

No. 24-1304

IN THE
Supreme Court of the United States

FIRSTENERGY SERVICE COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

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

**CORRECTED AND AMENDED
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 offers this brief to provide an industry perspective on the serious harms caused by the unwinding of already agreed to rate settlements. The rates EEI’s members charge their customers are determined through a complex regulatory process that involves ratemaking proceedings at FERC and often ends in settlements that FERC then approves. Once set, utilities organize their business affairs around the rates they charge. As a result, EEI’s members are significantly impacted when a rate-setting settlement is unwound and their expectations are thereby upset.²

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.

Central then to the operation of a utility is the rate it charges its customers. Determining that rate through ratemaking proceedings is a highly complex, extremely costly, and quite lengthy process. That is why FERC encourages utilities to reach settlements that resolve rate proceedings and thereby avoid those downsides of the ratemaking process. Doing so provides parties with certainty, reduces litigation costs, and leads to reasonable

² EEI takes no position on the second and third questions presented.

compromises in the resolution of difficult issues. But these benefits disappear if, as the Sixth Circuit held below, rate settlements can be unwound due to a post-settlement development. After all, the entire point of a settlement is to obtain certainty in the face of an uncertain outcome. If such certainty is exposed as illusory, parties will hesitate to settle and instead will opt to fight their ratemaking proceedings all the way to conclusion. That benefits no one. Utilities will lose the rate predictability they need and will have to bear higher litigation costs in ratemaking proceedings. Due to the nature of utility regulation, those harms ultimately will be borne by the utilities' customers. As for FERC, it will face a substantial increase in its administrative burdens due to the increased number of ratemaking proceedings going to conclusion rather than ending early in a settlement. The Sixth Circuit's decision creates all of these ills.

This important issue warrants this Court's review.

ARGUMENT

I. REGULATORY SETTLEMENTS PROVIDE MUCH NEEDED CERTAINTY TO UTILITIES

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. Instead of undertaking costly and arduous ratemaking proceedings, utilities often—and are encouraged to—reach regulatory settlements regarding the rates they will charge. These settlements ensure quick, certain, and cost-efficient resolution of their rates. Permitting the nullification of these rate-based settlements, as the Sixth Circuit did below, eliminates the crucial certainty and benefits they provide.

A. Predictable rates are central to 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).³ 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-17.⁴ 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).⁵

³ <https://www.energy.gov/sites/prod/files/2017/02/f34/Appendix--Electricity%20System%20Overview.pdf>.

⁴ FERC has exclusive jurisdiction over rates for interstate transmission or sale of electricity while states have jurisdiction over rates charged in retail sales to consumers. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016). “[I]nterstate 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).

⁵ <https://pubs.naruc.org/pub.cfm?id=7BFEF211-155D-0A36-31AA-F629ECB940DC>.

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 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, rate predictability is critical to utilities’ operations. Utilities’ plans and operations are based on the certainty that their rates and approved rate settlements provide on the revenue side. If that certainty were to be upset, such as by a lower rate unexpectedly springing into effect, that would result in both harm to the utility and serious downstream effects on the utility’s customers. In the short term, utilities would have to cut costs or raise capital to bridge the shortfall between their expected revenue and their actual lower revenue under the new rate. See 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, the result would be 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.* Customers suffer in all events. 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.

Denying utilities predictable rates sufficient to cover costs and result in a reasonable return 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).⁶ “Under this ‘compact,’ a utility typically 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 predictably recover costs from their customers and earn a reasonable rate of return, 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.

⁶ 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.

B. Utilities and FERC rely on settlements to set predictable rates that uphold the regulatory compact

Given the importance of rates to both IOUs and the regulatory compact, there is much focus on the FERC ratemaking proceedings where those rates are set. Unfortunately, however, ratemaking proceedings are highly complex and extremely costly. “[R]atemaking is much less a science than an art, requiring both technical understanding and policy judgment.” *Consol. Edison Co. of New York, Inc. v. FERC*, 45 F.4th 265, 286 (D.C. Cir. 2022) (citations and internal quotation marks omitted). It “involves complex industry analyses and difficult policy choices,” *E. Tex. Elec. Coop., Inc. v. FERC*, 90 F.4th 579, 587 (D.C. Cir. 2024) (citation and internal quotation marks omitted), as FERC employs various sets of accounting principles and tests, see *Constellation Mystic Power, LLC v. FERC*, 45 F.4th 1028, 1043-1046 (D.C. Cir. 2022). This necessarily entails the preparation of detailed and complicated models that FERC uses to inform its judgment. *Emera Maine v. FERC*, 854 F.3d 9, 20 (D.C. Cir. 2017). Unsurprisingly, all this requires significant technical expertise and resources for both FERC and the utilities, leading to “lengthy, complex, and convoluted proceedings.” *BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1271 (D.C. Cir. 2004).

Fortunately, much of these costs and labor can be avoided with settlements. Settlements benefit both FERC and utilities, “as they provide parties with certainty, reduce litigation costs, and permit parties to reach reasonable compromise in resolving difficult issues.” *Florida Power & Light Co.*, 175 FERC ¶ 61,024, at ¶ 6 (2021). For those reasons, “FERC and the courts both have long taken the position that ‘settlements of rate proceedings are to be encouraged.’” App. 56a (Moore, J., dissenting) (quoting *United Mun. Distrib. Grp. v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1984)). Indeed, FERC “strongly favors settlements, particularly in cases that are highly contested

and complex.” *San Diego Gas & Elec. Co.*, 122 FERC ¶ 61,009, at ¶ 13 (2008); see also *State of Maine*, 91 FERC ¶ 61,213, 61,772 (2000) (“Our strong support of settlements militates in favor of giving these parties certainty, and letting them receive the full benefits of their bargain.”). In short, settlement is a deliberate, calculated decision that provides certainty to the parties, avoids lengthy and costly litigation, and eases FERC’s administrative burdens.

But these benefits evaporate if rate settlements can be unwound based on later events. If a settlement can be modified due to a later legal or factual development, then the settlement does not actually afford any certainty to the parties. That defeats the entire point of the settlement—to secure certainty in the face of an uncertain future. It reduces settlements to mere placeholders that are temporary and contingent rather than permanent.

If the settlement does not actually secure a lasting compromise between the parties, why would a party enter a settlement in the first place? Indeed, as Judge Moore explained in her dissent, “it is obvious that parties might hesitate to enter rate settlements if subsequent developments could later pull the rug out from under them.” App. 57a (alteration marks and quotation omitted). Instead, they will be encouraged to pursue the ratemaking proceeding all the way through.

Everyone will suffer as a result. Utilities’ costs will increase as they pursue expensive litigation, and their rates will be uncertain as they await the outcome of the rate-making proceeding. This will also mean greater administrative costs and burdens on FERC as more proceedings are litigated rather than settled. See David G. Tewksbury, et al., *New Chapters in the Mobile-Sierra Story: Application of the Doctrine After NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 32 Energy L.J. 433, 454 (2011) (“Moreover, the FERC has found that

settlements are essential ‘to the orderly and expeditious conduct’ of its business as it ‘could not possibly cope with the flood of business engendered by its jurisdictional statutes if the outcome of a substantial proportion of that business were not the result of voluntary settlements.’”) (citation omitted).

In sum, settlements offer FERC and utilities important certainty and benefits that will be rendered illusory if post-settlement developments can justify unwinding the settlement.

C. The Sixth Circuit’s decision nullifies the benefits of ratemaking settlements

The Sixth Circuit’s decision creates a split with the D.C. Circuit and dramatically dilutes the benefits secured by the settlement process. In this case, “Duke’s and [FirstEnergy]’s [returns on equity (‘ROE’)], including any adders, were each embedded in a comprehensive settlement package submitted to [FERC] to resolve a complex, multi-issue dispute among those entities, their customers, and other affected parties.” App. 99a. FERC “[did] not know the precise trade-offs and concessions made by parties to those proceedings during the settlement process and the terms to which and conditions to which those parties would have agreed with respect to Ohio transmission assets had the [FERC] policy on RTO Adders been different.” *Ibid.* FERC’s decision not to disturb the settlements “makes sense.” *Id.* at 58a (Moore, J., dissenting).

By contrast, the Sixth Circuit’s decision “signal[s] to parties that their settlements could become *unsettled* as a result of later legal developments in which the parties had little say.” *Ibid.* “This in turn would rob the settlement process of the certainty and predictability that incentivize settlements and thereby enhance administrative efficiency in support of the public good.” *Ibid.* Under the Sixth Circuit’s approach, rates determined by settlement are

subject to change and do not provide an assurance of cost recovery. All the ill consequences detailed above will be the inevitable result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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