No. 24-1074

IN THE

Supreme Court of the United States

ENTERGY ARKANSAS, LLC,

Petitioner,

v.

DOYLE WEBB, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE ARKANSAS PUBLIC SERVICE COMMISSION, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Edison Electric Institute ("EEI") is an association that represents all investor-owned electric companies, international affiliates, and industry associates worldwide. EEI members provide electricity for hundreds of millions of Americans and operate in all 50 states and in the District of Columbia. EEI's members are committed to providing affordable, clean, and reliable energy, for

[1] Pursuant to this Court's Rule 37.2, EEI provided timely notice of its intention to file this brief to counsel for all parties. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than EEI, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

which they make considerable investments in needed and beneficial transmission infrastructure—investments the Federal Energy Regulatory Commission ("FERC") and Congress have recognized are critical to ensuring a reliable, cost-effective, and modern bulk power system.

EEI's members are directly impacted when the filed-rate doctrine is not followed—that is, when interstate power rates filed with FERC are denied binding effect and utilities are prevented from recovering FERC-approved wholesale-level costs from their retail customers. EEI offers this brief to provide an industry perspective on the various harms caused by the trapping of utilities' costs and why this Court must ensure utilities receive the reasonable assurance of cost recovery the filed-rate doctrine provides.

SUMMARY OF ARGUMENT

In return for providing reliable, affordable, resilient, increasingly clean, and available service for customers, utilities are permitted to recoup their costs and earn a reasonable return on their investment. This "regulatory compact" ensures that the public has access to the services needed to power modern life and that utilities have the financial means to provide them. It has been the cornerstone of utility regulation for over a century.

A key component of the regulatory compact is the filed-rate doctrine. The filed-rate doctrine plays an indispensable role in maintaining the regulatory compact by ensuring that utilities have a predictable revenue stream that includes recovery for approved costs. One aspect of this doctrine is that it requires state authorities to honor FERC-set wholesale utility rates. In other words, once FERC approves an interstate wholesale rate, FERC's lack of jurisdiction over retail rates cannot be used to prevent the utility from recovering FERC-approved wholesale costs. This prevents the impermissible "trapping" of

a utility's wholesale costs by denying cost recovery for them. In this way, the filed-rate doctrine provides utilities with the certainty that they will be able to recover FERC-approved wholesale costs from retail customers and thereby safeguards the regulatory compact.

In the decision below, the Eighth Circuit undercut the fundamental essentials of the regulatory compact by failing to enforce the filed-rate doctrine. The effects of disrupting that carefully calibrated set of benefits and burdens cannot be overstated, as both utilities and their customers will suffer from this upsetting of the foundational premise of modern utility regulation. This important issue warrants this Court's review.

ARGUMENT

I. THE FILED-RATE DOCTRINE PREVENTS THE HARMFUL CONSEQUENCES OF NOT ALLOWING RECOVERY OF WHOLESALE COSTS

Under the utility-rate model, utilities make investments that enable the provision of necessary services to the public, and through payments from customers, they recoup their expenses and earn a reasonable return on their investment. The filed-rate doctrine plays a key role in maintaining this regulatory compact by ensuring that authorities with jurisdiction over retail rates permit utilities to recover FERC-approved wholesale costs.

A. Not permitting utilities to recover their costs causes instability for utilities and risks breaking the regulatory compact

Most electricity customers in the United States are served by Investor-Owned Utilities ("IOUs"). U.S. Dep't of Energy, *Transforming The Nation's Electricity System: The Second Installment of the Quadrennial Energy*

Review (QER) App. at A-33 (2017).[2] IOUs are privately owned, for-profit utilities whose retail service, including the rates they charge, is regulated by state public utilities commissions. *Id.* at A-34. Rates are set out in published legal documents called tariffs.

State commissions set rates with the goal of providing affordable and reliable electricity to consumers while ensuring that IOUs are given the opportunity to recoup their costs and earn a reasonable return on their investment. *Id.* at A-17. Rates thus incorporate the utility's expenses. *Ibid.* Properly accounting for all expenses, such that full cost recovery is achieved, is important because it allows utilities to maintain and invest in the electricity system and thereby ensure reliable and affordable electricity for customers. Arthur Abal et al., Nat'l Ass'n of Regul. Util. Comm'rs, *Tariff Toolkit: Primer on Rate Design for Cost-Reflective Tariffs* at 10 (2021).[3]

This exchange—regulated cost recovery and earning a regulated return in exchange for the provision of reliable, affordable, and available service for customers that powers modern life—is known as the regulatory compact. This Court has long recognized the existence of this regulatory compact. See*, e.g.*, *Bluefield Waterworks & Improvement Co.* v. *Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-693 (1923) (noting that a utility is entitled to earn a return on investment that is "reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties"); *Cedar Rapids Gas Light Co.* v. *City of Cedar*

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[2] https://www.energy.gov/sites/prod/files/2017/02/f34/Appendix--Electricity%20System%20Overview.pdf.

[3] https://pubs.naruc.org/pub.cfm?id=7BFEF211-155D-0A36-31AA-F629ECB940DC.

Rapids, 223 U.S. 655, 669 (1912) (similar); *In re Binghamton Bridge*, 70 U.S. 51, 74 (1865) (similar).

As a result of the utility rate model, not permitting utilities to recover their costs not only harms utilities but also has serious downstream effects on the utility's customers. In the short term, utilities will have to cut costs or raise capital to bridge the shortfall. Abal, *supra*, at 11. Cost cutting can negatively impact investment in maintenance and upgrades and fundamental system reliability more broadly. *Ibid.* Raising capital shifts the financial burden onto future ratepayers, making electricity less affordable in the future and thereby creating intergenerational inequities. *Ibid.* In the long term, under-recovery of costs results in systemic underinvestment in electricity infrastructure. *Ibid.* Chronic underinvestment will eventually result in higher service costs, as utilities will be required to rely on older and less productive equipment and facilities. *Ibid.* Accordingly, even if IOUs are not permitted to increase rates to account for wholesale costs, customers still will foot the bill eventually. There simply is no free lunch here. Customers will pay now, or they will pay later. That is the inexorable conclusion that flows from the basic facts of utility regulation.

Failing to permit cost recovery also upsets the careful balance of benefits and burdens that forms the regulatory compact. The regulatory compact "characterize[s] the set of mutual rights, obligations, and benefits that exist between the utility and society." Dr. Karl McDermott, Edison Elec. Inst., *Cost of Service Regulation In the Investor-Owned Electric Utility Industry: A History of Adaptation* at 5 (2012).[4] "Under this 'compact,' a utility typically

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[4] https://www.ourenergypolicy.org/wp-content/uploads/2012/09/COSR_history_final.pdf#:~:text=This%20paper%20examines%20the%20history%20of%20cost%20of,facing%20utilities,%20their%20customers,%20and%20their%20regulators%20today.

is given exclusive access to a designated—or franchised—service territory and is allowed to recover its prudent costs (as determined by the regulator) plus a reasonable rate of return on its investments. In return, the utility must fulfill its service obligation of providing universal access within its territory." Dep't of Energy, *supra*, at A-11.

If IOUs are unable to recover costs from their customers, this careful balance of benefits and burdens that has been the lodestar of utility regulation for over a century—and which has powered the rise of modern life with the provision of reliable, affordable, and increasingly clean energy—will be undermined. That would substantially harm utilities and make them a much less attractive investment—which would result in less investment in utility infrastructure and higher rates for utility customers.

B. The filed-rate doctrine is a key component of the regulatory compact and ensures reasonable cost recovery for utilities

One key component of the regulatory company is the filed-rate doctrine. "The filed rate doctrine requires that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Entergy La., Inc.* v. *La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (citation and internal quotation marks omitted). "When the filed rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause." *Ibid*. Thus, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 965 (1986). "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give

FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Id.* at 966.

Importantly for utilities, this means "'trapping' of costs is prohibited." *Id.* at 970. Once FERC approves an interstate wholesale rate, a state may not exercise its jurisdiction over retail rates and sales "to prevent the [utility] from recovering the costs of paying the FERC-approved rate." *Ibid.* In other words, impermissible trapping occurs when a utility "cannot fully recover its costs of purchasing at the FERC-approved rate." *Ibid.*

The upshot of the filed-rate doctrine is that IOUs are provided certainty they will be able to recover FERC-approved wholesale costs from retail customers. This assurance yields a stable and predictable regime for IOUs and ultimately benefits utility customers through the provision of reliable service for a known cost. IOUs rely upon the filed-rate doctrine when they make decisions about whether and how to invest in grid infrastructure. The certainty and predictability provided by the filed-rate doctrine encourages these important investments and ensures that IOUs will have the financial ability to make them. These assurances are vital to IOUs and their regulated rate structure. Without the security that they will recover their costs and earn a reasonable return on their investments, IOUs cannot effectively provide and make investments in the essential public services consumers require.

In short, the filed-rate doctrine is fundamental to the healthy functioning of the power grid. Its faithful application ensures critical investment in energy infrastructure, prevents distorted cost allocations, and preserves the regulatory compact. And its contravention threatens ill consequences for the power grid and the public alike.

II. THE EIGHTH CIRCUIT'S DECISION UNDERCUTS THE ASSURANCES PROVIDED BY THE FILED-RATE DOCTRINE

The Eighth Circuit's decision dramatically dilutes the filed-rate doctrine's protection against trapping of costs. In this case, the Eighth Circuit held that "the filed rate doctrine does not apply because FERC made no preemptive decision regarding the refund's cost allocation." Pet. App. 7a. According to the court of appeals, because "[FERC] declined to decide how the costs should be allocated," nothing precluded the state commission from deciding whether shareholders or ratepayers should bear the costs. *Ibid.* Thus, under the decision below, unless FERC opines that its decision has preemptive effect, the filed-rate doctrine can be completely disregarded. This holding therefore nullifies the baseline rule of the filed-rate doctrine that ensures a utility can recover its FERC-approved costs and replaces it with an unpredictable, case-by-case regime under which FERC decides whether preemption applies.

Making FERC the sole arbiter of the preemptive effect of the filed-rate doctrine renders the assurances guaranteed by that doctrine illusory and makes its application fundamentally unpredictable. IOUs' ability to recover FERC-approved wholesale costs will no longer be a certainty, but rather will turn on an unpredictable, case-by-case assessment by FERC. No longer will IOUs have the guarantee they will recover their FERC-approved costs through retail rates. Instead, IOUs will have to litigate at FERC in favor of preemptive effect, before state agencies arguing that FERC made a preemptive decision, and in courts for review of the state agencies' decisions—all before they know whether costs can be recovered.

The resulting uncertainty will have a direct and detrimental impact on utilities and their customers. Obtaining

financing for new investment will be more difficult and more costly since the return will be more in doubt. Customers ultimately will pay the price—either in the form of less reliable infrastructure that suffers from under-investment or through the higher rates necessary to cover the more costly financing. Those are the precise ills that the regulatory compact and filed-rate doctrine are designed to prevent. So it should be no surprise that eviscerating the filed-rate doctrine comes with such consequences.

In sum, the Eighth Circuit's decision sets the bait for trapping of IOUs' costs. Consumers will suffer the consequences. This important issue warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted and the Eighth Circuit's judgment summarily vacated.

Respectfully Submitted.

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April 2025