No. _____

In the Supreme Court of the United States

PAUL HUDSON, *ET AL.*,
Petitioners,

v.

AEP TEXAS NORTH COMPANY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003), the Court reserved the question whether States are preempted from deciding that a utility violated its Federal Energy Regulatory Commission (FERC) tariff. As *Entergy* recognized, the filed-rate doctrine requires States to give effect to federal tariffs when setting retail rates. When disputes over the meaning of FERC tariffs arise in retail rate proceedings, are States preempted from interpreting those tariffs to ensure that the filed rate is used?

PARTIES TO THE PROCEEDING

Petitioners are Paul Hudson in his official capacity as the Chairman of the Public Utility Commission of Texas, Julie Parsley in her official capacity as Commissioner of the Public Utility Commission of Texas, and Barry Smitherman in his official capacity as Commissioner of the Public Utility Commission of Texas.

Respondents are AEP Texas North Company; the Cities of Abilene, Ballinger, Cisco, San Angelo, and Vernon, Texas; and Texas Industrial Energy Consumers.

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This case raises the question that the Court expressly reserved in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39 (2003): whether federal law preempts a State from deciding that a utility's implementation of a FERC-filed tariff violates the terms of that tariff. The answer to this question involves the interplay of federal and state authority in the regulation of electric rates. It is beyond question that the right to establish reasonable interstate wholesale rates lies exclusively with the federal government. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988). Conversely, authority over retail rates has been reserved to the States. *Id.* at 373 (recognizing "undoubted" state jurisdiction over retail rates). States must

allow recovery of the wholesale rates mandated by the federal tariff when setting retail rates. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986). This requirement is embodied in the filed-rate doctrine, whose basic principle is that the rate on file with FERC is the only lawful rate that may be charged. *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951). This doctrine applies not only to rates per se, but also to allocations among utilities in an interstate utility system. *Nantahala*, 476 U.S. at 966. Thus, "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." *Mississippi Power*, 487 U.S. at 371.

The issue in this case is whether a State can, in the context of a retail rate-making proceeding, decide a contested issue as to the amount that is due under the FERC tariff, or whether only FERC may resolve any such dispute. The court of appeals held that the State was preempted from construing the tariff until FERC had considered and resolved the issue. This holding contravenes the Court's prior decisions on the filed-rate doctrine and threatens the authority of States to effect timely rate relief. The Court should grant the petition to answer the question left open in *Entergy* and to clarify that FERC's exclusive jurisdiction to establish rates does not preempt States from construing those FERC-filed tariffs so that the filed rate may be recovered in retail rates.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1- 9) is reported at 473 F.3d 581 (5th Cir. 2006). The court of appeals' denial of the petition for panel rehearing and rehearing en banc (Pet. App. 25-26) is unreported. The district court's Memorandum Opinion and Order (Pet. App.10-22) is reported

at 389 F. Supp.2d 759 (W.D. Tex. 2005), and the final judgment (Pet. App. 23-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2006. The order of the court of appeals denying the petitions for panel rehearing and rehearing en banc was entered on January 26, 2007. Pet. App. 25-26. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

AEP Texas North Company (TNC) is a subsidiary of American Electric Power Company (AEP) and serves retail customers in northern and western Texas subject to the jurisdiction of the Public Utility Commission of Texas (PUCT). As required by Texas law, TNC commenced a proceeding at the PUCT to reconcile its past fuel expenses and revenues. The PUCT was to use any resulting under-recovered balance to establish a charge to be paid by customers in TNC's service area. Part of the fuel expense that TNC claimed was the cost of power purchased from third-party utilities. Under PUCT

regulations, utilities must offset such purchased-power expenses with revenues that they earn from wholesale power sales. 16 Tex. Admin. Code § 25.236(a)(7)(C).

As a subsidiary of AEP, TNC's income from such off-system sales is determined in part by a FERC-approved tariff called the System Integration Agreement (SIA). The SIA provides, among other things, that profits from certain off-system sales are to be divided between the companies in AEP's two operating regions—the AEP West and the AEP East—according to a specific formula. Once allocated between the regions, the margins are further subdivided among the various subsidiaries in each region according to other tariffs. The SIA formula allocates the margins between regions based in part on margins each region produced in prior years. Significantly, the SIA defines those margins as the "revenues collected" for each sale less the costs incurred in conducting the sale.

In the PUCT proceedings, ratepayer groups challenged the amount of off-system sale margins that TNC claimed under the SIA, arguing that the utility had acted contrary to the tariff by including in the tally of "revenues collected" the market value of open transactions—sales in which no revenues had yet been collected. This resulted in a greater share of margins allocated to AEP East. And AEP was not required to share margins with all of its customers in AEP East as it was for the Texas utilities in AEP West. Thus, AEP benefitted by including the uncollected, open transactions in its calculations of margins. Indeed, TNC stipulated that the effect of including the open-transaction values in the SIA profit calculations was to decrease the amount TNC shared with its ratepayers.

The PUCT ultimately agreed with the ratepayer groups that the federal tariff required TNC to include only those revenues

that had been collected. The PUCT's final order reduced TNC's final fuel balance to reflect the resulting obligation to share additional amounts with its ratepayers. Pet. App. 34.

TNC challenged the PUCT's order in federal district court, contending that the PUCT was prohibited from disagreeing with the utility's application of the SIA under the Court's opinion in *Entergy*. The district court exercised jurisdiction to consider TNC's claim of preemption under the Supremacy Clause of the United States Constitution (Art. VI., cl. 2) pursuant to 28 U.S.C. § 1331. The district court enjoined the Commissioners from enforcing the part of their order that credited TNC's retail ratepayers with the disputed amount. Pet. App. 24.

The court of appeals affirmed the judgment of the district court, holding that "FERC not the state, is the appropriate arbiter of any disputes involving a tariff's interpretation." Pet. App. 8.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT ISSUE RESERVED BY THE COURT IN *ENTERGY*: WHETHER A STATE, IN SETTING RETAIL RATES, MAY DECIDE A DISPUTE ABOUT THE MEANING OF A TARIFF FILED WITH THE FEDERAL ENERGY REGULATORY COMMISSION.

This case presents a clean set of facts upon which to resolve the question left open in *Entergy*. Because the great majority of States are affected by this question, and because the court of appeals has adopted a rule that alters long-standing practices, this question warrants immediate clarification.

A. In *Entergy*, the Court Reserved the Issue of State Authority to Interpret Federally Filed Tariffs.

The primary issue decided in *Entergy* was whether Louisiana was preempted from finding that the utility had acted imprudently when the federal tariff delegated discretion to the utility to determine a matter affecting an interstate cost allocation. 539 U.S. at 41-42. The Court held that when a tariff filed with FERC authorizes an interstate utility to decide a specific matter that affects the allocation of costs among the utility's state-jurisdictional affiliates, States may not second guess the prudence of the utility's decision in setting retail rates. 539 U.S. at 50.

Louisiana also argued that, even if it could not consider the prudence of the utility's decision, it *could* find that the utility violated the relevant tariff provisions. *Id.* The Court concluded, however, that the point could not be reached because the Louisiana commission had not found a violation of the tariff in its order. *Id.* at 51 ("[T]he question before us is whether the LPSC's order is pre-empted under *Nantahala* and *MP&L*, and that order does not rest on a finding that the system agreement was violated."). The Court thus concluded that "we have no occasion to address the question of the exclusivity of FERC's jurisdiction to determine whether and when a filed rate has been violated." *Id.*

B. The Court of Appeals Decided the Question Reserved in *Entergy*.

This case presents the question that the Court did not reach in *Entergy*. In reviewing the expenses TNC claimed, the PUCT construed the FERC-filed SIA and determined that TNC had not complied with the tariff. Rather than accepting TNC's interpretation, the PUCT applied what it determined to be the correct allocation under the SIA's formula. The courts below,

relying on *Entergy*, found that the PUCT was preempted from interpreting the FERC-filed tariff and held that only FERC can determine whether the tariff has been violated. Pet. App. 9.

C. A Decision About Interstate Allocations Among Electric Utilities Has Broad Impact.

Whether States may construe federal tariffs is a matter of fundamental importance that needs to be decided. Allocative tariffs like the SIA control significant quantities of costs and revenues shared among state-jurisdictional utilities throughout the country. Forty-two of the forty-eight contiguous States are served by subsidiaries of interstate public-utility holding companies.[1] AEP alone serves more than five million customers in eleven States.[2] When a parent company incurs costs that cannot be attributed to any one subsidiary, it must distribute those costs among its subordinates. Because of their interstate impact, those costs are often allocated pursuant to FERC-approved tariffs.

D. State Retail Rate-Making Proceedings Must Address These Allocated Costs and Revenues.

As the Court has recognized, "the cost allocation between operating companies is crucial to the setting of retail rates." *Entergy*, 539 U.S. at 42. In proceedings to change retail utility rates, States must decide whether the utility has properly accounted for all costs and revenues, including those claimed under FERC-established allocations. Rate cases are generally

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1. Michael Murphy, National Regulatory Research Institute, Holding Companies Registered under PUHCA and Their Regulated Utility Subsidiaries, 2-6 (Oct. 2005), *available at* http://www.nrri.ohio-state.edu/dspace/bitstream/2068/807/1/05-15.pdf.

2. *See* AEP: About Us, http://www.aep.com/about/default.htm (last visited Apr. 23, 2007).

substantial undertakings involving significant state resources and large sums of money. As one would expect, ratepayer groups and regulated utilities frequently disagree on any number of matters. Yet the Fifth Circuit has held that, when "any dispute" arises as to the proper construction of a FERC tariff, States may not decide the dispute. Pet. App. 9. Instead, States in the Fifth Circuit must abate their rate proceedings and file a request with FERC to have the contested issue resolved—no matter how insignificant the dispute or unfounded the position.

E. The Court of Appeals' Decision—That All Disputes About FERC Tariffs Must Be Referred to FERC—Adversely Impacts State and Federal Regulation.

Automatically sending all such disputes to FERC would substantially impede both state and federal regulatory efforts. Requiring States to halt retail rate proceedings to seek FERC resolution of any disagreement would likely result in an additional delay of months, if not years, before new retail rates

could be set.[3] FERC, moreover, would be tasked with the expanded caseload attributable to challenged tariff interpretations even though FERC itself has recognized that not all actions to enforce a FERC tariff require the exercise of FERC jurisdiction. *See City of Glendale, Cal. v. Portland General Electric Co.*, 115 FERC ¶ 61231, 61848 (2006); *Kentucky Utils. Co.*, 110 FERC ¶ 61285, 62102-03 (2005).

Moreover, if utilities adopt erroneous interpretations of their own tariffs, States might acquiesce in those interpretations rather than face the delays accompanying federal review. In this way, a primary purpose of the filed-rate doctrine—to ensure that utilities are held to the rates on file with FERC—would be defeated. *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998).

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3. Although FERC does not maintain aggregate performance statistics, the delays accompanying FERC proceedings are well known. *See Anadarko Petroleum Corp. v. Federal Energy Regulatory Comm'n*, 196 F.3d 1264, 1268 (D.C. Cir. 1999) (noting "snail-like pace" of FERC proceedings). Indeed, FERC dockets referenced in this petition demonstrate this point. *See Entergy Services, Inc. and Gulf States Utils. Co.*, 80 FERC ¶ 61197 (1997) (taking three years and nine months to determine that Entergy violated system tariff by including mothballed units as); *City of Glendale, Cal. v. Portland Gen. Elec. Co.*, 115 FERC ¶ 61231 (2006) (taking over seven months to finally decide that FERC had no primary jurisdiction to consider dispute); *Kentucky Utils. Co.*, 110 FERC ¶ 61285 (2005) (taking over eight months to finally determine that FERC had no primary jurisdiction to consider dispute).

II. THE COURT SHOULD CLARIFY THAT STATE COMMISSIONS ARE NOT PREEMPTED FROM DETERMINING WHETHER A UTILITY COMPLIED WITH ITS FERC TARIFF.

A. FERC Is Not the Exclusive Venue for Deciding a Dispute About the Meaning of a Tariff.

Although only FERC may set interstate wholesale electric rates, other authorities may *construe* the tariff. The Court has long held that a state court can interpret a federal tariff to settle a dispute even though the State is preempted from setting the rate. In *Great Northern Railway Co. v. Merchants' Elevator Co.*, 259 U.S. 285 (1922), this Court recognized the difference between setting rates and construing the filed tariff. Merchants' Elevator Company had sued the railroad in state court, alleging that the railroad had not charged rates that complied with its tariff. The question was one of tariff construction: specifically, whether the rule in the tariff or the tariff's exception to the rule applied to the service provided. The railroad claimed that the trial court lacked jurisdiction over the suit until the Interstate Commerce Commission decided the proper construction of the tariff, but this Court disagreed and found that the state court could construe the tariff. In reaching this conclusion, the Court recognized a distinction between setting rates—a legislative function unique to the federal agency—and determining whether a tariff was violated in order to decide a contract dispute:

> To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. . . . *But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in*

> *character from those presented when the construction of any other document is in dispute.*

259 U.S. at 291 (emphasis added). FERC itself has recognized that disputes over the meaning of FERC tariffs can be decided by state courts. *See City of Glendale, Cal. v. Portland General Elec. Co.*, 115 FERC ¶ 61231, 61847-48 (2006) (ruling that state court claim seeking only to enforce the filed rate, not to alter it, did not require exercise of FERC jurisdiction); *Kentucky Utils. Co.*, 110 FERC ¶ 61285, 62102-03 (2005) (holding that state court suit that "only seeks enforcement of an existing [FERC-filed] contract and not the setting of new just and reasonable rate . . . does not fall within the Commission's exclusive jurisdiction.").

Just as state courts may construe federal tariffs to perform their adjudicative roles, so should the PUCT be permitted to construe TNC's federal tariff to perform its regulatory function: setting retail rates that include the amounts due under the federally filed wholesale tariff.

The PUCT did not set wholesale electric rates; FERC set those rates when it approved the SIA. A formula in that tariff required computation of the revenues collected from off-system sales. The question the PUCT considered was whether interim estimates of the value of uncompleted transactions were "revenues collected." To set retail rates, the PUCT had to interpret the federal tariff; but the PUCT did not set interstate wholesale rates.

B. Preemption Is Not Necessary to Preserve Uniform Application of FERC-Filed Allocation Tariffs.

The Commissioners acknowledge the need for uniform application of interstate tariffs among the States. But this need does not overcome the PUCT's authority to construe the federal

tariff. The need for uniformity was claimed as a justification for preemption in *Great Northern* and *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). In both cases, the Court recognized that the ultimate availability of resort to this Court was sufficient to ensure the needed uniformity. That same process can provide uniformity in this case. Both state and federal courts may review the PUCT's construction of a filed FERC tariff, and in either case, further appeal to this Court remains available.

Allowing States to interpret federal tariffs when interpretation is necessary for a state agency to set retail rates does not preclude resort to the federal agency in all cases. When the federal tariff cannot be interpreted without a policy determination by FERC, either the state agency or the reviewing court can refer the question to the federal agency, with the doctrine of primary jurisdiction providing a framework for determining when referral is necessary.

The Court distinguished between questions within a federal agency's exclusive jurisdiction and those subject to the doctrine of primary jurisdiction in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956). There the Court was presented with claims both that the carrier had not complied with its tariff and that the tariff was unreasonable. Reasonableness of the tariff was a rate-setting question within the exclusive jurisdiction of the federal agency. *Id.* at 62-65. In addition, the Court found that one question of tariff compliance should have been referred by the Court of Claims to the Interstate Commerce Commission as a matter of primary jurisdiction. *Id.* at 63-65. Primary jurisdiction applies where a court has jurisdiction over a claim, but the court should nonetheless to refer some issue within the claim to a regulatory agency because the issue is within the agency's special competence. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

Similarly, state commissions can ensure uniformity by deferring to FERC when appropriate as a court would under the doctrine of primary jurisdiction.[4] State commissions are capable of interpreting tariffs, and many instances of FERC tariff application are so straightforward that resort to the FERC is unnecessary. For example, in the *Nantahala* case, the federal agency had approved a tariff allocating 22.5% of low-cost hydroelectric power to the Nantahala utility. If the Court had followed the Fifth Circuit's present rule that any dispute requires FERC's exclusive attention, then North Carolina would

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4. As a recent example, the PUCT abated its proceeding to obtain a decision within the special competence of a regulatory agency in Tex. Pub. Util. Comm'n, *Petition by UTex Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act, and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone, L.P. d/b/a SBC Texas*, Docket 26381 (June 22, 2006) (Order Abating Proceeding). The PUCT opted to defer decision in an arbitration until the Federal Communications Commission decides whether certain services are information services subject to one set of statutes and rules or telecommunications services subject to a different set of statutes and rules. Other States have also referred issues to federal agencies with primary jurisdiction. *See, e.g.*, Idaho Pub. Util. Comm'n, *In the Matter of the Application of Pagedata for Approval of an Amendment to a Paging Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(e)*, Case NO QWE-T-03-6 (Oct. 6, 2004) (Order at 7) (Ordering issue within primary jurisdiction of FCC referred to that agency); Kansas Corp. Comm'n, *In the Matter of the Complaint of Seminole Energy Services Requesting a Commission Investigation of the Rates, Fees, and Practices of Atmos Energy and its Wholly Owned Affiliate, Woodward Marketing, LLC*, Docket No. 03-ATMG-965-COM (Jan. 16, 2004) (Order at 10-11) (Ordering issue within primary jurisdiction of FERC referred to that agency).

have been powerless to apply the approved 22.5% share if any party to the retail rate-making proceeding had argued that a different percentage was required under the tariff. Resort to the federal agency would have been necessary even though the appropriate allocation was hardly disputable. Under such facts, the only consequence of resort to FERC would be delaying the state retail rate proceedings and wasting FERC's resources. Some tariff disputes may raise policy questions that *do* require referral to FERC, but the court of appeals' decision that all disputes should be referred to FERC ignores the difference. Preemption is unnecessary to protect the federal interests at stake.

Unlike requiring preemption, applying the doctrine of primary jurisdiction would allow the States to decide those questions of tariff interpretation that are not within the special competence of the federal agency. And, just as a court's improper refusal to refer under the doctrine of primary jurisdiction can be overturned on appeal, a state agency's improper refusal to refer an issue within FERC's special competence could be reversed. In addition, a court reviewing the correctness of the State's interpretation of the federal tariff could, itself, refer the issue to FERC under the doctrine of primary jurisdiction.

C. The Court of Appeals Erroneously Found That the *Entergy* Line of Cases Answers the Question Presented.

The court of appeals' decision is not compelled by the line of cases in which this Court has found an encroachment by States on FERC's rate-setting authority. *See Mississippi Power*, 487 U.S. at 373 ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."); *Nantahala*, 476 U.S. at

964 (holding that under the filed-rate doctrine a state court is preempted from deciding the reasonableness of a federal rate); *Entergy*, 539 U.S. at 49-50 (denying state authority to determine whether the utility prudently exercised discretion granted in a FERC tariff). Each of those cases involved a State conducting a prudence inquiry about allocations prescribed by a FERC tariff. In *Nantahala*, the North Carolina agency decided it was imprudent for the utility to be allocated less than 24.5% of the low-cost hydroelectric power. But the Federal Power Commission had already decided that 22.5% should be allocated to Nantahala. 476 U.S. at 958-60. In *Mississippi Power*, the Mississippi Supreme Court held that the Mississippi agency should determine whether the utility was prudent to acquire power from a nuclear power plant, even though FERC had already allocated a percentage of the electricity from that plant to the utility. 487 U.S. at 356. In *Entergy*, the Louisiana commission held that Entergy imprudently included mothballed units in wholesale rates. This Court noted that the FERC-approved tariff left "the classification of ERS units to the discretion of the [utility] operating committee." 539 U.S. at 49. Because the FERC tariff set out "how and by whom that classification should be made," *id.* at 50, the state agency, by assessing the prudence of Entergy's decision that certain plants were available, impermissibly challenged the reasonableness of FERC's tariff that granted the utility discretion to make that decision.

By considering the reasonableness of rates, States in *Nantahala, Mississippi Power,* and *Entergy* encroached on authority expressly granted by the Congress to FERC. Determining the prudence or reasonableness of expenses is a matter inherent to the setting of rates. *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 905 (4th Cir. 1987) ("[T]he prudence inquiry is inseparable from an inquiry

into [the rate's] justness and reasonableness."). Only FERC can determine whether interstate wholesale rates are just and reasonable. *See Montana-Dakota*, 341 U.S. at 251 (explaining the difference between the reasonableness decisions made by courts and the reasonableness decisions made by agencies in the process of setting rates).

Here, the PUCT does not dispute that it is preempted from deciding the justness or reasonableness of the allocation in the SIA. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581 (1981). Rather, the PUCT is simply requiring TNC to comply with the tariff set by FERC in approving the SIA. As recognized in *Great Northern*, requiring compliance with a tariff is distinct from setting rates. 259 U.S. at 291. Indeed, for that reason both federal courts and federal agencies are authorized to enforce a tariff. *See* 16 U.S.C. § 825e (allowing FERC to investigate whether a utility has violated a FERC order); 16 U.S.C. § 825p (allowing a suit to enforce compliance with a FERC tariff).

The question of the correct construction of a tariff is not limited to an action to enforce the tariff at FERC or in a federal district court under the Federal Power Act. *Pan American* shows that a tariff-construction question may arise in the context of a lawsuit, and that such a lawsuit may be brought in state court. *See* 366 U.S. at 664-65. Similarly, a dispute about the meaning of a federal tariff may arise in the context of a retail rate case and be decided by the state agency.

Both the utility and the State are bound by the filed rate. This Court has held that "the right to a reasonable rate is the right to the rate which the [FERC] files or fixes . . . ." *Montana-Dakota*, 341 U.S. at 251. The SIA conclusively and exclusively states the rights and liabilities of a utility. *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853

(9th Cir. 2004) ("Under the filed rate doctrine, the terms of the filed tariff are considered to be the law and to therefore, conclusively and exclusively enumerate the rights and liabilities of the contracting parties." [internal quotes omitted]). Thus, the PUCT was obligated by federal law to include the amounts set by TNC's federally filed tariff. To comply with that law, the PUCT had to construe the SIA.

TNC is also obligated to charge only the filed rate. *Id.* The utility cannot avoid that obligation by charging something other than the filed rate and then claiming that costs would be illegally trapped if the utility could only recover the filed rate through its retail rates.

Additionally, TNC cannot escape its duty to comply with the federally filed tariff by claiming it was granted *Entergy*-type discretion. *Entergy* did not hold that a utility always has discretion to determine the amount of its filed rate. The utility's discretion in that case rested on the wording of the FERC-approved tariff. Entergy's tariff allowed a mothballed generator to be treated as available, and, therefore, included in rates "if the [utility] operating committee determines it intends to return the unit to service at a future date." *Entergy*, 539 U.S. at 44. Thus, the FERC-filed tariff made the utility committee's intent the critical factor in determining whether a generator was included in rates.

But *Entergy* did not shift all discretion to set wholesale electric rates to the utility. When a FERC-filed tariff requires a certain action, the utility is bound by that tariff requirement. The company cannot claim that the mere duty under the tariff to perform a calculation constitutes discretion to decide the rate. The railroad in *Great Northern* was required to implement its tariff, but that obligation did not amount to delegating discretion to the utility to determine which rule applied.

Likewise, the fact that the SIA requires the utility to make certain calculations does not in any sense constitute a grant of discretion to determine how the allocation should be made.

In sum, States are not preempted from interpreting FERC tariffs. The State must include any and all FERC-authorized wholesale expenses when setting retail rates. In most cases, the State can easily determine whether the amounts claimed comply with the tariff. But if the interpretation of the tariff requires exercise of FERC discretion, a State can seek clarification from FERC as States have done in the past. In the event that a State proceeds without seeking necessary FERC review, that decision could be reversed. But the court of appeals' rule of preemption barring States from simply considering the tariff's meaning is not compelled by law and is unnecessary.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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