No. 12-852

In the Supreme Court of the United States

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission reasonably determined that two electric utilities are permitted to withdraw from an agreement with other electric utilities without satisfying additional conditions or obligations that are not imposed by the agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 692 F.3d 172. The orders of the Federal Energy Regulatory Commission (Pet. App. 11a-41a, 42a-81a) are reported at 134 F.E.R.C. ¶ 61,075 and 129 F.E.R.C. ¶ 61,143.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2012. A petition for rehearing was denied on October 11, 2012. The petition for a writ of certiorari was filed on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act, 16 U.S.C. 791a *et seq.*, gives the Federal Energy Regulatory Commission

(FERC or Commission) 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, "together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. 824d(c); see 18 C.F.R. Pt. 35 (filing obligations).

2. a. This case concerns six electric utilities owned by Entergy Corporation, a holding company. The Entergy utilities serve customers in four southern States (Arkansas, Louisiana, Mississippi, and Texas) and are sometimes referred to as the "Operating Companies." See Pet. App. 2a. For several decades, they have operated their generation and transmission facilities as a single, integrated system under a contract called the "System Agreement." See *ibid.* 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 total costs. See *Louisiana Pub. Serv. Comm'n* v. *Entergy Servs., Inc.*, 113 F.E.R.C. ¶ 61,282, at 62,132-62,133 (2005).

The System Agreement establishes a centralized process for building new power plants. See Pet. App. 3a. A committee assigns new projects to individual utilities on a rotational basis. Each utility assumes the responsibility for financing and maintaining its assigned plants. *Ibid.* In return for bearing those costs and associated risks, the utility "retains the rights to the energy those plants produce," although it "must also make any excess capacity available to its sister companies as a backstop for when demand exceeds self-generated supply." *Ibid.*

The System Agreement also "require[s] that the cost of producing electricity be 'roughly equal' among the [six utilities]." Pet. App. 3a. To that end, it establishes a mechanism of "equalization payments" to reduce cost disparities: Companies that use more system capacity than they generate must make cash payments to the other companies. See *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 42-43 (2003). Those payments, however, equalize only the costs of excess capacity and therefore do not succeed in equalizing overall production costs. See Pet. App. 32a.

Accordingly, on two occasions, in 1982 and 2005, the Commission found that disparities in production costs among the utilities had disrupted the rough equalization required by the System Agreement and resulted in undue discrimination. See Pet. App. 3a-4a. "In order to satisfy the Agreement's equality mandate," the Commission ordered the Operating Companies with lower production costs to make equalization payments to the Operating Companies with higher production costs. *Id.* at 3a.

b. The 2005 order had the effect of requiring Entergy Arkansas, one of the utilities, to make annual payments of hundreds of millions of dollars to the other utilities. Pet. App. 4a. As soon as the order was issued, Entergy Arkansas announced that it would withdraw from the System Agreement on December 18, 2013. That notice complied with the withdrawal provision of the agreement, which states that any utility "may terminate its participation in this Agreement by ninety-six (96) months written notice" to the other utilities. *Id.* at 6a (quoting System Agreement § 1.01). The purpose of the eight years' notice requirement is to give the other utilities ample "time to adjust their long-term plans and to acquire any needed capacity." *Id.* at 8a-9a (quoting Commission order, *id.* at 76a).

In response to the withdrawal notice, petitioner Louisiana Public Service Commission, a state entity that regulates electric utilities, filed a complaint with FERC against Entergy Services, Inc. (a service affiliate of Entergy Corporation) and all six of the utilities, seeking a remedy for Entergy Arkansas's withdrawal, such as an order requiring continuing equalization payments or imposing an equivalent obligation to supply power to the other utilities.

The Commission denied the complaint, making clear that it would determine at a later date whether the utilities' post-withdrawal arrangements are just and reasonable. *Louisiana Pub. Serv. Comm'n* v. *Entergy Corp.*, 119 F.E.R.C. ¶ 61,224, at 62,315 (2007). It observed, however, that the lengthy notice period required by the System Agreement would provide the four remaining utilities "the opportunity to make reasonable alternative resource arrangements if they believe it appropriate to do so, and for all members to try to address disputes, before the departure of Entergy Arkansas actually occurs." *Ibid.* Because it was not yet known what arrangements might replace the existing ones and what other factors, such as changes in fuel costs, might arise, the Commission found that it "would be premature for us to attempt to address these issues at this time." *Ibid.*

On November 8, 2007, Entergy Mississippi, another one of the six utilities, gave notice that it would withdraw from the System Agreement on November 7, 2015. See Pet. App. 43a.

3. In February 2009, Entergy Services submitted to the Commission, on behalf of Entergy Arkansas and Entergy Mississippi, notices of cancellation to terminate those utilities' participation in the System Agreement, as required by Commission regulations. See 18 C.F.R. 35.15. Petitioners and other parties filed protests.

FERC accepted the notices of cancellation, concluding that Entergy Arkansas and Entergy Mississippi were permitted to withdraw from the System Agreement and would have no continuing post-withdrawal obligations to the remaining utilities under that agreement. Pet. App. 74a-81a. In particular, it determined that the System Agreement contains no provisions requiring any payment or compensation for withdrawal. *Id.* at 75a-77a. FERC also observed, however, that Entergy Corporation "has an obligation to ensure that any future operating arrangement is just and reasonable" and made clear that it would review the replacement arrangements under the standards of the Federal Power Act. *Id.* at 77a.

Petitioners filed timely requests for rehearing, which FERC denied. The order on rehearing clarified that when it rejected petitioners' protests, FERC had considered not only the contractual language of the System Agreement, but also the history and circumstances of the Entergy system. Pet. App. 27a-30a. In reviewing that history, it found that generation resources like power plants were intended to be owned by the individual utilities rather than owned collectively, and so withdrawing companies had no continuing obligation to compensate other companies for their own plants. *Id.* at 30a, 33a. Its rehearing order also reaffirmed the view that a "two-part analysis," in which FERC first considered the utilities' ability to withdraw under the terms of the System Agreement and would review the justness and reasonableness of Entergy Corporation's successor arrangements separately, was the most appropriate way to evaluate the utilities' withdrawal from the System Agreement. *Id.* at 29a.

4. Petitioners challenged the Commission's orders by filing petitions for review in the United States Court of Appeals for the District of Columbia Circuit. See 16 U.S.C. 825*l*(b). They argued that the Commission's "approval of the withdrawal [of the two utilities] based solely on the Agreement lacks a reasoned basis." Pet. C.A. Br., 2011 WL 2941302, at *27-*30. The court of appeals, however, affirmed the Commission's orders, holding that the agency had reasonably interpreted the System Agreement in finding no conditions for withdrawal other than the required notice and that the Commission's decision did not violate the Federal Power Act. Pet. App. 1a-10a.

The court began by explaining the standard for its review of the Commission's orders under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See Pet. App. 5a-6a. "Because the gist of the petitioners' argument is directed at FERC's reading of the [System] Agreement," the court explained, it would apply the deferential standard of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), to determine whether "the agency's interpretation of the contract was reasonable." Pet. App. 5a-6a. Under that standard, the court said, it would evaluate the Commission's determination that the contract was ambiguous under a *de novo* standard of review, but would defer to the Commission's reasonable resolution of any ambiguity. See *id.* at 6a.

The court of appeals then turned to petitioners' contention that the Commission had misinterpreted the agreement by failing to adopt their argument that "a Company may not leave the System without compensating the remaining Companies for the assets it takes." Pet. App. 6a. The court explained that nothing in the text of the System Agreement places any conditions on withdrawal other than notice and that petitioners had not argued otherwise. See *id.* 6a-7a. Petitioners had instead relied on the agreement's alleged purposes to infer that it contemplated that the System as a whole has claims to individual assets built by each utility and therefore required compensation for those assets upon withdrawal. See *ibid.* The court of appeals, however, pointed out that the System Agreement explicitly "provides that '[e]ach Company *shall normally own* . . . such generating capability and other facilities as are necessary to supply all of the requirements of its own customers,'" indicating that the agreement contemplates individual rather than collective ownership of system assets. *Id.* at 7a. The court therefore held that the Commission had "reasonably concluded that the Agreement's purpose is central planning, not central ownership, and that there is nothing about that purpose that compels payments prior to withdrawal." *Ibid.*

The court of appeals also rejected petitioners' argument that regardless of the terms of the System Agreement, "'rough equalization' payments must continue after withdrawal"—"potentially forever"—because otherwise withdrawal "will have 'disparate consequences' on the remaining Operating Companies, which will then need to charge higher rates to their customers." Pet. App. 9a-10a (quoting Pet. C.A. Br., 2011 WL 2941302, at *39). The court explained that the "requirement of rough equalization is rooted in the Agreement," not any independent obligation under the Federal Power Act. *Id.* at 10a (citing *Louisiana Pub. Serv. Comm'n* v. *FERC*, 551 F.3d 1042, 1043 (D.C. Cir. 2008)). "Because rough equalization is tied to the Agreement," the court held, "it was reasonable for FERC to conclude that once a Company leaves the Agreement, it need not continue to make the payments." *Id.* at 10a.

Echoing the Commission's orders, the court of appeals cautioned that its decision "reaches only the obligation of the withdrawing Companies under the Agreement." Pet. App. 10a. Under the Federal Power Act, the Commission explained, it "must still review the post-withdrawal arrangements to ensure that they are just, reasonable, and not unduly discriminatory." *Ibid.*

5. The court of appeals denied petitioners' petitions for rehearing en banc without recorded dissent. Pet. App. 123a.

ARGUMENT

Petitioners contend (Pet. 12) that the Federal Power Act requires the two utilities that are withdrawing from the System Agreement to continue to make equalization payments to the remaining four utilities after withdrawal. The court of appeals, however, correctly deferred to the Commission's determination that the Act imposes no such requirement, and that case-specific holding does not conflict with any decision of this Court or another court of appeals. Moreover, as both the Commission and the court of appeals emphasized below, in due course the Commission will review the post-withdrawal arrangements to ensure that they comply with the Federal Power Act's command that rates be just and reasonable. Further review is therefore not warranted.

1. In the orders at issue here, the Commission determined that the System Agreement does not impose any conditions or obligations on parties withdrawing from the Agreement other than the eight years' notice requirement. Pet. App. 27a, 74a-75a. Before this Court, petitioners no longer challenge that interpretation of the System Agreement. Rather, they contend (Pet. 12) that FERC "abdicated" its responsibilities under the Federal Power Act by declining to require continued equalization payments from the two withdrawing utilities, despite the fact that such payments are not required by the agreement. See Pet. 12-13.

That argument lacks merit. The requirement for equalization payments arises from the System Agreement itself, not from any independent duty imposed by the Federal Power Act. As the court of appeals explained, in 1982 FERC "interpreted the Agreement to require that the cost of producing electricity be 'roughly equal' among the Operating Companies." Pet. App. 3a (citing *Louisiana Pub. Serv. Comm'n* v. *FERC*, 522 F.3d 378, 384 (D.C. Cir. 2008)); see System Agreement § 3.01 (mandate that there be "a basis for equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies"). FERC ordered the remedy of equalization payments in 1982 and 2005 "[i]n order to satisfy [that] equality mandate." Pet. App. 3a.

The understanding that that remedy arises from the System Agreement is reflected in decades of judicial precedent from this Court and the D.C. Circuit. See, *e.g.*, *Mississippi Power & Light Co.* v. *Miss. ex rel. Moore*, 487 U.S. 354, 357 (1988) ("The System Agreements have provided the basis for planning and operating the companies' generating units on a single-system basis and for equalizing cost imbalances among the . . . companies."); *Louisiana Pub. Serv. Comm'n* v. *FERC*, 551 F.3d 1042, 1043 (D.C. Cir. 2008) ("[W]e have long viewed the System Agreement as requiring that affiliates share the costs of power generation in roughly equal proportion.").[1] Accordingly, the Commission reasonably determined that the remedy no longer applies once a utility lawfully withdraws from the agreement, Pet. App. 77a, and the court of appeals correctly deferred to that conclusion, *id.* at 10a.

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[1] See also *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) ("Entergy allocates costs through the system agreement[.] [Section] 10 of the system agreement[] allows for cost equalization of shared capacity through a formula"). *Mississippi Indus.* v. *FERC*, 808 F.2d 1525, 1554-1555 ("The operating companies intended to roughly equalize the System's capacity costs among themselves by executing * * * the 1982 System Agreement."), vacated on other grounds, 822 F.2d 1104 (D.C. Cir. 1987); *Louisiana Pub. Serv. Comm'n*, 522 F.3d at 384 (noting that in *Mississippi Industries* the D.C. Circuit had agreed with the Commission that the System Agreement was intended to roughly equalize capacity costs among the utilities); *id.* at 390 (adhering to previous holding that the Commission had "jurisdiction to modify the capacity cost allocation in the System Agreement").

Contrary to petitioners' contention, the court of appeals did not "recast[] the case as one involving contract interpretation" exclusively. Pet. 9. The court acknowledged that petitioners were arguing that a rough-equalization requirement exists independent of the System Agreement. See Pet. App. 9a. It merely rejected that argument as without any sound legal basis. See *id.* at 9a-10a. Petitioners have failed to identify any error in that determination.

2. Petitioners contend that, by declining to impose continuing cost-equalization requirements independent of the System Agreement, the Commission "abandoned the role that this Court envisioned in its preemption rulings." Pet. 13. This Court's preemption rulings, however, have nothing to do with this case. Those decisions established that "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair." *Mississippi Power*, 487 U.S. at 371; see also *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003). That principle has no relevance to petitioners' argument that the Federal Power Act independently requires the Commission to impose a cost-equalization remedy on utilities that are no longer parties to the System Agreement, and the court of appeals did not address preemption.

Nor has the Commission abandoned its duty under the Federal Power Act to ensure that rates are just and reasonable. 16 U.S.C. 824d, 824e. As both the Commission and the court of appeals explained, the orders under review reach "only the obligation of withdrawing Companies under the Agreement." Pet. App. 10a. In due course, the Commission will consider whether Entergy Corporation's post-withdrawal arrangements meet the statutory requirements. See *id.* at 10a, 40a-41a, 77a, 80a. Petitioners' fear (Pet. 12) that the narrow decision below "clears the path for the reinstitution of unduly discriminatory rates in a large region of the country" therefore has no basis. The Commission will continue to enforce the requirements of the Federal Power Act against the utilities and has the authority to consider a range of remedial measures under the Act. But the Federal Power Act does not require the Commission to apply a remedy designed to enforce the terms of a contract to companies that are no longer parties to that contract.

3. Petitioners also argue (Pet. 11, 16-19) that the Commission improperly relied on the "*Mobile-Sierra* doctrine" in its arguments in the court of appeals. That doctrine provides that FERC "must presume" that a rate in a negotiated wholesale-energy contract meets the Federal Power Act's "just and reasonable" requirement, and that the presumption "may be overcome only if FERC concludes that the contract seriously harms the public interest." *Morgan Stanley Capital Grp.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 530 (2008). As petitioners themselves appear to acknowledge (Pet. 16), however, the *Mobile-Sierra* doctrine played no role in the analysis in the court of appeals' opinion or FERC's orders, so that argument supplies no ground for further review.[2]

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[2] Petitioners' contention appears to rest on the Commission's general observation in its appellate brief that focusing on the terms of the System Agreement was consistent with its statutory responsibilities because contracts play an "important role" in the Federal Power Act. See FERC C.A. Br., 2011 WL 4369179, at *27 (quoting *Morgan Stanley*, 554 U.S. at 551).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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