No. 18-333

In the
Supreme Court of the United States

OLD DOMINION ELECTRIC COOPERATIVE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF *AMICUS CURIAE* ALLIANCE FOR COOPERATIVE ENERGY SERVICES POWER MARKETING LLC (ACES) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Alliance for Cooperative Energy Services Power Marketing LLC ("ACES") is a Delaware limited liability company that participates, as agent on behalf of its members and customers, in wholesale electricity markets subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), including the markets operated by PJM Interconnection, L.L.C. ("PJM").

ACES is owned by twenty-one (21) rural electric cooperatives ("ACES Members"), including Petitioner Old Dominion Electric Cooperative ("ODEC"). Each ACES Member owns an equal percentage share of ACES in the amount of 4.76%. As such, no single ACES Member exercises control over ACES.[1]

As an agent for participants in FERC-regulated markets, and due to its role submitting bids and offers on behalf of entities transacting in those markets, ACES has an interest in ensuring that the authority of the FERC to establish just and reasonable rates is properly interpreted.

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[1] Pursuant to Rule 37.6, ACES affirms that no counsel for a party authored this brief in whole or in part and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity, other than ACES, made such a monetary contribution to the preparation or submission of the brief. Because ACES' decision to file this brief was made within 10 days of the due date, the parties' counsel of record did not receive notice of the intention of ACES to file this brief at least 10 days prior to the due date. However, all parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") warrants review by this Court, because the D.C. Circuit and the FERC have interpreted this Court's prior holdings in a manner that unnecessarily prevents the FERC from ensuring just and reasonable rates and may have significant, negative consequences far beyond the parties in this case.

By overstating the limitations on the FERC's authority to grant a waiver of certain provisions of PJM Open Access Transmission Tariff ("Tariff") and Operating Agreement ("OA") that would enable ODEC to recover nearly $15 million in make-whole payments promised by PJM, the D.C. Circuit has jeopardized the FERC's ability to fulfill its statutory obligations going forward and is risking the ability of electric transmission operators (e.g., PJM) to maintain system reliability at times when extraordinary circumstances like the 2014 "Polar Vortex" create unanticipated challenges.

In affirming the FERC's refusal to grant the requested waivers, the D.C. Circuit conflated the filed rate doctrine and the general prohibition against retroactive ratemaking. While related and complementary, the two concepts are distinct. "The considerations underlying the [filed rate] doctrine … are preservation of the agency's primary jurisdiction over the reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (hereinafter "*Arkla*") (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). That is, the filed

rate doctrine is designed to protect the agency from encroachment upon its exclusive authority, not to limit the agency's ratemaking authority.

On the other hand, the general prohibition against retroactive ratemaking is rooted in the statutory limits on the FERC's authority. This rule "prevents the Commission itself from imposing a rate increase for [electricity] already sold." *Arkla*, 453 U.S. at 578. This general prohibition against retroactive ratemaking, however, is not absolute, and the relevant timing for determining whether a rate is retroactive is not necessarily the date that the rate is filed with the FERC. *See id*.

Here, the rate change requested by ODEC did not implicate the concerns underlying the prohibition against retroactive rulemaking. The request was not retroactive because, prior to ODEC incurring the costs, PJM assured ODEC that, "if ODEC purchased natural gas in order to run its units as scheduled by PJM, ODEC would be made whole for its fuel costs." Pet. App. 22a. In doing so, PJM, as the entity responsible for procuring electricity from generation owners to serve demand within its region, made a promise to ODEC that ODEC would be kept whole, and ODEC relied upon that promise in its fuel procurement decisions.

Ultimately, the confiscatory rate paid to ODEC was unjust and unreasonable on its face, and ODEC's recovery of its actual costs (as promised by PJM) would be just and reasonable. *See PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, 61,148 (2014) (approving waiver of certain PJM Tariff and OA provisions on a prospective basis). FERC's failure to reach the merits of the waiver request, which the

D.C. Circuit affirmed, incorrectly short-circuited the analysis.

In short, this case affects more than a single generation owner that sought just and reasonable compensation and fulfillment of promises that induced the owner to procure natural gas to support electric power-system reliability. If the D.C. Circuit's opinion is allowed to stand, it will undermine the FERC's ability to fulfill its mandate to ensure that all rates and charges are just and reasonable and may undercut electric power system reliability in the future.

ARGUMENT

I. The D.C. Circuit's Opinion Is Contrary To This Court's Prior Decisions.

The D.C. Circuit's opinion is contrary to this Court's prior decisions developing the filed rate doctrine and the general prohibition against retroactive ratemaking. At its core, the analysis of the D.C. Circuit misses the mark by conflating the filed rate doctrine and the general prohibition against retroactive ratemaking. Pet. App. 3a ("Those rules mandating the open and transparent filing of rates and broadly proscribing their retroactive adjustment are known collectively as the filed rate doctrine.") (internal quotations omitted).

The filed rate doctrine and the prohibition against retroactive ratemaking are related, but they address separate and distinct statutory purposes and must each be analyzed separately to prevent the distortion of either. These concepts, correctly construed, make clear that the D.C. Circuit's decision to affirm the FERC's decision should not stand.

When properly applied, the filed rate doctrine can never stand as a barrier to the FERC reaching the merits of a rate filing. Likewise, although the FERC is limited in its ability to engage in retroactive ratemaking, those limitations do not prevent the FERC from reaching the merits of ODEC's waiver petition.

A. *The Filed Rate Doctrine Does Not Prevent FERC from Granting ODEC's Waiver Request.*

The filed rate doctrine provides that "no regulated seller is legally entitled to collect a rate in excess of the one filed with the Commission for a particular period." *Arkla*, 453 U.S. at 576; *see also Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("the right to a reasonable rate is the right to the rate which the Commission files or fixes").

The doctrine is intended to *protect*—not limit—the authority of the Commission. *Arkla,* 453 U.S. at 577-78 ("The considerations underlying the doctrine … are preservation of the agency's primary jurisdiction over the reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.") (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). While its origins can be traced to this Court's cases interpreting the Interstate Commerce Act ("ICA"), its applicability to electricity is derived from the exclusive authority granted to the FERC in the Federal Power Act ("FPA"). *Mont.-Dakota Utils. Co.*, 341 U.S. at 250, 258.

Because the filed rate doctrine is intended to preserve the FERC's authority to determine and au-

thorize a just and reasonable rate, the D.C. Circuit's misinterpretation of the doctrine thwarts the doctrine's statutory purpose of empowering the FERC by viewing it as an impediment to the FERC's ability to exercise its authority.

B. *The Prohibition Against Retroactive Ratemaking Does Not Prevent FERC from Granting ODEC's Waiver Request.*

The prohibition against retroactive rates, as articulated by this Court, is rooted in the fact that the FERC's authority to impose just and reasonable rates is generally limited to setting rates on a prospective basis. *Arkla*, 453 U.S. at 578. In *Arkla*, this Court interpreted Section 5 of the NGA[2] and found that "the Commission itself has no power to alter a rate retroactively." *Id*. The equivalent provision of the FPA (Section 206) contains the same forward-looking language as Section 5 of the NGA. 16 U.S.C. § 824e(a) ("the Commission shall determine the just and reasonable rate … to be *thereafter* observed and in force.") (emphasis added).

The same forward-looking language, however, is conspicuously absent from Section 205, which is the provision of the FPA applicable to filing new rates and changes to existing rate schedules (as opposed to challenging filed rates). Pet. App. 80a-81a. This subtle difference perhaps explains why this Court described narrowly the scope of the prohibition

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[2] Because the relevant provisions of the Federal Power Act and the Natural Gas Act "are in all material respects substantially identical," this Court has an established practice of "citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkla*, 453 U.S. at 578 n.7.

against retroactive ratemaking, by confining it to two specific acts: (1) "the Commission may not *impose* a retroactive rate alteration," *Arkla*, 453 U.S. at 578 n.8; and (2) "the Commission *itself*" cannot "impos[e] a rate increase for [electricity] already sold," *id.* at 578 (emphasis added).

Even if the prohibition against retroactive ratemaking somehow applies to Section 205 of the FPA, this Court has observed that "nothing in the [FPA] forbids parties to set their rates by contract." *Id.* at 582. In fact, "the Commission itself lacks affirmative authority, absent extraordinary circumstances, to 'abrogate existing contractual arrangements.'" *Id.* (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 820 (1968) (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 377-78 (1956))).

This ability to agree to rates privately is important because a private agreement can impact whether a rate is retroactive or prospective. *See Arkla*, 453 U.S. 578 n.8 (the FERC "may, for good cause shown, 15 U.S.C. § 717c(d), waive the usual requirement of timely filing of an alteration in a rate") (internal quotations omitted). For example, in *Arkla*, the FERC entertained a request to replace a filed rate with a revised rate from a private agreement, such that the revised rate would have an effective date years prior to FERC receiving it. *Id.* at 576 n.6.

In fact, the D.C. Circuit has recognized that the retroactive rate prohibition does not apply when parties agreed to the change, even if the change was not filed with the FERC. *City of Pigua v. FERC*, 610 F.2d 950, 954-55 (D.C. Cir. 1979) (effective date

based on existing agreement prior to filing date not retroactive).

In this case, because the parties to the sale (PJM and ODEC) agreed in advance that PJM would make ODEC whole for the costs ODEC would incur to stand ready to sell electricity to PJM, there was no retroactive ratemaking. The fact that the adjusted rate was not filed with the FERC prior to ODEC incurring the costs is immaterial to the prospective character of the adjustment.

II. The FPA's Core Mandate and FERC's Practice of Waiving its Filing and Notice Requirements Weighs Against Denial of ODEC's Request.

While the filed rate doctrine and general prohibition against retroactive ratemaking are derived from the FPA, the core mandate of the FPA is that all rates must be just and reasonable. *See* 16 U.S.C. § 824d. That statutory directive weighs against any hasty denial of ODEC's waiver request.

Section 205 authorizes the FERC, for good cause shown, to waive its filing and notice requirements. *Id*. § 824d(c). In fact, late notice filings are so common that the FERC has addressed waiver of the obligations in an order that refines the policy regarding prior notice. *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993) (hereinafter "*Prior Notice Order*"), *order on reh'g*, 65 FERC ¶ 61, 081 (1993).

Pursuant to the *Prior Notice Order*, the Commission will authorize rates for electricity already sold (without prior notice) subject to a refund of interest on the proceeds for the period of time between when

the proceeds were received and the effective date of the order authorizing the sales. *Id.* at ¶ 61,980. In the case of market-based sales, the FERC requires additional refunds of any revenues resulting from the difference between the market-based rate and a cost-justified rate. *Id.* The *Prior Notice Order* thus expressly contemplates that waivers of prior-notice requirements are available under appropriate circumstances.

Here, before ODEC procured natural gas at extremely high prices, and certainly prior to committing to sell electricity to PJM, ODEC and PJM communicated regarding the price of any such electricity, and PJM committed to keeping ODEC whole for the costs it would incur to support system reliability during the Polar Vortex. Pet. App. 7a. This fact is undisputed in the record, and in the FERC proceeding, PJM supported ODEC's efforts to make good on PJM's promise. Pet. App. 36a-37a. The FERC acknowledged in its January 24 Order that providing a waiver of the offer cap was "necessary to address the reliability concerns posed by the sustained extreme weather . . . and maintain confidence in market operations," but nonetheless denied ODEC's request for recovery of these costs.[3] *See PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, 61,148 (2014). By affirming the FERC's failure to reach the merits of the waiver request, the D.C. Circuit incorrectly short-circuited the FERC's analysis, thereby sowing doubt as to PJM's ability to address reliability con-

[3] Notably, the "offer cap" at issue in this case does not equate to a "rate cap." The offer cap applies to only one component of the price paid for electricity. Many variables—most of them unknowable—contribute to the ultimate price paid by consumers.

cerns in real-time when they arise during extraordinary circumstances like the Polar Vortex.

Even under the D.C. Circuit's flawed reasoning that prior notice is necessary before the FERC can grant a waiver, the D.C. Circuit failed to recognize that the entire PJM market *did* receive notice of PJM's intent to keep generation owners whole for the costs they incurred. This notice is reflected by a statement PJM published on its website expressing its intent to seek a retroactive waiver to make generation owners whole. Pet. App. 7a. The D.C. Circuit rejected this notice by theorizing that notice must be included in a formula rate, Pet. App. 12a-13a, but such a narrow reading is inconsistent with the purpose of the FPA to ensure just and reasonable rates. Moreover, all interested parties have an opportunity to challenge the just and reasonableness of the waiver on its merits. 16 U.S.C. § 824d(e) (providing for suspension of rates and hearings).

As this Court has explained in other contexts, "when there is a conflict between the filed rate and the contract rate, the filed rate controls." *Arkla*, 453 U.S. at 582. But here, ODEC's waiver request at most presented a conflict between an existing filed rate and a proposed filed rate, and the FPA clearly prescribes the standard for FERC's resolution of the conflict: justness and reasonableness. Because the filed rate doctrine is intended to protect the FERC's authority to determine the just and reasonable rate, the D.C. Circuit incorrectly invoked that maxim to deny the FERC an opportunity to make a just and reasonable determination. Pet. App. 15a. The D.C. Circuit's fundamental misapprehension of these im-

portant principles governing the FERC's authority warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

October 15, 2018 Respectfully submitted,

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