No. 99-1914

In the Supreme Court of the United States

TOWN OF NORWOOD, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND NEW ENGLAND POWER COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT*

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION
IN OPPOSITION**

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Energy Regulatory Commission acted reasonably and in accordance with its authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, in approving a series of filings made by the New England Power Company (NEPCO) that (1) allow NEPCO's wholesale electric power customers the option of terminating their power–purchase contracts early in return for paying a contract–termination charge to reimburse NEPCO for costs it incurred in expectation of serving those customers for the full contract term; (2) permit NEPCO to divest itself of certain generation assets; and (3) restructure NEPCO's contractual relationship with certain of its affiliates to accommodate state-imposed retail competition requirements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 202 F.3d 392. The orders of the Federal Energy Regulatory Commission (Pet. App. 28a-116a) are reported at 81 F.E.R.C. ¶ 61,281 (1997), 82 F.E.R.C. ¶ 61,179 (1998), 83 F.E.R.C. ¶ 61,174 (1998), 83 F.E.R.C. ¶ 61,265 (1998), 83 F.E.R.C. ¶ 61,275 (1998), and 84 F.E.R.C. ¶ 61,175 (1998).

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2000. A petition for rehearing was denied on March 1, 2000 (Pet. App. 117a). The petition for a writ of certiorari was filed on May 30, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Section 205(c) of the Federal Power Act (FPA), 16 U.S.C. 824d(c), public utilities are required to file all rates pertaining to sales within the jurisdiction of the Federal Energy Regulatory Commission (FERC), and all contracts affecting such rates, with the Commission. Any changes to previously-filed tariffs must be submitted in accordance with FPA Section 205(d), 16 U.S.C. 824d(d), and the Commission in turn is empowered to investigate the reasonableness of the proposed change pursuant to FPA Section 205(e), 16 U.S.C. 824d(e). Under Section 203(a) of the FPA, 16 U.S.C. 824b(a), the Commission must approve the disposition of facilities subject to its jurisdiction if they have a value in excess of $50,000, and the Commission must also approve mergers.

The Commission's authority to entertain proposed modifications to a filed tariff is subject to judicially-developed doctrines respecting the parties' contractual interests. In this regard, the *Mobile-Sierra* doctrine holds that where parties have negotiated a contract that denies either party the right to change prices unilaterally, FERC may abrogate or modify the contract only if the public interest so requires. See *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348 (1956). As a separate matter, under the filed rate doctrine, a utility may lawfully charge only the rate that is reflected in the tariff on file when the service is performed. *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981). A corollary principle, pertinent here, prohibits retroactive rate increases for tariffed services. *Ibid.*

Since enactment of the FPA in 1935, the electric utility industry has undergone significant changes. Alternative electric power suppliers have created a wholesale market for low-cost power to compete with the traditional, vertically integrated utilities that had built high-cost generation capacity. FERC has taken various steps to encourage this competition. Invoking its authority under Sections 205 and 206 of the FPA, 16 U.S.C. 824d and 824e, to remedy unduly discriminatory or preferential rules, regulations, practices or contracts affecting public utility rates for transmission in interstate commerce, FERC issued Order No. 888 and accompanying regulations requiring all public utilities owning or controlling transmission facilities to offer non-discriminatory open access transmission services.[1] See generally *Transmission Access Policy Study Group* v. *FERC*, No. 97-1715, 2000 WL 762706, at *5-*6 (D.C. Cir. June 30, 2000). At the same time, recognizing that utilities required to provide non-discriminatory access to their transmission lines might incur transition (*i.e.*, "stranded") costs because their historic customers could, under the new regulations, import cheaper power purchased elsewhere, the Commission provided utilities

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[1] Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996), clarified, 76 F.E.R.C. ¶¶ 61,009 and 61,347 (1996), modified, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), aff'd in part and remanded in part *sub nom. Transmission Access Policy Study Group* v. *FERC*, No. 97-1715, 2000 WL 762706 (D.C. Cir. June 30, 2000).

a limited opportunity to recover stranded costs that they incur as a result of its new rules. *Ibid.* The stranded cost regulations are codified at 18 C.F.R. 35.26.

2. New England Power Company (NEPCO) is a public utility subject to FERC's jurisdiction under the FPA. NEPCO and its affiliates are also subject to regulation by the States of Massachusetts and Rhode Island to the extent they provide retail services to customers within those States.

Between December 1996 and May 1998, NEPCO made a series of filings with FERC for the ultimate purpose of accommodating the introduction of retail electric power competition in Massachusetts and Rhode Island.[2] Taken together, the filings sought FERC approval of changes to certain wholesale power sales agreements between NEPCO and its affiliates; the sale of non-nuclear generation assets by NEPCO to USGen New England, Inc. (USGen); and a general revision to NEPCO's tariff that would allow NEPCO's wholesale power customers to terminate their power contracts early in return for paying a "contract termination charge." See Pet. App. 4a-7a.

In the first filing, NEPCO proposed amending its power sales agreements with its affiliates in Massachusetts and Rhode Island that purchase power at wholesale from NEPCO under FERC-approved tariffs and resell that power to retail customers in those States. It

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[2] Several States, including Massachusetts and Rhode Island, have acted within their authority to regulate intrastate retail services to encourage electric utility competition. They have, *inter alia*, adopted retail access programs to require electric utilities within their borders to provide retail customers a choice of electricity suppliers.

proposed to permit such affiliates to terminate their long-term requirements contracts on short notice in order to allow them to purchase cheaper power from other electric suppliers. The early termination, however, would be subject to the payment of a contract termination charge (CTC) to reimburse NEPCO for a portion of the costs it had incurred in preparing to meet its obligation to provide power to the affiliates over the full term of their long-term contracts.[3] Ultimately, NEPCO's December 1996 filing was resolved through settlement agreements with its affiliates and state regulatory authorities. The settlements, presented to FERC for approval, permitted early contract termination for NEPCO's affiliates subject to payment of a CTC. It also obligated NEPCO to provide its affiliates with the option of taking service from NEPCO under new "wholesale standard offer rates" for a limited transition period at escalating prices set by the Massachusetts and Rhode Island regulatory authorities under their retail restructuring programs.[4] In addition, the settlements obligated NEPCO to file with the Commission a plan to divest itself of most of its generation assets. Pet. App. 4a-5a.

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[3] Under NEPCO's contracts with its affiliates, neither party could terminate the long-term power contract without providing seven-years' advance notice of termination. See Pet. App. 5a.

[4] The standard offer rates were intended to provide a safeguard for retail customers of the affiliates that did not or could not immediately take advantage of the competitive sources of retail supply that were expected to develop. The rates increased sharply over a brief period of time to induce customers to migrate to the competitive market once they have had time to negotiate with retailers that, as a result of federal and state efforts to provide access to new sources of power, would now be able to compete to supply once-captive customers. Pet. App. 17a-18a.

In accordance with the terms of its settlement agreements, on October 1, 1997, NEPCO sought Commission approval under FPA Section 203, 16 U.S.C. 824b, to sell generating assets to USGen. In connection with its proposed purchase of those assets, USGen agreed to assume responsibility for providing NEPCO's affiliates with the wholesale standard offer service, and NEPCO proposed to implement a rate freeze that would prevent increases in its rates for its remaining wholesale customers. Pet. App. 5a.

Petitioner, one of the remaining wholesale customers, objected to NEPCO's proposed settlements with its affiliates and to the proposed divestiture transaction. Petitioner purchased electricity at wholesale from NEPCO and resold that electricity to retail customers in Massachusetts. Contending that the wholesale standard offer rates proposed for NEPCO's affiliates would provide them with an unfair advantage as retail competitors, petitioner objected to the filings. In addition, on March 4, 1998, petitioner notified NEPCO that it was canceling its power supply contract with NEPCO, which had been extended to the year 2008, and switching to a different wholesale supplier effective April 1, 1998.[5]

NEPCO responded to petitioner's cancellation notice by filing a proposed revision to its FERC tariff that would provide all of its wholesale customers, including petitioner, the opportunity to terminate their long-term requirements contracts on 30-days' notice, rather than the seven-years' notice of termination required under

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[5] Petitioner had purchased power from NEPCO since 1983, under FERC-approved agreements, for resale to petitioner's retail customers. See *Town of Norwood* v. *FERC*, No. 99-2155, 2000 WL 822872, at *1 (1st Cir. June 29, 2000).

the FERC tariff, on the payment of a CTC. Petitioner objected to this filing as well, arguing that the CTC for the non-affiliated wholesale purchasers, standing alone and in concert with the settlement and the divestiture filings, was unlawful and unduly discriminatory. Pet. App. 6a-7a.

In three sets of orders issued between November 1997 and June 1998, the Commission approved all three NEPCO filings. *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), reh'g denied, 83 F.E.R.C. ¶ 61,265 (1998), Pet. App. 28a-43a (approving the settlement agreements between NEPCO and its affiliates); *New England Power Co.*, 82 F.E.R.C. ¶ 61,179, reh'g denied, 83 F.E.R.C. ¶ 61,275 (1998), Pet. App. 44a-101a (approving the sale of NEPCO's non-nuclear generating facilities to USGen); *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, reh'g denied, 84 F.E.R.C. ¶ 61,175 (1998), Pet. App. 102a-116a (approving the amendment of NEPCO's tariff to permit its unaffiliated customers to terminate their long-term contracts prematurely subject to payment of a CTC). The Commission considered and rejected petitioner's various challenges to the filings, including, *inter alia*, that NEPCO's proposals conflicted with Order No. 888's stranded-cost recovery regulations, constituted an impermissible award of contract damages, violated the *Mobile-Sierra* and filed rate doctrines, and resulted in discriminatory and anticompetitive charges. In doing so, the Commission acknowledged that there existed a contract dispute between petitioner and NEPCO triggered by petitioner's cancellation, but specifically declined to address either the merits of that dispute or the impact of that dispute on the general tariff provision changes before it. Pet. App. 108a-109a, 114a.[6]

3. The court of appeals upheld the Commission's orders in all respects. Pet. App. 1a-27a. The court began by addressing what it perceived to be the principal focus of petitioner's attack: the Commission's approval of NEPCO's tariff amendment permitting wholesale customers like petitioner to terminate their long-term contracts early, subject to the payment of a CTC. First, the court rejected petitioner's contention that in approving the CTC the Commission violated its Order No. 888 stranded-cost regulations. The Commission had found that those regulations did not apply to NEPCO's filings. The court affirmed the Commission's interpretation of the regulations and went on to observe, as did the Commission, that there was a separate (although parallel) justification for stranded–cost recovery specifically recognized by Order No. 888:

> [Petitioner] as a requirements-contract customer of power furnished by New England Power is being afforded an option to switch immediately to a competing supplier, without the seven years' notice required by the contract. *New England Power Co.*, 83 FERC ¶ 61,174 at 61,722-23 (1998). In short, there is a different reason for similar relief; and while Order No. 888 does not mandate the new tariff, neither does it forbid it. *See* Order No. 888, 61 Fed. Reg. at 21662 (reserving the possibility of stranded cost recovery in other situations).

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[6] For a description of the history and disposition of that contract dispute, see *Town of Norwood* v. *New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), petition for cert. pending, No. 99-1913.

Pet. App. 10a.

Next, the court of appeals addressed petitioner's claim that the CTC was nothing more than an effort to collect contract damages and therefore was inconsistent with FERC's practice of deferring to the courts on matters involving contract disputes. In rejecting that claim, the court of appeals found that while the Commission precedent relied on by petitioner reflected an unwillingness on the part of the Commission to resolve disputes over the meaning of contract provisions, no such dispute was involved here, where the Commission was merely approving, on a generic basis, a CTC for customers who wished to terminate their contracts early. Pet. App. 11a.

The court of appeals also found no merit to petitioner's claims that the Commission was required to reject NEPCO's proposed CTC on the basis of the *Mobile-Sierra* and filed rate doctrines. As to the *Mobile-Sierra* doctrine, the court took the view that, by permitting its non-affiliated customers to terminate their contracts early subject to the payment of a CTC, NEPCO could be viewed as having modified the contract. But the court went on to note that

> from [petitioner's] vantage, the option merely gives it something that it did not have before; it remained free to insist that New England Power continue to supply power under the contract until expiration. The termination charge is certainly a detriment, but, absent a showing that its formula is any worse than contract damages, it merely spells out what would have been the law's remedy if [petitioner] had no option but simply breached the existing contract.

Pet. App. 12a.

Generally, the filed rate doctrine works to prohibit retroactive increases for tariffed services. See *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981). Applying that formulation of the doctrine, the court of appeals found no error in the Commission's approval of the CTC tariff amendment. The court reasoned that, as the tariff amendment did not require petitioner to pay more for past purchases, there was no retroactive increase for tariffed services. Instead, the tariff amendment merely gave petitioner an option it did not have before to cancel future purchases on short notice, subject to the payment of termination charges. Pet. App. 12a-13a.

The court of appeals also rejected petitioner's contentions that NEPCO's proposed CTC was unduly discriminatory because it differed from the CTC that NEPCO had negotiated by settlement with its affiliates and that a full evidentiary hearing was warranted on this issue. Pet. App. 15a. In rejecting that argument, the court observed that differential treatment does not necessarily amount to undue preference where the difference in treatment can be explained in an acceptable manner. *Ibid.* Here, the court affirmed the Commission's determination that differential treatment was acceptable because petitioner had passed up the opportunity to settle on the same terms as NEPCO's affiliates. *Id.* at 16a-17a. Moreover, as petitioner's request for a hearing had been ruled by the Commission to be untimely and unsupported, and petitioner had not rebutted those rulings, the court of appeals found no merit to petitioner's claim that it was entitled to a hearing. *Id.* at 16a.

This left petitioner's claims that the wholesale standard offer rates, which were offered to NEPCO's affiliates under the terms of the settlement but not to petitioner, were unduly discriminatory, and when coupled with the CTC, were anticompetitive. The court of appeals held that it was not discriminatory for NEPCO to limit its standard offer rates to its affiliates, because only its affiliates, and not petitioner, were required by state regulators to provide corresponding retail standard offer rates to their own customers. Pet. App. 17a-18a. The court held that the fact that petitioner, as a municipal system, was under no obligation to provide such service distinguished petitioner from NEPCO's affiliates and sufficiently justified differential treatment. *Id.* at 18a. As to petitioner's claims of anticompetitive effects, the court found that petitioner had forfeited any argument on that issue because it had done little more than make conclusory allegations and had "virtually abdicated its responsibility to brief the issue to us." *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.

1. Petitioner contends that the court of appeals and FERC misapplied agency regulations and agency and judicial precedent to the facts of this case. The misapplication of settled law to particular facts, however, does not warrant this Court's review. In any event, the court of appeals properly evaluated and rejected petitioner's several claims.

a. Petitioner's contention that the court of appeals misread the Commission's Order No. 888 regulations regarding the recovery of stranded costs, and thereby created a major uncertainty requiring the Court's review (Pet. 13-16), has no basis. As the Commission made plain in issuing Order No. 888, the stranded-cost regulations promulgated by that order were not to serve as the exclusive means for a utility to recover stranded costs.[7] As the court of appeals correctly observed, "the restrictions in Order No. 888 are no more than conditions on stranded cost recovery under *that* order and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer purports to disregard an existing contractual obligation." Pet. App. 10a-11a (emphasis added). Cf. *Transmission Access Policy Study Group* v. *FERC*, 2000 WL 762706, at *23-*25 (recognizing that FERC's Order No. 888 stranded-cost recovery regulations were created to deal with stranded costs incurred by FERC's regulation requiring open-access transmission service). Thus there is no basis for petitioner's claim that NEPCO's proposed CTC should have been rejected because it did not meet the requirements of those regulations,[8] and there is no "uncertainty," as pe-

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[7] See Order No. 888, 61 Fed. Reg. 21,662 (1996) (noting that, in the case of "voluntary restructuring," FERC "[is] willing to consider case-specific proposals for dealing with stranded costs"); see also Order No. 888-A, 62 Fed. Reg. 12,382 (1997) ("Order No. 888 does not by its terms bar the recovery of costs that do not result from the use of Commission-required transmission access (i.e., costs that result when a departing customer does not use the former supplying utility's open-access tariff). Utilities may, as before, seek recovery of such non-open-access-related costs on a case-by-case basis in individual rate proceedings."); *id.* at 12,406 ("Such costs are outside the scope of the rule [No. 888] because such costs would not be stranded as a direct result of the new open access.").

[8] Petitioner wrongly suggests (Pet. 15-16) that NEPCO could not permissibly amend its tariff to provide customers the option of terminating their long-term contracts early by paying a CTC absent compliance with Order No. 888's stranded–cost regulations.

titioner claims (Pet. 16), in the recovery of stranded costs. In any event, should such uncertainty arise, it can be addressed in the first instance through administrative proceedings and, if necessary, appellate review, and does not now warrant this Court's attention.

b. Nor was there any misapplication of breach-of-contract law, as petitioner claims (Pet. 17-18). As the court of appeals properly characterized the matter, there is no breach of contract at issue in this case. Pet. Ap. 11a. The Commission neither interpreted petitioner's contract with NEPCO nor determined whether petitioner breached its contract with NEPCO. Rather, at issue was a general tariff amendment providing an option for customers bound by existing contracts to terminate their long-term obligations by paying a CTC. The Commission's decision does not address the situation of customers breaching their contracts. Thus, this case presents no significant question of contract law, much less "an irreconcilable conflict" with the jurisdiction of courts adjudicating breach-of-contract claims, as petitioner argues.

2. Petitioner argues (Pet. 18-24) that the court of appeals erroneously applied this Court's decisions to the facts of the case. In particular, petitioner claims that the court of appeals misapplied the *Mobile-Sierra* and filed rate doctrines in reviewing and ultimately upholding the Commission's acceptance of tariff amendments permitting the imposition of a CTC. Again, peti-

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That contention overlooks FPA Section 205, 16 U.S.C. 824d, under which public utilities subject to FERC's jurisdiction, such as NEPCO, may file, and FERC may approve, lawful amendments to tariffs governing wholesale power sales. As NEPCO's tariff amendment was precisely the type of filing permitted by that provision, no additional authority, under Order No. 888 or any other rule, was required.

tioner claims no more than a misapplication of settled legal principles to the facts of this case. In any event, petitioner's claims of error are mistaken.

a. Under the *Mobile-Sierra* doctrine, the Commission may not approve filed-for changes to a contract that are inconsistent with existing contractual obligations, absent a finding that such changes are in the public interest. The court of appeals held that FERC's approval of NEPCO's tariff amendment giving customers something they did not have before, *i.e.*, the ability to terminate long-term contracts early subject to payment of a CTC, triggered no *Mobile-Sierra* concerns. Pet. App. 12a. Regardless of the tariff amendment, petitioner remained free to continue to require NEPCO to supply it with power under the terms of its existing contract until, in the normal course, the contract expired by its terms. Because the tariff amendment did not impose any new contractual obligation on petitioner or alter any existing contractual obligation to petitioner's detriment, the court of appeals rightly confirmed that petitioner could have no objection to the tariff amendment under the *Mobile-Sierra* doctrine.[9]

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[9] Petitioner argues (Pet. 22) that the court of appeals erred in holding that the CTC merely gave petitioner an option to terminate that it had not previously had. According to petitioner (Pet. 22), FERC did not allow the CTC until May 15, 1998, almost a month after petitioner had terminated its contract with NEPCO on April 22, 1998, and therefore subjected itself to the CTC. NEPCO, however, had filed the CTC with FERC on March 18, 1998, and it was accepted to be effective as of March 31, 1998. See Pet. App. 102a. Accordingly, at the time of the termination of petitioner's contract with NEPCO, petitioner was already on notice of the CTC, and the CTC was in fact made effective prior to the date of the termination.

b. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory authority." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Below, petitioner argued that the obligation to pay a CTC under the revised tariff provisions approved by FERC was retroactive because it was imposed after petitioner had ceased making purchases from NEPCO. Pet. App. 13a. As the court of appeals observed, however, the tariff change governed only future purchases of power or failures to purchase power from NEPCO, and not rates for purchases made by petitioner in the past. *Ibid.* Because the court of appeals was manifestly correct on this point—the CTC being triggered by the wholesale customer's exercise of a newly-created option —there was no misapplication of the filed rate doctrine.

c. Petitioner's final claim (Pet. 24-27) is that FERC improperly declined to hold an evidentiary hearing. As the Commission found, and the court of appeals affirmed, petitioner's proffer simply did not support its claims of undue discrimination. See Pet. App. 16a-19a. Under those circumstances, it was no abuse of discretion for the Commission to rely on the evidence submitted and to resolve the issues on the written record and without further trial-type evidentiary hearings. See *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 241 (1973); *Moreau* v. *FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); *American Pub. Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1066 (D.C. Cir. 1977).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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