -- in your charge to the wholesale company the charge
6 of sending a salesman to the foreign State to tell him
7 about your product. All right? And now we have -- now we
8 have -- you go before the State commission and the company
9 says, and it costs me \$117 to send Mr. Smith to do that.

10 And you want to say, I, of course, am forbidden
11 from arguing to you, the State commission, that they
12 violated the tariff. But I can tell you that this
13 salesman, named Murphy, actually spent most of his time in
14 a chicken restaurant, and therefore, what he did for that
15 117 fell outside the tariff. It didn't violate the
16 tariff. It fell outside the tariff.

17 And similarly, you want to say here that the
18 cost of the generator in mothballs did not violate the
19 tariff to include it, but rather fell outside the tariff
20 because they never had the minutes, et cetera. Is that
21 what you're arguing?

22 MR. FONTHAM I'm arguing both, Your Honor,
23 because --

24 QUESTION: Well, what's both? If you say --

25 MR. FONTHAM Well --

1 QUESTION: If you say you're arguing it violated
2 the tariff, you have an additional problem which is that
3 the Louisiana Public Service Commission itself said that
4 the staff wants us to say this violated the FERC tariff,
5 but we have no power to do that.

6 MR. FONTHAM No. That -- that was as to the
7 refunds. That was as to the period going up to 1996.

8 QUESTION: No. No.

9 MR. FONTHAM But -- but, Your Honor, let me --
10 let me take this and put it in -- in context here. When a
11 State commission decides issues of intrastate ratemaking,
12 it decides all kinds of questions of Federal law. It has
13 to decide what the Internal Revenue Code requires. It has
14 to decide what the consolidated tax return provides for.
15 It has to decide SEC allocations that are filed with the
16 SEC.

17 So along comes a situation that's completely
18 within its expertise. What does a FERC tariff require?
19 And it makes so many decisions involving millions and
20 millions of dollars in which it -- it decides as -- as any
21 other State court. You apply Federal law, you apply State
22 law. It's the whole body of law that you're dealing with.

23 QUESTION: Except that FERC specifically
24 addressed this question.

25 MR. FONTHAM No, Your Honor. The FERC did not

1 address this question. This is tariff 2. Tariff 1 the
2 FERC did address and it said the utility violated the
3 tariff.

4 Now we're on tariff 2, and tariff 2 was
5 designed, according to the FERC, to curb the utility's
6 discretion. And -- and that tariff 2, designed to curb
7 the utility's discretion, the utility then immediately
8 proceeded to ignore. And even in their reply brief, they
9 say, we did nothing more than we ever did before. That's
10 on the first page of their reply brief.

11 QUESTION: But isn't the way to look at the
12 problem this way? FERC says you may charge a certain
13 tariff. We're not coming up with the actual number now --

14 MR. FONTHAM No.

15 QUESTION: -- because it depends on facts that
16 will vary over time. You may -- we -- we are approving a
17 tariff. You supply the number and you must supply the
18 number according to certain conditions. And what the
19 Louisiana commission is now saying is, the number that you
20 supplied was a number that violates those conditions.

21 MR. FONTHAM Right. That's true.

22 QUESTION: The fact remains that on the face of
23 it, FERC has said, if you come up with the number, that's
24 the tariff. So if you are going to challenge that number,
25 aren't you, in effect, challenging a FERC determination?

1 And to do that, don't you have to go back to FERC and say,
2 they didn't follow your conditions, and therefore you,
3 FERC, should tell them that that number is, in fact, wrong
4 and they can't charge it?

5 MR. FONTHAM Your Honor --

6 QUESTION: What's wrong with that analysis?

7 MR. FONTHAM -- I -- I don't think that's
8 correct. I do think that your predicate is correct.
9 They -- they -- the FERC gave them a tariff. That's the
10 tariff. The utility's decision doesn't become the tariff.
11 It's like any contract case. If I have a contract with
12 you, and I can charge you 5, and I send you a bill for 10,
13 that doesn't -- my 10 doesn't become the tariff.

14 QUESTION: Right, except that in this case --
15 and -- and maybe this is where I'm going wrong. Tell me
16 if I am. In this case, I thought FERC did not say the
17 number is 5.

18 MR. FONTHAM Yes. It said -- what it said
19 was -- is, you go through this process, step 1, step 2,
20 step 3 --

21 QUESTION: Right.

22 MR. FONTHAM -- step 4. The utility did none
23 of that.

24 QUESTION: No, but -- but at the end -- but what
25 FERC is saying is, if -- if you go through that process,

1 the number you get at the end of the process is what our
2 tariff guarantees you to charge.

3 MR. FONTHAM Yes, that's true.

4 QUESTION: And in this case, you're saying -- so
5 that -- so that the -- FERC is not saying what the number
6 is in advance. It's setting the process in advance.

7 MR. FONTHAM Right.

8 QUESTION: And what you're saying is, sure, they
9 came up with the number, ostensibly what FERC told them
10 they could do, but they didn't go through the right
11 process to get it, and therefore the number's no good.
12 But in order to say the number is no good, you're still
13 challenging something which, at least on its face, has
14 been authorized by FERC. And therefore, why isn't the
15 appropriate action for you to take, to go back to FERC and
16 say, the number they're claiming under your authority is
17 the wrong number, tell them it's the wrong number?

18 MR. FONTHAM Okay. I'll -- I'll answer the
19 last question first. The reason the appropriate action
20 for the LPSC to take is not to go to FERC is because the
21 LPSC has the authority as part of its State ratemaking
22 authority, as part of State law to make --

23 QUESTION: Yes, but that's the question here.
24 That's the question here.

25 MR. FONTHAM That's the question.

1 QUESTION: Do they have it or is it preempted?

2 MR. FONTHAM Well, it wasn't preempted --

3 QUESTION: And one question as to whether it's
4 preempted, I would think, would be can they go back to the
5 Federal ratemaker and -- and, in fact, get the relief that
6 they want. That's something we ought to consider.

7 MR. FONTHAM And, Your Honor, the -- our
8 position is -- and I believe it's correct -- that there's
9 nothing in the Federal Power Act that preempts the State
10 from doing this, that the only FERC jurisdiction to decide
11 enforcement issues didn't even -- they created it in 1980
12 approximately. They were told in 16 U.S.C. 825m that if
13 they found a violation of a tariff, they had to go to
14 United States District Court.

15 And there's nothing in the Federal Power Act.
16 In fact, the Senate had a provision in the Federal Power
17 Act that the FERC can award remedies for violations of its
18 orders. It was pulled out.

19 QUESTION: In other words, they --

20 QUESTION: Okay. You're talking about the
21 condition today, and what you're saying today is, whenever
22 FERC sets a tariff that leaves the bottom line number to
23 be filled in later, a State utility commission in a
24 ratemaking proceeding may challenge that bottom line
25 number in its own bailiwick.

1 MR. FONTHAM No, Your Honor. We're saying that
2 if there's a tariff --

3 QUESTION: I thought that's what you were doing.

4 MR. FONTHAM -- and it sets forth objective
5 requirements, and it -- and the utility doesn't follow
6 those objective requirements, then they're not entitled to
7 bill for the units. That's all we're saying. We're
8 not -- this is not --

9 QUESTION: All that you're saying is that
10 Justice Souter was wrong to limit it to places where the
11 Federal tariff is open. It's just as applicable to
12 instances where the Federal tariff is specific. And
13 you're saying that Congress in the Federal Power Act set
14 up an act where you have a single central Federal body to
15 provide tariffs for, let's say, the billions and billions
16 of kilowatt hours made every year, but that each State --
17 50 or 51 different local service commissions are going to
18 adjudicate whether or not those millions of words are, in
19 fact, violated and what we will have is 51 separate
20 decisionmaking bodies to determine when a FERC tariff has
21 been violated.

22 Now, I grant you Congress did not say in the
23 act, and we don't mean to do that. But it would be an
24 awfully surprising thing for them to want to do.

25 MR. FONTHAM They did say we don't want to do

1 that. It's in -- it's in the introduction.

2 QUESTION: Well, if they said they don't want to
3 do it, then why are you arguing to the contrary?

4 MR. FONTHAM I'm saying that they -- well,
5 maybe I misunderstood what they don't want to do, Your
6 Honor.

7 QUESTION: I mean, don't want to do that is --
8 means that they don't want 51 bodies --

9 MR. FONTHAM Okay, they didn't --

10 QUESTION: -- adjudicating the correctness of
11 the application of rules for wholesale rates that are
12 contained of thousands or millions of words filed before
13 the Federal Power Commission.

14 MR. FONTHAM They -- they --

15 QUESTION: I've always thought that the Federal
16 Power Act did not want to have 51 adjudicative bodies, but
17 rather wanted to have one centralized body that States
18 were free to use.

19 MR. FONTHAM Not -- not at all.

20 QUESTION: No, okay.

21 MR. FONTHAM What the Federal Power Act says is
22 there's one central body to make the rate, to establish
23 the reasonable and just terms of the rate. All the courts
24 in the United States can decide whether a tariff is
25 violated, including the State courts, and that's the way

1 it always has been. In fact, the FERC wouldn't hear the
2 cases until 1979.

3 If there was a case of a tariff violation
4 pending in State court, you had the potential, this
5 potential of possible loss of uniformity, which never
6 really happened. As a matter of fact, this is a
7 high-profile case. Where are the conflicting decisions?
8 And the reason is we have an objective tariff. They
9 violated the objective tariff. Nobody can really dispute
10 that. It was litigated in the lower courts.

11 QUESTION: Mr. Fontham -- Mr. Fontham, there are
12 five States in this and there could be more in a regional
13 organization.

14 MR. FONTHAM Yes, Your Honor.

15 QUESTION: If each State's public service
16 commission can do what the Louisiana commission has done,
17 you could have chaos.

18 MR. FONTHAM No.

19 QUESTION: One will say, my utility was
20 underpaid. Another one will say, ours was overpaid. And
21 each one could do exactly what the Louisiana commission
22 has done. It -- it seems to me that that just cries out
23 for having the one decisionmaker, FERC.

24 MR. FONTHAM Well, Your -- Your Honor, I -- I
25 will respectfully disagree that this as big a problem

1 as -- as you are suggesting. And I'll -- I'll tell you
2 that literally billions of dollars of costs are split up
3 by Energy among its companies, only a very small sliver
4 under the Federal Power Act. Now, they split up these
5 costs from Energy Operations, which is a nuclear company;
6 Energy Services, which is a service company, by allocating
7 them into the jurisdictions. Anytime there would be a
8 conflicting decision, you could have -- supposedly you
9 could have chaos. What really happens is the utility
10 tries to shove as much costs as it possibly can into the
11 jurisdictions which are reviewing the rates frequently.

12 QUESTION: But -- but your answer to Justice
13 Ginsburg and your earlier answer to Justice Breyer, with
14 reference to whether there is a preemptive effect in the,
15 what we might call, the enforcement --

16 MR. FONTHAM Right.

17 QUESTION: -- or interpretation phase of the --
18 of the tariff, it seems to me is contrary to what we said
19 in Mississippi Power. We -- we actually were quoting
20 Nantahala. There we said the Mississippi Supreme Court
21 erred in adopting the view that the preemptive effect of
22 FERC jurisdiction turns on whether a particular matter was
23 actually determined in FERC proceedings. We have long
24 rejected this sort of case-by-case analysis of the impact
25 of State regulation upon the national interest.

1 MR. FONTHAM Yes, Your Honor, and -- and bear
2 in mind what Justice Stevens was addressing there. The
3 issue of prudence -- and the Court were addressing, but
4 the issue of prudence is an issue is that comes up in
5 making the rate. The FERC in the Federal Power Act is --
6 is authorized to establish just and reasonable rates. If
7 you're going to raise prudence, you raise it in the
8 proceeding where the just and reasonable rate gets
9 established. We admit they have that.

10 Then you have the next question. If they start
11 violating their contract, is that something that the
12 States can't look at? And there's nothing in the Federal
13 Power Act that suggests that States --

14 QUESTION: Well, but it was violating the
15 contract in -- in a context where FERC had -- had looked
16 at that -- that specific violation, and it -- and it
17 announced the remedy.

18 MR. FONTHAM No. The prior violation. This is
19 the second tariff, Your Honor. This is a new tariff that
20 sets conditions which were supposedly designed to curb
21 their discretion.

22 But going back to MP&L, this Court's decision
23 affirmed the decision of the Mississippi Public Service
24 Commission. It reversed the Mississippi Supreme Court.
25 It affirmed the Mississippi Public Service Commission.

1 In -- in that decision of the Mississippi Public Service
2 Commission, 327 million will be incurred under the FERC
3 tariff. They -- they had to actually estimate what would
4 be incurred.

5 Now, if you hand the utility the right to tell
6 the State public service commission that, oh, it will be
7 500 million, do they have to pass it through? If this
8 Court is going to give the sword of preemption to
9 utilities, and basically, there's a test, you know. We've
10 got concurrent jurisdiction. The test for concurrent
11 jurisdiction or exclusive jurisdiction is unmistakable
12 intent of Congress. Congress had it in there, pulled it
13 out of the -- in the Senate report. The FERC can -- can
14 hear violations. It was in the Senate version of the bill
15 in 1935. If you look on page 6 of our brief, you'll find
16 that the Senate pulled it out. The FERC had no -- no --
17 jurisdiction to hear tariff violation cases. It could go
18 to court. That's 16 U.S.C., section 825m

19 In about 1980, the FERC said, well, you know
20 what? We're going to infer the power to do that. And for
21 the first time ever, because up until then, the FERC had
22 been refusing to hear cases that were pending in State
23 court, wouldn't even exercise primary jurisdiction. Now,
24 obviously, if you have exclusive jurisdiction, there's no
25 need for a primary jurisdiction doctrine. They wouldn't

1 even exercise primary jurisdiction. They left it to the
2 State courts, all the State courts.

3 Now, if you leave it to the State courts, what
4 is -- how can you possibly say a State ratemaking agency,
5 which decides issues of Federal law, contracts, all the
6 time, has to interpret allocations, has to decide if
7 they're right -- how could the Federal Power Act have
8 taken away their power when the Federal Power Act was
9 passed --

10 QUESTION: Well, I want to be sure I get a
11 response to this, though, because you said before -- and
12 this very interesting argument might be cut short if the
13 paragraph that I read to you is applied to the 19 --
14 post-1965 costs, which I -- aren't they the costs that
15 were at issue when -- when the staff was talking about
16 disallowing costs?

17 MR. FONTHAM: The post-1997 --

18 QUESTION: No. The post -- the -- there's the
19 post-'65 or -- what --

20 MR. FONTHAM: August -- it's August 5th, 1997.

21 QUESTION: But -- yes.

22 MR. FONTHAM: You have -- you have costs
23 incurred in '96, which interestingly enough, were incurred
24 in violation of a FERC tariff as determined by the FERC.

25 QUESTION: Yes, yes, that's right. I understand

1 that.

2 MR. FONTHAM As determined by the FERC.

3 QUESTION: But they are -- but it's -- it's the
4 '97 costs we're talking about here.

5 MR. FONTHAM Going forward. That's correct.

6 QUESTION: And -- and when they're talking
7 about this, it seemed as if they're talking about
8 post-August 5th, 1997 costs on page 64a, 65a.

9 MR. FONTHAM Right. That's when the new
10 tariff --

11 QUESTION: Are you sure they're not?

12 MR. FONTHAM That's when the new tariff became
13 effective.

14 QUESTION: Yes. But you know what I'm thinking
15 of on page 64a and 65a of your appendix.

16 MR. FONTHAM I don't, but I'll be happy to
17 look.

18 QUESTION: I'm a little puzzled by your
19 reference to the new tariff. I thought the --

20 QUESTION: It's -- it's -- they have a -- B, is
21 this committee precluded from determining whether the
22 operating committee's decision was in compliance with the
23 amended section 10.02 of the system agreement?

24 MR. FONTHAM It's the amendment. Yes. The
25 amendment took effect August 5th, 19 --

1 QUESTION: Yes, and they're talking about the
2 post-August 5th, aren't they?

3 MR. FONTHAM That's correct.

4 QUESTION: All right. Then they say, LPSC staff
5 argues that the MS-1 overpayment should be disallowed
6 because the decision violated the FERC tariff. As ELI
7 argues, this commission is preempted from determining
8 whether the terms of a FERC tariff have been met, for the
9 issue of violation or compliance with a FERC tariff is
10 peculiarly within FERC's purview. Any allegation of a
11 violation of a FERC tariff should, therefore, be brought
12 before FERC.

13 All right. I read that and thought they seem
14 not to have decided this on the basis that you've been
15 arguing it.

16 MR. FONTHAM Your Honor, I believe they did
17 decide it on the basis that I've been arguing, but I'll
18 concede that that language is sitting in there. It's
19 wrong. And --

20 QUESTION: You mean it's wrong as a matter of
21 law? It's wrong at describing what they thought?

22 MR. FONTHAM It's wrong. I think it relates
23 to the refunds, but it's wrong as a matter of this Court's
24 law, the fact that there was a primary jurisdiction
25 doctrine, the fact that the States have always had the

1 power to decide this, the fact that the FERC had to
2 infer jurisdiction to decide tariff violations in the --
3 in around 1979 or 1980. The FERC has never had
4 exclusive jurisdiction to decide if a contract has been
5 violated.

6 The Arkla against Hall case. That case is a
7 case that came through the -- this -- the Louisiana
8 courts. This Court held there's a difference between
9 establishing the just and reasonable rate and enforcing
10 the contract.

11 And if you go back to the -- the Pan American
12 case decided by this Court, this Court held that with
13 regard to contract enforcement issues, which somebody was
14 arguing need to be decided by the FERC, there was a State
15 proceeding pending.

16 QUESTION: Why is this a contract enforcement
17 proceeding? I don't follow.

18 MR. FONTHAM: Because, Your Honor, the -- it's a
19 contract. This is one of the sections of the contract.
20 This is the section that -- it's an amendment to the
21 contract that was approved by the FERC. It's a contract
22 between the parties --

23 QUESTION: A contract between whom?

24 MR. FONTHAM: Pardon?

25 QUESTION: Who is the -- who are the parties to

1 this contract?

2 MR. FONTHAM The parties to the contract are
3 the five operating companies, plus --

4 QUESTION: But you agreed with me earlier that
5 the operating companies have to follow the instructions of
6 Entergy.

7 MR. FONTHAM Only by virtue of the fact that
8 Entergy -- not under the contract, not because the
9 contract says so. They don't have to take an illegal
10 charge. But as a matter of practice, I admit that the
11 big boss of Entergy can tell the operating companies
12 what to do, and they're not going to lose their jobs
13 over it. So they'll take the charge if it's an
14 overcharge. You're darned right. But not because
15 the contract says so, Your Honor. Not at all.

16 QUESTION: Is this contract the contract that
17 has been accepted by and approved by FERC and, in effect,
18 incorporated into the tariff?

19 MR. FONTHAM Yes, Your Honor.

20 QUESTION: So that we're not talking about a
21 freestanding contract.

22 MR. FONTHAM We're --

23 QUESTION: We're talking, in effect, about a
24 term which the tariff incorporates by its reference to the
25 contract.

1 MR. FONTHAM We are -- we are really -- the
2 contract itself --

3 QUESTION: Well, isn't --

4 MR. FONTHAM -- more or less becomes the
5 tariff, Your Honor.

6 QUESTION: Right. That's --

7 MR. FONTHAM There is no separate tariff. It's
8 just a contract. It becomes a rate schedule filed with
9 the FERC. But in Pan American, this Court said, you
10 know, in -- in its nature -- by its nature, a contract
11 like that is a State court contract. And the -- and the
12 Court made the statement by the fact that everybody knows
13 there's a scheme of Federal regulation doesn't change
14 that. And the State courts -- and I think it implicitly
15 means this --

16 QUESTION: Thank you, Mr. Fontham

17 MR. FONTHAM Yes, Your Honor.

18 REBUTTAL ARGUMENT OF DAVID W. CARPENTER

19 ON BEHALF OF THE PETITIONER

20 QUESTION: Mr. Carpenter, you have 4 minutes
21 remain ing.

22 MR. CARPENTER: Unless the Court has any further
23 questions, I have nothing else I need to add.

24 CHIEF JUSTICE REHNQUIST: Thank you,
25 Mr. Carpenter.

1 The case is submitted.
2 (Whereupon, at 11:56 a.m., the case in the
3 above-entitled matter was submitted.)

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