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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ADRIENNE ELIZABETH CLAIR
THOMPSON COBURN LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006-1167
(202) 714-6247
aclair@thompsoncoburn.com

DENNIS LANE
Counsel of Record
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave. N.W.
Suite 800
Washington, D.C. 20006-4605
(202) 785-9100
dennis.lane@stinson.com

Counsel for Petitioner
Old Dominion Electric Cooperative

November 27, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page(s)

American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998) 6

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 1, 7

City of Girard v. FERC, 790 F.2d 919 (D.C. Cir. 1986) 7

Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791 (D.C. Cir.), *cert. denied*, 498 U.S. 907 (1990) 7, 8

Duke Energy Corp. v. FERC, 892 F.3d 416 (D.C. Cir. 2018) 5

E. & J. Gallo Winery v. Encana Corp., 503 F.3d 1027 (9th Cir. 2007) 6

FERC v. Electric Power Supply Ass'n, 136 S. Ct. 760 (2016) 2, 3, 4

NStar Elec. & Gas Corp. v. FERC, 481 F.3d 794 (D.C. Cir. 2007) 2

Pub. Util. Comm'n of State of Cal. v. FERC, 988 F.2d 154 (D.C. Cir. 1993) 8

ADMINISTRATIVE DECISIONS

Invenergy Nelson LLC, 147 FERC ¶ 61,067 (2014) 4

PJM Interconnection, L.L.C., 146 F.E.R.C. ¶ 61,041 (2014) 4

PJM Interconnection, L.L.C., 146 F.E.R.C. ¶ 61,078 (2014) 4

TABLE OF AUTHORITIES

STATUTES	Page(s)
16 U.S.C. § 824d(c)	6
16 U.S.C. § 824d(d)	1
47 US.C. § 203(a)	6

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Federal Energy Regulatory Commission ("Commission" or "FERC") seeks to downplay the adverse impact of the decision below on the electric industry and its conflict with prior court and the Commission rulings by claiming that the decision "correctly applied 'decidedly routine' legal principles." Opp. at 8, citing Pet. App. at 2a. Those principles are the filed rate doctrine and its corollary, the rule against retroactive ratemaking, which stand for the propositions that "the courts lack authority to impose a different rate than the one approved by the Commission, [and] the Commission itself has no power to alter a rate retroactively." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

Whatever the validity of applying those principles routinely in the context of cost-of-service ratemaking, which involves fixed rates that remain in effect until replaced, their application to preclude consideration of retroactive waiver requests, as the decision below does, is anything but routine in the context of market-based ratemaking, which involves rates that constantly fluctuate as market conditions change. Besides upsetting FERC's routine practice of considering such waiver requests (Opp. at 12-13), the lower court's finding of "an absence of any equitable waiver authority in the Commission" to allow retroactive relief (Pet. App. 12a; *see* Opp. at 8-9 (same)) is inconsistent with the statutory provision, 16 U.S.C. § 824d(d), allowing waiver of the 60-day rate change notice requirement for good cause as well as the practical reality that retroactive waiver requests in the market-based rate context are often the only means to seek relief in extraordinary conditions, like the 2014 Polar Vortex, because to

maintain critical system stability typically requires out-of-merit generation arrangements that "do not always lend themselves to being filed 60 days before service commences, as out-of-merit generators [a]re often called into service only . . . on very short notice." *NStar Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007) (citation omitted). In light of the lower court's broad ruling that the filed rate doctrine and rule against retroactive ratemaking preclude even consideration of retroactive waiver requests, only review by this Court will validate the legitimate role that waiver requests play as a vehicle for determining the propriety of retroactive relief for out-of-the-ordinary circumstances affecting market-based rates.

ARGUMENT

1. As the decision below found, "no violation of the filed rate doctrine occurs when 'buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." Pet. App. 12a (citation omitted). The Commission does not respond to the argument that a market-based rate *by itself* gives customers (and, here as in all FERC cases, the customers are sophisticated wholesale sellers of electricity) advance notice that the rates will fluctuate with market conditions. Pet. at 6-7. This argument follows from, as this Court recognized, how market-based ratemaking works: "when wholesale buyers' demand for electricity increases, the price they must pay rises correspondingly; and in those times of peak load, the grid's reliability may also falter." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 769 (2016). Instead, the Commission, following the lower court's lead, argues that while the court recognized that market-based rates fluctuate, it found a lack of notice because "the

[governing] Tariff did not include a 'formula rate.'" Opp. at 11; *see* Pet. App. at 13a ("Old Dominion has failed to identify any Tariff provisions that openly specify the type of market-variable cost components required for formula rates.").

But including openly specific cost components in a formula rate is not the only way for customers to be on advance notice that market-based rates will increase and reliability will decrease as demand rises; rather, as this Court noted, these are matters that "every customer knows." *Electric Power Supply Ass'n*, 136 S. Ct. at 769. That these sophisticated customers had advance notice that market-based rates would fluctuate as conditions change is reinforced by the FERC-approved structure under which these rates are set. *See id.* at 768 ("each operator conducts a competitive auction to set wholesale prices for electricity. These wholesale auctions serve to balance supply and demand on a continuous basis, producing prices that reflect its value at given locations and times throughout the day."); *see also* Pet. at 1 (PJM runs a Day-Ahead Energy Market and a Real-Time Energy Market for wholesale sales); Opp. at 3-4 (same). Advance notice that extraordinary conditions, such as the 2014 Polar Vortex, will cause market-based rates to spike does not require the presence of a specific cost component in a formula rate before FERC can even consider a retroactive waiver request, as the decision below ruled. Rather, the nature of market-based rates and their implementing structure sufficiently notify customers of such a possibility.

In FERC's view, all this is of no moment given PJM's $1,000/MWh price cap. Opp. at 11. As the Commission sees it, "the filed rate doctrine and rule against retroactive ratemaking therefore prohibited FERC from waiving the cap, because it 'did exactly what a cap is

supposed to do – serve as a firm ceiling on market prices.'" Opp. at 11, quoting Pet. App. 14a. This assertion is not supported by the evidence that, instead, showed "marginal costs to generate electricity spiked to approximately $1,200/megawatt-hour." Pet. App. at 7a; *see PJM Interconnection, L.L.C.*, 146 F.E.R.C. ¶ 61,041 at P 2 (2014) (noting also that during the period at issue energy market offers bid into the day-ahead market "at a price of $999/MWh, implying that the costs for these resources was above the $1,000/MWh but their offers were constrained by the offer cap"); *see also Electric Power Supply Ass'n*, 136 S. Ct. at 769 (noting marginal cost "is the price an efficient market would produce"). Clearly, the cap did *not* do what it was "supposed to do—serve as a firm ceiling on market prices," but constrained prices by not reflecting the marginal cost of supplying electricity during the 2014 Polar Vortex. Indeed, that was FERC's contemporaneous view of the situation: "Presently, however, the $1,000/MWh bid cap is preventing competitive marginal cost bids and resulting competitive prices that are needed to balance supply and demand." *PJM Interconnection, L.L.C.*, 146 F.E.R.C. ¶ 61,078 at P 42 (2014). These were appropriate conditions for considering retroactive waiver relief. *See, e.g., Invenergy Nelson LLC,* 147 FERC ¶ 61,067 at P 23 n.13 (2014) ("Tariff waivers are typically filed by a utility requesting the Commission to authorize a deviation from the utility's tariff for a short period of time or for particular short-lived circumstances in cases in which changing the tariff itself would be inefficient.").

2. In response to the argument that the decision below effectively ends FERC's long-standing practice of considering these types of waivers, the Commission stated that "many of the cases" involved in this practice "are distinguishable, because they 'deal with non-rate

terms and conditions.'" Opp. at 11-12, citing Pet. App. at 71a-72a. First, to state the obvious, many other indistinguishable cases deal with rate terms and conditions.[1] Next, nothing in the filed rate doctrine or rule against retroactive ratemaking exempts their application from cases involving non-rate terms and conditions of a FERC-approved tariff. *See* Pet. App. at 72a n.40 (asserting a "retroactive waiver of a non-rate term and condition that does not subject ratepayers to an additional surcharge may not violate" the doctrine or rule). This Court has rejected such an assertion:

> The Ninth Circuit thought the filed rate doctrine inapplicable "[b]ecause this case does not involve rates or ratesetting, but rather involves the provisioning of services and billing." Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not in-

[1] The Commission points to one 2014 Polar Vortex case where it denied retroactive rate recovery as a violation of the filed rate doctrine and rule against retroactive rate recovery. Opp. at 12 n. 5. That case did not involve a retroactive waiver request; rather, "Duke insists that PJM did issue a directive to buy gas and that the Tariff does provide for indemnification for losses sustained as a result of such a directive." *Duke Energy Corp. v. FERC*, 892 F.3d 416, 420 (D.C. Cir. 2018). In any event, research has not uncovered any case, other than the instant matter and *Duke Energy*, in which FERC found the doctrine and rule completely bar a merits consideration of a retroactive waiver request. *See* Pet. App. at 56a-57a (dissenting Commissioner noted another case where FERC granted retroactive waiver in the 2014 Polar Vortex, and, more generally, that the "Commission can waive—and has waived—the prior notice requirement to ensure that resources are compensated for providing a reliability service.").

> clude non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price." The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges," 47 U.S.C. § 203(a).

American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223 (1998) (internal citations omitted). The Federal Power Act contains virtually identical language to the cited Communications Act provision. *Compare* 16 U.S.C. § 824d(c)(". . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges . . . ."); *see E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1040 (9th Cir. 2007) ("although the Supreme Court initially applied the Filed Rate Doctrine to actual filed rates, courts have held that the principles underlying this doctrine preclude challenges to a wide range of FERC actions, not just the act of literal rate filing").

3. The Commission argues there is "no reason to believe that any 'conflict' actually exists or should be resolved in favor of permitting retroactive rate increases" (Opp. at 12-13) between the decision below and rulings by this Court and by the D.C. Circuit assuming *arguendo* that "waiver is available for retroactive collection of a higher rate than the one on file."

Arkansas Louisiana Gas Co., 453 U.S. at 578 n.8; *see City of Girard v. FERC*, 790 F.2d 919, 924-25 (D.C. Cir. 1986) (following this Court's lead by assuming waiver is available). It seems self-evident that a conflict exists between the assumption that waiver is available for good cause and the lower court's ruling that the "filed rate doctrine and rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other reason." Pet. App. at 11a.[2] Rather than, as the lower court did here, find no discretion even to consider the retroactive waiver, this Court and the D.C. Circuit did not question FERC's authority to consider the waiver, and agreed with FERC's finding "that respondents have not demonstrated that good cause exists for waiving the filing requirement…." 453 U.S. at 578 n.8; *see City of Girard*, 790 F.2d at 925 ("we agree with the Commission's express finding that Girard failed to demonstrate good cause").

Nor does the subsequent decision in *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir.), *cert. denied*, 498 U.S. 907 (1990), show "that there is no such conflict." Opp. at 13. *Columbia* turned on the lack of notice to the affected customers:

---

[2] Old Dominion is *not* asking this Court to address, much less to decide, whether the waiver at issue "should be resolved in favor of permitting the [requested] retroactive rate increase." Opp. at 12. Obviously, Old Dominion believes that its evidence shows its requested relief should be granted under FERC's well-established test for judging retroactive waiver relief requests (Pet. at 11), but that is a question for the Commission to address in the first instance, should this Court grant remand after resolving the legal question of whether a waiver request can be considered in a market-based rate context based on exigent circumstances, such as those presented by the 2014 Polar Vortex.

"as the Commission had failed to provide adequate notice to the downstream purchasers that the price they would be paying for gas during the 1980-83 period would be subject to adjustment, the Commission was without authority to impose a retroactive surcharge for whatever cause." 895 F.2d at 797; *see Pub. Util. Comm'n of State of Cal. v. FERC,* 988 F.2d 154, 165 (D.C. Cir. 1993) (indicating that the notice in *Columbia* "was limited to a 'highly restricted audience,' which did not include the downstream purchasers") (citation omitted). A market-based rate by itself gives adequate notice that the rates will be set by what market conditions dictate, including the possibility that in exigent circumstances, the market price will exceed the tariff cap, and may require a limited retroactive waiver of the tariff to allow recovery of otherwise unrecoverable, and thus confiscatory, costs.

CONCLUSION

For the reasons stated herein and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ADRIENNE ELIZABETH CLAIR
THOMPSON COBURN LLP
1909 K Street, N.W.
Suite 600
Washington, D.C. 20006-1167
(202) 714-6247
aclair@thompsoncoburn.com

DENNIS LANE
Counsel of Record
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave. N.W.
Suite 800
Washington, D.C. 20006-4605
(202) 785-9100
dennis.lane@stinson.com

Counsel for Petitioner
Old Dominion Electric Cooperative

November 27, 2018