

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ENTERGY LOUISIANA, INC. ,                   :

4                   Petitioner                   :

5           v.                                       :   No. 02-299

6   LOUISIANA PUBLIC SERVICE                   :

7   COMMISSION, ET AL.                       :

8   - - - - -X

9   Washington, D. C.

10    Monday, April 28, 2003

11               The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States at

13   11:02 a.m

14   APPEARANCES:

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

16       the Petitioner.

17   AUSTIN C. SCHLICK, ESQ., Assistant to the Solicitor

18       General, Department of Justice, Washington, D. C. ; on

19       behalf of the United States, as amicus curiae,

20       supporting the Petitioner.

21   MICHAEL R. FONTHAM, ESQ., New Orleans, Louisiana; on

22       behalf of the Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

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

Mr. Carpenter.

ORAL ARGUMENT OF DAVID W. CARPENTER  
ON BEHALF OF THE PETITIONER

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

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

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

1 ORAL ARGUMENT OF MICHAEL R. FONTHAM

2 ON BEHALF OF THE RESPONDENTS

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

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

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

14 (Laughter.)

15 MR. FONTHAM Thank you, Your Honor.

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

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

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

21 QUESTION: Because?

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

25 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-subsidiary 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 Entergy 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   remaining.  
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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