No. 18-333

In the Supreme Court of the United States

OLD DOMINION ELECTRIC COOPERATIVE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Federal Energy Regulatory Commission's determination that it lacked authority under the filed rate doctrine and the rule against retroactive ratemaking to waive provisions of a regional transmission operator's tariff to permit a generator to retroactively recover from ratepayers higher-than-expected fuel costs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 892 F.3d 1223. The orders of the Federal Energy Regulatory Commission (Pet. App. 20a-79a) are reported at 151 F.E.R.C. ¶ 61,207 and 154 F.E.R.C. ¶ 61,155.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2018. The petition for a writ of certiorari was filed on September 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, provides the Federal Energy Regulatory Commission (FERC or Commission) with jurisdiction over the

rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. 824(a) and 16 U.S.C. 824(b) (2012 & Supp. V 2017). The FPA requires FERC to ensure that rates are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b), and (e). To facilitate that mandate, the FPA requires regulated utilities to file with the Commission and keep open for public inspection a schedule of the rates they intend to charge ratepayers. 16 U.S.C. 824d(c) and (d); see 18 C.F.R. Pt. 35 (filing obligations). Rates actually charged may not exceed those on file with the Commission. 16 U.S.C. 824d(d); see *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981).[1]

A utility that wishes to alter the rates it charges is required to provide 60 days' notice to the Commission and file new rate schedules "stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." 16 U.S.C. 824d(d). The Commission may waive, for good cause, the 60-day filing period. *Ibid.* Absent advance notice to ratepayers, however, "no regulated seller of [power] may collect a rate other than the one filed with the Commission"—a principle

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[1] *Arkansas Louisiana Gas Co.* addressed the Natural Gas Act, 15 U.S.C. 717 *et seq.*, rather than the FPA. But because the "pertinent sections of the two statutes" are "'in all material respects substantially identical,'" this Court's "established practice" is to "cit[e] interchangeably decisions interpreting" the relevant provisions. *Arkansas Louisiana Gas Co.*, 453 U.S. at 577 n.7 (quoting *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)); see also, *e.g.*, *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016) ("This Court has routinely relied on [Natural Gas Act] cases in determining the scope of the FPA, and vice versa.").

known as the "filed rate doctrine." *Arkansas Louisiana Gas. Co.*, 453 U.S. at 577. In addition, a "corollary" to the filed rate doctrine, *Towns of Concord, Norwood, & Wellesley* v. *FERC*, 955 F.2d 67, 71 & n.2 (D.C. Cir. 1992), bars the "Commission itself" from "alter[ing] a rate retroactively," *Arkansas Louisiana Gas Co.*, 453 U.S. at 578; see *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). The rule against retroactive ratemaking thus "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods." *Towns of Concord*, 955 F.2d at 71 n.2 (explaining that the rule against retroactive ratemaking is a "logical outgrowth of the filed rate doctrine") (quoting *Associated Gas Distribs.* v. *FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (en banc) (Williams, J., concurring)). "The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure predictability." *Qwest Corp.* v. *Koppendrayer*, 436 F.3d 859, 864 (8th Cir. 2006); see also, *e.g.*, *Public Utils. Comm'n* v. *FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993).

2. PJM Interconnection, L.L.C. (PJM), is the grid operator responsible for coordinating the movement of electricity over transmission facilities throughout 13 States in the mid-Atlantic region and the District of Columbia. *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016). In that role, PJM is responsible for ensuring that electric power is reliably transmitted from power generators to load-serving entities, *i.e.*, retail providers of electricity to customers (traditionally, public utilities). *Id.* at 1292-1293. PJM ensures that current and longer-term demand is met by administering competitive auctions for wholesale power. *Id.* at 1293. In PJM's "same-day" auctions, generators bid

to provide immediate delivery of electricity. *Ibid.* In "next-day" auctions, generators bid to satisfy anticipated near-term demand. *Ibid.* And in "capacity auction[s]," generators make bids that, if accepted, obligate them to be available to supply electricity—if called upon by PJM—at any time during a one-year delivery period three years in the future. *Ibid.*; see *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 768-769 (2016) (describing auctions).

Petitioner is a not-for-profit electrical generation and transmission utility that participates in the PJM market as both a generator and a load-serving entity. Pet. App. 5a. Petitioner owns three natural gas-fired power plants in Maryland and Virginia, each of which is a "generation capacity resource" in the PJM market. *Ibid.* This means that petitioner contractually committed itself to offer all of its plants' available generation capacity into PJM's same-day and next-day markets, and to generate electricity when called upon by PJM. *Ibid.*; *id.* at 20a-21a. Generation capacity resources are compensated for being available as well as for the electricity they produce. See *Duke Energy Corp.* v. *FERC*, 892 F.3d 416, 417-418 (D.C. Cir. 2018).

PJM's Open Access Transmission Tariff (Tariff) and Operating Agreement (Agreement) set forth the rules governing PJM market operations. Pet. App. 5a-6a. Three of those rules are particularly relevant here. First, the Tariff and Operating Agreement provide that generation capacity resources "must offer" all their available capacity into same-day and day-ahead auctions in a given delivery year. *Id.* at 6a (quoting Agreement § 1.10.1A(d); Tariff § 1.10.1A(d)). Second, "the Operating Agreement empowers PJM to take 'measures appropriate to alleviate an Emergency, in order to preserve

reliability' in the electricity market and to meet consumer need." *Id.* at 5a (quoting Agreement § 1.6.2(vii)). That authority includes directing generation capacity resources "to start, shutdown, or change [the] output levels of [their] generation units." *Id.* at 5a-6a (quoting Agreement § 1.7.20(b)) (brackets in original). Third, the Tariff "caps the prices at which generators may offer their capacity into the day-ahead market at $1,000/megawatt-hour." *Id.* at 6a (citing Tariff § 1.10.1A(d)(viii)).

3. In January 2014, a southward shift in the polar vortex—a mass of Arctic air—produced unusually cold temperatures and a surge in demand for electricity in the mid-Atlantic region. Pet. App. 6a-7a. The increased demand for power generation caused a spike in the price of natural gas, which is one of the primary fuels used by petitioner's generators to produce electricity. *Ibid.*

In light of the cold weather conditions, PJM invoked its emergency authority to ensure reliability and meet consumer demand. Pet. App. 7a. PJM reiterated that generation capacity resources such as those operated by petitioner were obligated to be available to run at full capacity during acute demand spikes. *Ibid.* To meet its contractual obligations, petitioner purchased natural gas at high prices, which caused its marginal costs of generating electricity to increase to more than $1000/megawatt-hour. *Ibid.* PJM's Tariff, however, precluded petitioner from submitting bids into the day-ahead auction exceeding the $1000/megawatt-hour offer cap. *Ibid.* Ultimately, petitioner sold electricity into PJM markets at a loss on several days in January 2014. *Ibid.* In addition, petitioner incurred financial losses when PJM scheduled petitioner's generation units for dispatch on certain dates, but either canceled or cut short the dispatches. *Id.* at 8a-9a.

On January 23, 2014, PJM filed two waiver requests with the Commission, seeking relief for generators. Pet. App. 8a. Those requests sought waiver of the $1000/megawatt-hour offer cap, on a prospective basis beginning the next day (January 24, 2014), so that generators could recover their actual costs for the remainder of the winter season. *Ibid.* The Commission promptly granted both requests, waiving the statutory 60-day notice period. *Ibid.*; *id.* at 15a.[2]

Five months later, in June 2014, petitioner filed a petition with the Commission, seeking retroactive waiver of PJM Tariff and Operating Agreement provisions to allow it to recover nearly $15 million attributable to PJM's emergency measures in January 2014. Pet. App. 9a-10a. Petitioner "conceded * * * that the filed Tariff categorically precluded its compensation for losses caused by the rate cap," but sought waiver of the applicable terms on equitable grounds. *Id.* at 12a; see *id.* at 10a. The Commission denied petitioner's request, finding retroactive waiver of the Tariff to be impermissible under the filed rate doctrine and the rule against retroactive ratemaking. *Id.* at 52a-53a. Petitioner could not avoid the effect of these doctrines, the Commission explained, because "ratepayers had not received any prior notice of [petitioner's] requested relief." *Id.* at 52a.

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[2] Two days before it requested waivers from the Commission, PJM posted on its website a statement "express[ing] its intent to file with the Commission 'as soon as practical' a 'retroactive waiver' of the rate cap to compensate those generation capacity resources whose costs for electricity generation had exceeded the Tariff's rate cap." Pet. App. 7a-8a (citation omitted). It is undisputed, however, that PJM's January 23, 2014 waiver requests applied only prospectively. *Ibid.*; Pet. 3.

The Commission also denied petitioner's request for rehearing. Pet. App. 60a-79a. It explained that petitioner's request for "retroactive recovery of costs related to a past service is a classic example of a violation of the filed rate doctrine and the prohibition of retroactive ratemaking." *Id.* at 64a. And while petitioner contended that the "equities" supported retroactive waiver, FERC explained that D.C. Circuit precedent foreclosed it from relying on equitable considerations to "waive the filed rate" doctrine. *Id.* at 68a-69a (citation omitted). In particular, the Commission explained, the court of appeals' decision in *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir.), cert. denied, 498 U.S. 907 (1990), had clearly held that the Commission lacks authority to "waive the filed rate retroactively in order to permit a utility to modify a rate charged for services during a prior period, when there was no notice that the rate was subject to change." Pet. App. 68a-69a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-19a. The court began by explaining that "[t]he governing law is not in question": "The filed rate doctrine and the 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 equitable considerations." *Id.* at 11a (citing *Columbia Gas Transmission Corp.*, 895 F.2d at 794-797). So too, the court stated, "there is no dispute that the PJM Tariff's filed rate did not allow the cost recovery that [petitioner] seeks." *Id.* at 12a.

The court of appeals rejected petitioner's argument that "recouping its losses would be consistent with the filed rate doctrine because ratepayers were on notice that the Tariff set a market rate for electricity, and the

Polar Vortex altered that market rate." Pet. App. 12a. The court explained that "no violation of the filed rate doctrine occurs" when a formula-based rate puts ratepayers on advance notice that the rate may change based on fluctuations in "specified cost drivers." *Ibid.* But the Tariff at issue here did not include a formula-based rate; instead, the Tariff "on its face assured customers that, however the market might change, charges would be capped at $1,000 per megawatt-hour." *Id.* at 13a. Thus, here, "[c]ustomers * * * were on explicit notice that, although market forces might cause some variation within a range, the rates charged would never exceed the agreed-upon rate cap." *Id.* 13a-14a. "To toss th[e] cap aside after the fact just because it did exactly what a cap is supposed to do—serve as a firm ceiling on market prices—would retroactively rewrite the terms of the filed rate," in violation of the filed rate doctrine and the rule against retroactive ratemaking. *Id.* at 14a.[3]

ARGUMENT

The court of appeals correctly applied "decidedly routine" legal principles, Pet. App. 2a, to hold that the Commission lacked authority to retroactively waive the filed rate in this case. The decision below is consistent with the FPA, and it does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly determined that the Commission lacked authority to retroactively waive

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[3] The court of appeals also rejected petitioner's alternative argument that ratepayers received the requisite notice from the January 21 statement on PJM's website. Pet. App. 14a-15a; see p. 6 n.2, *supra*. Petitioner does not renew (Pet. 5-13) that argument in this Court. But see Alliance for Cooperative Energy Servs. Power Mktg. LLC Amicus Br. 3, 6-8, 10.

the $1000/megawatt-hour price cap in the governing Tariff. Because the Commission did not abuse its discretion, act in an arbitrary and capricious manner, or commit an error of law, the court correctly denied the petition for review. See 5 U.S.C. 706(2)(A); *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016); Pet. App. 11a.

As the court of appeals observed, "there is no dispute that the PJM Tariff's filed rate did not allow the cost recovery that [petitioner] seeks." Pet. App. 12a. Indeed, petitioner "repeatedly conceded before the Commission and th[e] court that the filed Tariff categorically precluded its compensation for losses caused by the [offer] cap [of $1000/megawatt-hour]." *Ibid.*

The court of appeals also correctly stated that the "governing law is not in question here." Pet. App. 11a. As this Court has long held, "the 'filed rate doctrine' * * * forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Moreover, the filed rate doctrine and the rule against retroactive ratemaking bar the Commission from "waiv[ing] the operation of a filed rate or * * * retroactively chang[ing] or adjust[ing] a rate for good cause or for any other equitable considerations." Pet. App. 11a (citing *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791, 794-797 (D.C. Cir.), cert. denied, 498 U.S. 907 (1990)). As the court explained, "[t]hese corollary rules operate as a nearly impenetrable shield for consumers, ensuring rate predictability and preventing discriminatory or extortionate pricing." *Ibid.* (citation omitted).

2. Petitioner primarily contends (Pet. 6-10) that affording it relief would not violate the filed rate doctrine

or the rule against retroactive ratemaking. Petitioner relies (Pet. 6) on the court of appeals' acknowledgment that "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 (quoting *Natural Gas Clearinghouse* v. *FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)) (per curiam) (brackets in original); see *Northwest Pipeline Corp.* v. *FERC*, 61 F.3d 1479, 1490-1491 (10th Cir. 1995). Although notice "does not relieve the Commission" from compliance with the filed rate doctrine or the rule against retroactive ratemaking, it "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision." *Columbia Gas Transmission Corp.*, 895 F.2d at 797 (emphasis omitted). Under this notice principle, "the filing of tariffs that provide a formula for calculating rates, rather than a specific rate number," does not violate the filed rate doctrine, because the "'formula itself is the filed rate that provides sufficient notice to ratepayers.'" *West Deptford Energy, LLC* v. *FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) (citation omitted).

Contrary to petitioner's arguments (Pet. 6-8), the court of appeals correctly concluded that the foregoing principle has no application to this case. Petitioner contends (*ibid.*) that ratepayers were on notice that the Tariff's "market-based rates" would fluctuate, and that the court incorrectly "assum[ed]" that the Tariff set a "fixed market price." But the court fully understood PJM's auction mechanism and market-based rate Tariff. See Pet. App. 12a-13a. And the court recognized that

prices in PJM markets fluctuate, but that the Tariff did not include a "formula rate[]" as that term is used in this context. *Id.* at 13a. Indeed, as the court correctly explained, "the filed rate on its face" set a maximum price of $1000/megawatt-hour. *Ibid.* Thus, customers were not, as petitioner contends (Pet. 6-8), on notice that their rates might spike above that level due to emergency weather conditions; instead, they "were on explicit notice that, *although market forces might cause some variation within a range*, the rates charged would never exceed the agreed-upon rate cap." Pet. App. 13a-14a (emphasis added). 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." *Id.* at 14a; see *id.* at 73a (observing that petitioner's request "presents the classic situation addressed by the filed rate doctrine and the prohibition against retroactive ratemaking").[4]

3. Petitioner next contends (Pet. 5) that the court of appeals' decision "effectively ends FERC's long-standing practice of considering waivers seeking retroactive relief of market-based rate tariff terms." See Pet. 11. But as the Commission explained, "many of the cases" petitioner cited for the proposition that FERC considers retroactive waivers are distinguishable, because they

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[4] Petitioner gains no ground in pointing out that when FERC granted PJM's prospective waiver requests, it acknowledged that the $1000 cap was "preventing competitive marginal cost bids and resulting competitive prices that are needed to balance supply and demand." Pet. 10 (quoting *PJM Interconnection, L.L.C.*, 146 F.E.R.C. ¶ 61,078 at ¶ 42 (2014)). That acknowledgment merely underscores that FERC addressed the issue as permitted by the FPA, the filed rate doctrine, and the rule against retroactive ratemaking—*i.e.*, on a prospective basis.

"deal with non-rate terms and conditions, such as deadlines and other qualification requirements for participating [in certain] auctions or penalties for untimely or inaccurate information submissions." Pet. App. 71a-72a (footnote omitted); see *id.* at 72a n.40 (explaining that "[a] retroactive waiver of a non-rate term and condition that does not subject ratepayers to an additional surcharge may not violate the filed rate doctrine or the rule against retroactive ratemaking"). By contrast, FERC continued, "[petitioner's] request for waiver presents the classic situation addressed by the filed rate doctrine and the prohibition against retroactive ratemaking of a utility seeking to impose on ratepayers an additional surcharge for service already performed." *Id.* at 73a.[5]

4. Finally, petitioner contends (Pet. 12-13) that there exists a "conflict" between the Commission's inability to waive rates retroactively, on the one hand, and its authority to waive the 60-day advance notice requirement for rate changes, 16 U.S.C. 824d(d), on the other. Petitioner points out that this Court and the court of appeals have previously "assumed, *arguendo*, that waiver is available for retroactive collection of a higher rate than the one on file," finding in particular cases

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[5] Petitioner notes (Pet. 11 n.2) that its brief in the court of appeals "included an appendix that listed over 70 cases in which FERC had considered a request for retroactive waiver of market-based rates during the past decade." But FERC had already distinguished many of the decisions cited by petitioner. See Pet. App. 71a-73a. And other cases on petitioner's list affirmatively support the Commission's decision here. For example, in *Duke Energy Corp.* v. *PJM Interconnection, L.L.C.*, 151 F.E.R.C. ¶ 61,206 (2015), denied review, 892 F.3d 416 (D.C. Cir. 2018), the Commission rejected a request for cost recovery arising from the January 2014 polar vortex as a "violation of the filed rate doctrine and the rule against retroactive ratemaking." *Id.* ¶ 1.

that the parties seeking retroactive waivers had failed to demonstrate good cause. Pet. 12 (quoting *Arkansas Louisiana Gas Co.*, 453 U.S. at 578 n.8, and citing *City of Girard* v. *FERC*, 790 F.2d 919, 924-925 (D.C. Cir. 1986)) (brackets omitted). But petitioner provides no reason to believe that any "conflict" actually exists or should be resolved in favor of permitting retroactive rate increases. Indeed, petitioner fails to address the court of appeals' subsequent decision in *Columbia Gas Transmission Corp.*, which held—nearly three decades ago—that there is no such conflict, and that FERC lacks statutory authority to waive rates retroactively. 895 F.2d at 795-797. This Court declined to review that decision, *FERC* v. *Columbia Gas Transmission Corp.*, 498 U.S. 907 (1990) (No. 90-131), and the same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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