No. 14-757

In the Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission (FERC) reasonably concluded that petitioner's challenges to a formula contained in a FERC-approved tariff must be raised in a proceeding under 16 U.S.C. 824e.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-47, 303-340) are reported at 761 F.3d 540 and 771 F.3d 903. The orders of the Federal Energy Regulatory Commission (Pet. App. 48-62, 63-81, 82-115, 116-254, 255-302, 341-401, and 402-439) are reported at 128 F.E.R.C. ¶ 61,020; 137 F.E.R.C. ¶ 61,030; 142 F.E.R.C. ¶ 61,012; 137 F.E.R.C. ¶ 61,029; 142 F.E.R.C. ¶ 61,013; 139 F.E.R.C. ¶ 61,105; and 145 F.E.R.C. ¶ 61,047.

JURISDICTION

The judgment of the court of appeals in *Louisiana Public Service Commission* v. *FERC*, 761 F.3d 540, was entered on August 1, 2014. A petition for rehearing was denied on September 26, 2014 (Pet. App. 440). The judgment of the court of appeals in *Louisiana*

Public Service Commission v. *FERC*, 771 F.3d 903, was entered on November 14, 2014. The petition for a writ of certiorari was filed on December 26, 2014. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, provides the Federal Energy Regulatory Commission (FERC or Commission) with jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. 824(a)-(b). The Act requires the Commission to ensure that rates are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b) and (e). To facilitate that review, every public utility must file with the Commission a schedule of its rates. 16 U.S.C. 824d(c); see 18 C.F.R. Pt. 35 (filing obligations).

Under Section 824e of the FPA, the Commission, either on its own initiative or on a motion by a third party, must change a filed rate prospectively if it no longer meets the statutory standards. 16 U.S.C. 824e(a)-(b). A regulated utility may also petition under Section 824d for a change to the rate. 16 U.S.C. 824d(d)-(e).

2. The petition for a writ of certiorari seeks review of two decisions of the United States Court of Appeals for the Fifth Circuit. Those cases concern a FERC-approved tariff for electric utilities owned by Entergy Corporation, a public utility holding company. The tariff is called the "System Agreement." Pet. App. 2-3, 305. During the relevant period, Entergy sold electricity in four southern States (Arkansas, Louisiana, Mississippi, and Texas) though six subsidiaries that

are sometimes referred to as the "operating companies." *Id.* at 2.[1]

For decades, the Entergy operating companies have run their generation and transmission facilities as a single, integrated system. Pet. App. 2-3, 305. The System Agreement requires each of the six utilities to operate its generation facilities for the benefit of the whole system, dispatching electricity system-wide in a way that minimizes costs. See *Louisiana Pub. Serv. Comm'n* v. *FERC*, 522 F.3d 378, 383-384 (D.C. Cir. 2008) (*LPSC 2008*) (per curiam). Likewise, the System Agreement requires that the cost of producing electricity be roughly equal among the operating companies. See Pet. App. 3.

Historically, the rotation of responsibility for constructing new electricity-generation capacity among the operating companies had the effect of roughly equalizing costs. But on two occasions, in 1985 and 2005, the Commission found that differences in production costs among the utilities had led to unwarranted disparities in the allocation of costs among the companies. See Pet. App. 5, 306. In response, the Commission imposed a "bandwidth" remedy on Entergy. *Id.* at 306. The bandwidth remedy prohibits the production costs for each operating company from deviating more than 11% above or below the system average. *Id.* at 6, 306-307. If the costs go beyond that range, costs must be reallocated among the companies

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[1] Entergy Arkansas ended its participation in the System Agreement in December 2013 and Entergy Mississippi will do so in November 2015. See *Council of City of New Orleans* v. *FERC*, 692 F.3d 172, 174-177 (D.C. Cir. 2012), cert denied, 133 S. Ct. 2382 (2013); FERC C.A. Br. at 11-12, *Council of City of New Orleans*, *supra* (No. 11-1043).

to ensure that each company is within the 11% bandwidth. On judicial review, see 16 U.S.C. 825*l*(b), the United States Court of Appeals for the District of Columbia Circuit upheld the bandwidth order. See *LPSC 2008*, 522 F.3d at 389-394.

FERC then directed Entergy to incorporate the bandwidth remedy into the System Agreement. See Pet. App. 307. Entergy accordingly submitted amendments to the System Agreement, which the Commission accepted with modifications. *Id.* at 7, 307. As particularly relevant here, the amendments modified the System Agreement's service schedule to provide a "bandwidth formula" for calculating production costs of the operating companies. *Id.* at 7, 307-308. Once each operating company calculates its annual production costs using the bandwidth formula, the company's costs "are then compared to the System average to determine whether a variation of greater than 11 percent from the average exists," and therefore whether low-cost companies should make payments to high-cost companies to keep all of the companies within the bandwidth. *Id.* at 307-308.

The bandwidth formula's calculations are based on the actual end-of-year data that the operating companies are separately required to report through "FERC Form 1." Pet. App. 7; see *id.* at 25; see also 18 C.F.R. 141.1. As particularly relevant here, the definition of four of the cost inputs into the formula—for example, "Nuclear Accumulated Provision for Depreciation and Amortization"—includes a proviso stating that the means of accounting for that input should be consistent with standards approved by the state "retail regulator having jurisdiction over the Company, unless the FERC determines otherwise," or similar

language. Pet. App. 15 (emphasis omitted); see *id.* at 15 n.5.

3. As part of the implementation of the bandwidth remedy, Entergy must make compliance filings each year. Pet. App. 308. Those filings initiate annual "bandwidth proceedings." In those proceedings, FERC applies the bandwidth formula using each company's production costs from the prior year. *Ibid.* Parties may challenge the data supplied by the companies as inaccurate or incomplete. See *id.* at 149.

Before the first annual bandwidth proceeding, petitioner, a state utility commission, filed a complaint under Section 824e of the FPA challenging "the justness and reasonableness of cost inputs" into the bandwidth formula. Pet. App. 16. FERC dismissed the complaint on the ground that petitioner was required to bring that challenge in the bandwidth proceeding. See *ibid.* (citing *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 124 F.E.R.C. ¶ 61,010, at ¶ 27 (2008)).

Entergy initiated the first bandwidth proceeding in May 2007 by filing calculations based on 2006 data. During that litigation, the Commission determined that the bandwidth formula represents the lawful, FERC-approved rate. See *Entergy Servs., Inc.*, 130 F.E.R.C. ¶ 61,023, at ¶¶ 170-173 (2010); *Entergy Servs., Inc.*, 139 F.E.R.C. ¶ 61,103, at ¶¶ 42, 48-53 (2012).[2] As a consequence, FERC determined that in a bandwidth proceeding a party may challenge only errors in applying the formula; a party may not chal-

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[2] As the D.C. Circuit has explained, "[t]he Commission need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula.'" *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578, cert. denied, 498 U.S. 952 (1990).

lenge the formula itself, including the definition of the particular cost inputs into the formula. See *Entergy Servs., Inc.*, 139 F.E.R.C. ¶ 61,103, at ¶¶ 48-53. The Commission further explained that to challenge the lawfulness of the formula itself, a party must initiate a proceeding under Section 824e of the FPA to change the rate. See *id.* at ¶ 50.

FERC acknowledged that "prior to Entergy's annual bandwidth filings, when neither we nor the parties had any experience with such filings, the Commission did make some general statements that could be interpreted as suggesting that parties had the opportunity in Entergy's annual bandwidth filings to challenge the reasonableness of any cost inputs" into the bandwidth formula. *Entergy Servs., Inc.*, 139 FERC ¶ 61,103, at ¶ 48; see Pet. App. 17-18. Since the first bandwidth proceeding, however, FERC has consistently explained that a Section 824e complaint is the proper avenue to challenge the bandwidth formula, including the methodology for computing various inputs into the formula. See Pet. App. 36.

Petitioner and Entergy each filed petitions for review of the Commission's orders in the first annual bandwidth proceeding in the D.C. Circuit. Pet. App. 309. After the instant petition for a writ of certiorari was filed, the D.C. Circuit denied in part and dismissed in part the petitions for review of FERC's orders in the first bandwidth proceeding. See *Louisiana Pub. Serv. Comm'n* v. *FERC*, No. 12-1282 (Mar. 13, 2015), slip op. 6 (*LPSC 2015*) (per curiam). The D.C. Circuit agreed with FERC that petitioner's challenge to certain inputs into the bandwidth formula was properly brought in a Section 824e proceeding, not an annual bandwidth proceeding. See *id.* at 4. "An at-

tack on the formula itself," the court explained, "is not valid in an annual bandwidth proceeding." *Ibid.* (citation omitted). The court further noted that petitioner is "currently pressing its claim before the Commission in a separate proceeding pursuant to Section [824e]," which is "the appropriate forum." *Ibid.*

4. The decisions under review here arose from the second and third annual bandwidth proceedings.

a. i. Entergy initiated the second annual bandwidth proceeding in May 2008. Pet. App. 309. In that proceeding, petitioner asked the Commission to modify the depreciation rates that are incorporated into certain cost variables in the bandwidth formula. *Id.* at 320. Consistent with its ruling in the first bandwidth proceeding, the Commission rejected that position on the ground that "changes to the bandwidth formula must be done through either a section [824d] or [824e] proceeding." *Id.* at 147; see *id.* at 146-155; see also *id.* at 18, 34. "Because the Commission has approved the [bandwidth] formula," the court explained, "it is the filed rate and * * * may not be changed absent a section [824d] or [824e] proceeding." *Id.* at 147. The Commission also noted that "no party allege[d] that Entergy used incorrect depreciation expense numbers in submitting its bandwidth filing." *Id.* at 149-150.

FERC concluded that its determination was consistent with the text of the System Agreement—in particular, the "unless" clauses in the definitions of the depreciation cost inputs (*i.e.*, "unless the FERC determines otherwise"). See Pet. App. 152-154. Recognizing that those clauses were "ambiguous," the Commission interpreted them simply to account for the possibility that "some of the actual depreciation expenses recorded and reflected in the bandwidth

formula may include depreciation expenses charged to traditional wholesale customers that were approved by the Commission and not state regulators, rather than as an acknowledgment of the possibility that in a filing implementing the bandwidth remedy the Commission will require Entergy to input depreciation expenses other than the expenses already approved for inclusion in the bandwidth formula as approved by retail regulators." *Id.* at 153.

Finally, the Commission rejected petitioner's argument that it had impermissibly "delegated our jurisdiction to state agencies regarding depreciation expense" by allowing the formula to incorporate cost inputs that reflect state-approved data. Pet. App. 150; see *id.* at 150-151. The Commission explained that it had previously approved the bandwidth formula and that "[i]f any entity wants to change the depreciation rates used in that formula, it must seek a modification to the bandwidth formula in a section [824d] or [824e] filing." *Id.* at 150.

The Commission denied petitioner's request for rehearing. Pet. App. 266-273, 302. It reiterated that petitioner's "challenge constitutes a challenge to the bandwidth formula itself, a rate already approved by the Commission." *Id.* at 272.

ii. Petitioner sought judicial review of the Commission's order in the United States Court of Appeals for the Fifth Circuit. The court of appeals denied the petition in relevant part. Pet. App. 1-37, 47. The court held that FERC had properly "interpreted challenges to the state depreciation rates as attacks on the [bandwidth] formula itself" that could not be brought in "[a]nnual bandwidth proceedings," which "are reserved for challenges to whether Entergy Corporation

has properly implemented the formula rate." *Id.* at 23; see *id.* at 24-37.

The court of appeals rejected petitioner's contention that FERC's interpretation of the System Agreement's "unless" clauses was arbitrary and capricious. Even assuming that FERC was entitled to no deference in interpreting the System Agreement despite the agency's technical expertise, the court held, "the System Agreement's language sustains FERC's interpretation." Pet. App. 32; see *id.* at 33. The court also found FERC's interpretation to be consistent with the "filed-rate doctrine," which embodies the principle that a rate on file with the Commission is the lawful rate until it is changed and that any change can take effect only prospectively. *Id.* at 34; see *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981). The court explained that where a filed rate is a formula, like the bandwidth formula, a change to the formula can be accomplished only through a proceeding under Section 824d or 824e of the FPA to change the filed rate prospectively. See Pet. App. 34-35.

The court of appeals rejected petitioner's argument that FERC had acted arbitrarily in changing its position on the proper proceeding in which to challenge the bandwidth formula. See Pet. App. 35-37. The court explained that "FERC changed its interpretation in light of its gained experience conducting annual bandwidth proceedings, explained its new interpretation of the System Agreement, and consistently has interpreted the System Agreement after the change." *Id.* at 36.

Finally, the court of appeals rejected petitioner's argument that by refusing to consider a challenge to the depreciation inputs in a bandwidth proceeding,

FERC had impermissibly subdelegated its authority to the state regulatory bodies that approve which depreciation expenses utilities may account for on their books. See Pet. App. 24-28. The court explained that an agency impermissibly delegates its authority if it "does not exercise its own judgment, and instead cedes near-total deference to private parties' estimates." *Id.* at 25-26 (quoting *Texas Office of Pub. Util. Counsel* v. *FCC*, 265 F.3d 313, 328 (5th Cir. 2001), cert. denied, 535 U.S. 986 (2002)). Applying that standard, the court concluded that "there is no unlawful subdelegation in this case because FERC exercised its role when it initially reviewed and accepted the bandwidth formula incorporating the state agencies' depreciation rates." *Id.* at 26. "Moreover," the court continued, "FERC has clarified that it will continue to exercise oversight of the state rates in a Section [824e] complaint proceeding." *Ibid.* The court pointed out that petitioner had, in fact, "prosecuted a Section [824e] complaint challenging the very inputs it contends FERC has shielded from review," and that petitioner's complaint was rejected on the merits. *Id.* at 27-28.[3] Given that its claim had already been adju-

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[3] That Section 824e complaint was filed in 2010. See Pet. App. 10. The Commission set the matter for a "trial-type evidentiary hearing." *Ibid.* (citation omitted). It subsequently affirmed the administrative law judge's conclusion that petitioner had not "met its burden of proof under Section [824e] of the Federal Power Act . . . to show the existing bandwidth formula is unjust and unreasonable or unduly discriminatory or preferential." *Ibid.* (quoting *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 139 F.E.R.C. ¶ 61,107, at ¶ 2 (2012)).

Petitioner also filed a Section 824e complaint in 2011 seeking to require Entergy to remove from the second and third bandwidth calculations costs and expenses that, although recorded in the

dicated by FERC in a Section 824e proceeding, the court stated, petitioner could "not explain how it nonetheless can press its argument that FERC subdelegated its authority." *Id.* at 28.

b. i. The third bandwidth proceeding was commenced in May 2009. Pet. App. 310. Petitioner argued that certain revenues and expenses should be removed from the 2008 bandwidth calculation because they were not incurred in 2008. *Id.* at 363-365. Petitioner further argued that the formula should utilize partial-year accounting to reflect the mid-year acquisition of generation facilities. *Id.* at 376-379. (Unlike in the second bandwidth proceeding, neither of those arguments implicated the "unless" clauses in certain cost definitions.)

As in the first and second bandwidth proceedings, the Commission rejected petitioner's objections on the ground that a Section 824e proceeding, not an annual bandwidth proceeding, was the proper forum to raise them. See Pet. App. 358-361, 370-373, 381-383. The Commission denied rehearing in relevant part, again making clear that "parties can challenge in a bandwidth proceeding erroneous inputs, implementation errors, or prudence of cost inputs," but that "modifications to the bandwidth formula itself must be raised in an FPA section [824e] complaint, or proposed by En-

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FERC Form 1 for those years, related to periods before the bandwidth remedy took effect. Pet. App. 11, 313. The Commission denied the request for retroactive relief because it was prohibited by the filed-rate doctrine, but held the complaint for prospective relief in abeyance pending the outcome of a related proceeding. *Ibid.*

tergy in a section [824d] filing." *Id.* at 412; see *id.* at 408-412, 430-431, 438-439.

ii. The Fifth Circuit denied petitioner's petition for review of those orders. See Pet. App. 303-326, 340. As in its prior decision, the court held that FERC had "reasonably excluded challenges to the 'justness and reasonableness' of formula inputs from annual bandwidth implementation proceedings." *Id.* at 316 (emphasis omitted); see *id.* at 317-326. The court explained that FERC had reasonably "concluded that adjustments to the formula inputs are adjustments to the bandwidth formula itself," which must be raised in a Section 824e proceeding. *Id.* at 318; see *id.* at 317-322. "[W]ith or without special deference," the court determined, "FERC's interpretation is clearly not arbitrary." *Id.* at 320.

The court of appeals also again rejected the argument that FERC had unreasonably changed its interpretation of the System Agreement. See Pet. App. 322-326. Although "in two of its early orders, FERC stated that challenges to the formula inputs could be raised at the annual bandwidth proceedings," the court continued, "FERC corrected its previous interpretation in its very first ruling on an annual bandwidth proceeding." *Id.* at 322. And a "litany of FERC orders" had made clear that in an annual bandwidth proceeding, "formula inputs may be challenged for incorrect data, faulty math, and imprudent expenditures—not for whether the cost variables themselves should be included in the formula." *Id.* at 325.

ARGUMENT

Petitioner seeks review (Pet. i.) of the questions whether FERC may interpret a tariff to "vest absolute discretion" in state agencies to set depreciation

allowances for FERC-regulated utilities and to prevent FERC from "reviewing the costs" included in applying a formula rate. Those questions are not presented by these cases. The decisions below held only that FERC had reasonably concluded, based on the text of the FPA and the language of the System Agreement, that an annual bandwidth proceeding is not the appropriate proceeding in which to raise challenges to the inputs into the bandwidth formula. Both the court of appeals and the Commission made clear, however, that petitioner may raise such challenges by filing a complaint with the Commission under Section 824e of the FPA, and petitioner has in fact taken advantage of that avenue in cases not before this Court.

The decisions below reflect the correct interpretation of the FPA and the System Agreement and a case-specific application of settled principles of administrative law. They do not conflict with any decision of this Court or another court of appeals. Indeed, after the petition was filed, the D.C. Circuit expressly adopted the relevant holding of the decisions below. See *Louisiana Pub. Serv. Comm'n* v. *FERC*, No. 12-1282 (Mar. 13, 2015), slip op. 4 (*LPSC 2015*) (per curiam). Further review is therefore not warranted.

1. FERC reasonably concluded that petitioner may not challenge elements of the bandwidth formula in an annual bandwidth proceeding.

a. It is well-settled that FERC orders are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. See 5 U.S.C. 706(2)(A); *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Given the technical nature of ratemaking, moreover, the Commission's ratemaking

decisions are entitled to "great deference." *Morgan Stanley Capital Grp.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 532 (2008).

FERC reasonably concluded that certain objections that petitioner raised in the second and third bandwidth proceedings must be brought in a Section 824e proceeding because they attacked the bandwidth formula itself. Annual bandwidth proceedings, the Commission determined, are reserved for challenges to the application of the formula, such as claims that the companies used "incorrect data, faulty math, [or] imprudent expenditures." Pet. App. 325. That conclusion followed from the general text of the FPA, which channels challenges to the lawfulness of a filed rate—including a formula rate—through proceedings under Section 824d and 8424e. See *Public Util. Comm'n of Calif.* v. *FERC*, 254 F.3d 250, 257 (D.C. Cir. 2001). Annual bandwidth proceeding, in contrast, were designed under the Entergy System Agreement merely to ensure that the bandwidth formula was correctly applied to the relevant data.

FERC's conclusion was also consistent with the text of the System Agreement. As the court of appeals explained, "[t]he System Agreement defines certain cost variables" that are entered into the bandwidth formula "as incorporating actual values recorded in certain FERC accounts as approved by retail regulators." Pet. App 14-15; see *id.* at 15 n.5 (listing relevant provisions of System Agreement). Four of those definitions (including those at issue in the second bandwidth proceeding) "contain[] an important proviso": that they apply "unless the FERC determines otherwise." *Id.* at 15 (emphasis omitted). The court of appeals held that the provisos were ambigu-

ous with respect to "whether FERC is mandated to restructure depreciation inputs at each annual bandwidth proceeding." *Id.* at 33. FERC resolved that ambiguity by concluding that the clauses "refer only to those instances when state agencies do not provide the relevant data" and so do not require FERC to reconsider the propriety of each cost input at each annual bandwidth proceeding. *Ibid.* The court of appeals found that interpretation reasonable, because otherwise the proviso would "subsume[] the primary clause" by requiring a "yearly reconstruction of each company's costs in the bandwidth proceeding." *Ibid.*

b. In this Court, petitioner does not challenge either the proposition that Section 824d and 824e are appropriate avenues for challenging formula rates or the court of appeals' conclusion that FERC's interpretation of the "unless" provisos reasonably construed the text of the System Agreement. See Pet. 21-31. But petitioner nevertheless contends (Pet. 25, 27) that FERC's interpretation "vested absolute discretion in retail regulators" and "abdicate[d] its jurisdiction." That argument is misplaced. FERC did not conclude that petitioner is foreclosed from challenging the use of state-approved costs as an input into the bandwidth formula. Rather, FERC merely held that the proper way to raise such a challenge is to file a Section 824e complaint to amend the formula.

That reasonable conclusion does not represent an abdication of FERC's authority to state regulators. When FERC initially approved the bandwidth remedy, it necessarily reviewed and approved the various formula inputs. Pet. App. 26-27; see *Louisiana Pub. Serv. Comm'n* v. *FERC*, 522 F.3d 378, 391-394 (D.C. Cir. 2008) (per curiam). And FERC has an ongoing

duty under Section 824d to ensure that those inputs are just and reasonable. Pet. App. 25-27. A third party who believes that they are not just and reasonable may seek to amend the formula under Section 824e. And petitioner has done just that. *Id.* at 27. As the court of appeals pointed out, petitioner obtained FERC review of the very objection to depreciation-cost inputs for which petitioner contends FERC has precluded all review. See *id.* at 28. That petitioner was required to proceed under Section 824e does not support its contention that FERC has foreclosed any avenue of review.

It is true that if FERC were to conclude that a particular formula input was not just and reasonable in a Section 824e proceeding, petitioner could not obtain retrospective relief in the form of rate refunds for Louisiana ratepayers. But that is a function of the statutory scheme. Section 824e(a) provides that "[w]henever the Commission * * * shall find that any rate * * * charged * * * is unjust[or] unreasonable, * * * the Commission shall determine the just and reasonable rate * * * to be *thereafter* observed and in force." 16 U.S.C. 824e(a) (emphasis added). As this Court has explained with respect to the materially identical provision of the Natural Gas Act, 15 U.S.C. 717d(a), in light of that language, "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 578 (1981). That principle—often referred to as part of the filed-rate doctrine—means that even if the Commission finds an existing rate to

be unjust and unreasonable, the replacement rate applies only prospectively. Pet. App. 34, 318.

Accordingly, there is nothing unusual about the fact that if the Commission concludes in a Section 824d or Section 824e proceeding that (contrary to its prior determinations) the bandwidth formula produces unjust and unreasonable rates, the Commission will order only prospective relief through a going-forward change to the formula. That is ordinarily true in electricity ratesetting cases. It does not suggest that the Commission has "abdicate[d]" its statutory duties.

c. Petitioner contends that the Commission's decisions in this case violate a purported "policy that cost inputs may always be reviewed for justness and reasonableness, either in annual cases or retroactively, in subsequent Section [824e] reviews." Pet. 28 (citing *Public Serv. Elec. & Gas Co.*, 124 F.E.R.C. ¶ 61,303, at ¶¶ 17-20, and *Public Util. Comm'n of Calif.*, 254 F.3d at 253, 258). It is true that the particular data inputted into formula rates can be challenged outside of Section 824d or 824e proceedings. But a formula rate's identification of which cost inputs should be entered into the formula is part of the formula rate itself, and challenges to those definitions must be brought through a Section 824d or 824e proceeding. See *Public Util. Comm'n of Calif.*, 254 F.3d at 257 ("In approving formula rates, the Commission has relied on [Section 824e] as a mechanism to ensure that the rates are just and reasonable."); *Public Serv. Elec. & Gas. Co.*, 124 F.E.R.C. ¶ 61,303, at ¶ 18 ("The courts have recognized that section [824e] permits customers to challenge formula rates.").

2. Petitioner briefly contends (Pet. 29-30) that the decisions below conflict with the D.C. Circuit's deci-

sions in *Louisiana Public Service Commission* v. *FERC*, 184 F.3d 892 (1999) (*LPSC 1999*), and *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554, cert. denied, 543 U.S. 925 (2004). That argument lacks merit.

As discussed above, after the petition for a writ of certiorari was filed in this case, the D.C. Circuit, in the course of upholding FERC's order in the first annual bandwidth proceeding, expressly adopted the holding of the Fifth Circuit that challenges to inputs into the formula rate may not be raised in annual bandwidth proceedings. See *LPSC 2015*, slip op. 4 ("An attack on the formula itself is not valid in an annual bandwidth proceeding.") (quoting Pet. App. 34). Accordingly, even if petitioner had identified some tension between the decisions below and other D.C. Circuit decisions, it is now clear that the D.C. Circuit has adopted precisely the same resolution of the specific question in this case as the Fifth Circuit. Any intra-circuit tension within the D.C. Circuit between that holding and holdings in other cases addressing different issues would be best resolved by that court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, no tension exists between the decisions below and the two D.C. Circuit decisions that petitioner cites. In *LPSC 1999*, unlike in these cases, petitioner had "filed a complaint against Entergy under [Section 824e] of the Federal Power Act." 184 F.3d at 895. The complaint had alleged that "due to changed circumstances, the allocation of capacity costs had become unjust and unreasonable." *Ibid.* FERC had found that the allegations were insufficient to warrant an evidentiary hearing, *ibid.*, but the D.C. Circuit reversed that conclusion, see *id.* at 900. In the

course of its evaluation of the particular allegations raised by petitioner, the D.C. Circuit rejected the view that "because the Entergy system may be viewed as a single seller at retail, the Commission need not regulate antecedent wholesale transactions among the operating companies." *Id.* at 897. The court explained that "the Commission has the duty—not the option—to reform rates that by virtue of changed circumstances are no longer just and reasonable." *Ibid.*

That analysis fully comports with the decisions below. Both the court of appeals and FERC recognized that petitioner may raise its challenges to the bandwidth-formula inputs in a Section 824e proceeding, as it did in the proceedings involving a different issue in *LPSC 1999*. Indeed, as the court of appeals explained, FERC held a full evidentiary hearing on petitioner's Section 824e challenge to the bandwidth formula's inclusion of retail depreciation rates (and then rejected that claim on the merits). See Pet. App. 10, 27; see also note 3, *supra*.

The decisions below are also consistent with the D.C. Circuit's decision in *United States Telecom*. That decision held that in giving state regulatory bodies the authority to make certain determinations required by the Telecommunications Act of 1996, 47 U.S.C. 151 *et seq.*, the Federal Communications Commission (FCC) had impermissibly sub-delegated its decisionmaking authority. See 359 F.3d at 564-568. The court rejected the FCC's argument that federal agencies "have the presumptive power to subdelegate to state commissions, so long as the statute authorizing agency action refrains from foreclosing such a power." *Id.* at 565. The court explained that "subdelegations to [non-federal] parties are assumed to be

improper absent an affirmative showing of congressional authorization." *Ibid.*

United States Telecom involved a conceded subdelegation to state regulatory bodies. In this case, however, the court of appeals determined that FERC had not subdelegated decisionmaking authority to state agencies, because FERC initially approved the bandwidth formula and has the continuing duty to ensure that the bandwidth formula's inputs are just and reasonable, and a party can challenge those inputs by filing a complaint with the Commission under Section 824e. As the court of appeals explained, "FERC's continuing review in Section [824e] proceedings distinguishes it from the unease expressed in *United States Telecom*[] of agencies' 'vague or inadequate assertions of final reviewing authority.'" Pet. App. 27-28 (quoting *United States Telecom*, 359 F.3d at 568).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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