No. 00-1025

In the Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

KEVIN P. MADDEN
General Counsel

DENNIS LANE
Solicitor

LARRY D. GASTEIGER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether petitioner's exercise of an option to extend a wholesale power contract was effective where, although the underlying contract that contained the option had been filed with the Federal Energy Regulatory Commission, petitioner's notice of its exercise of the option was not filed with the Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 00-1025

TOWN OF NORWOOD, MASSACHUSETTS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 217 F.3d 24. The order of the Federal Energy Regulatory Commission (Pet. App. 14a-23a) is reported at 87 F.E.R.C. ¶ 61,341.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2000. A petition for rehearing was denied on August 25, 2000 (Pet. App. 24a-25a). On November 13, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 22, 2000, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 205(c) of the Federal Power Act (FPA), 16 U.S.C. 824d(c), requires public electric utilities to file with the Federal Energy Regulatory Commission (Commission or FERC) all rates and charges pertaining to sales of electric power within the Commission's jurisdiction "and the classifications, practices, and regulations affecting such rates and charges," as well as all contracts that "affect or relate to such rates, charges, classifications, and services." Changes to previously filed rates or contracts must be submitted in accordance with Section 205(d) of the FPA, 16 U.S.C. 824d(d). Those statutory provisions are consistent with the judicially developed "filed rate doctrine," which generally forbids a utility from charging rates other than those on file with the regulating agency at the time the service is provided. See generally *Arkansas La. Gas Co. (Arkla)* v. *Hall*, 453 U.S. 571, 577-578 & n.7 (1981).

2. Beginning in 1983, petitioner purchased wholesale electric power from New England Power Company (NEPCO) for petitioner's municipal electric company. Pet. App. 2a.[1] NEPCO is a public utility subject to the Commission's jurisdiction under the FPA. The contract between petitioner and NEPCO stated that NEPCO would provide electric service to petitioner under NEPCO's FERC Tariff No. 1. *Ibid.* Tariff No. 1, in turn, provided that once NEPCO initiated service,

---

[1] The 1983 contract and the history of petitioner's dispute with NEPCO are described in *Town of Norwood* v. *New England Power Co.*, 202 F.3d 408 (1st Cir.), cert. denied, 121 S. Ct. 57 (2000), and *Town of Norwood* v. *FERC*, 202 F.3d 392 (1st Cir.), cert. denied, 121 S. Ct. 57 (2000).

service would continue until terminated by either party's written notice of termination, which had to be provided at least seven years in advance. *Id.* at 15a. The contract fixed November 1, 1998 as the earliest date on which either party could terminate the contract. Consistent with the tariff's notice provision, the contract provided that petitioner and NEPCO could not give notice of termination prior to November 1, 1991 (seven years before the earliest possible termination date). *Id.* at 2a.

In 1989, petitioner and NEPCO amended their power contract to allow petitioner, at its option, to postpone the earliest date at which either party could give notice of termination by up to 20 years, in 10-year increments. Pet. App. 3a, 15a. Petitioner could exercise its option by providing NEPCO written notice one year before the date on which the extension would take effect. *Id.* at 15a-16a. NEPCO filed the contract amendment with the Commission, and the Commission accepted it on March 29, 1989. *Id.* at 16a.

On July 25, 1990, petitioner gave notice that it was extending the contract for the first 10-year increment. Petitioner's letter to NEPCO stated:

> The Town of Norwood, Massachusetts hereby gives notice to New England Power Company that it extends the date by which either [NEPCO] or Norwood could give notice of intent to terminate service from the present date of November 1, 1991, contained in the Power Contract between [NEPCO] and Norwood dated April 11, 1983, to November 1, 2001. The effect of this is that the Power Contract between [NEPCO] and Norwood would be extended for 10 years to midnight, October 31, 2008 (Article III, Paragraph A).

> This notice is given pursuant to Article III of the contract of April 11, 1983, as amended January 11, 1989.

Pet. App. 16a.

Beginning in 1996, NEPCO made a series of filings with the Commission in which it sought authority to restructure NEPCO and its services in preparation for competition among power suppliers. Among other things, NEPCO sought authority to divest some of its power-generating facilities. Petitioner objected to the proposed divestiture. Pet. 5; Pet. App. 3a-4a. After the Commission approved NEPCO's request, petitioner notified NEPCO on March 4, 1998 that it intended to terminate its contract with NEPCO as of April 1, 1998 —thus giving NEPCO less than one month's notice of termination. Pet. App. 3a-4a, 17a n.9. Petitioner further informed NEPCO that it was withdrawing its notice of July 25, 1990, which had extended the contract. *Id.* at 17a n.9.

On March 18, 1998, NEPCO responded by filing an amendment to its FERC Tariff No. 1 under which customers were given the option of terminating service on only 30 days' notice, subject to a charge that would compensate NEPCO for the early termination. Pet. App. 4a & n.1, 16a. NEPCO represented that, if approved by the Commission, the new option would allow petitioner to terminate its existing service effective on April 1, 1998, rather than on November 1, 2008 (the earliest date for termination under the 1983 contract as extended by petitioner in 1990). *Id.* at 17a-18a. The Commission rejected petitioner's objections to the amount of NEPCO's early-termination charge, and approved NEPCO's tariff amendment. *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, reh'g denied, 84

F.E.R.C. ¶ 61,175 (1998), aff'd, *Town of Norwood* v. *FERC*, 202 F.3d 392 (1st Cir.), cert. denied, 121 S. Ct. 57 (2000).

3. In April 1999, petitioner requested that the Commission issue a declaratory order that petitioner's contract with NEPCO had terminated on October 31, 1998, so that NEPCO could not assess contract termination charges for any period after that date. Pet. App. 4a. The Commission rejected petitioner's request. *Id.* at 14a-23a.

The Commission found that petitioner's letter of July 25, 1990, validly extended the power contract until October 31, 2008. Pet. App. 21a-23a. In so ruling, the Commission rejected petitioner's claim that the contract extension was ineffective because NEPCO did not file petitioner's letter of July 25, 1990, with the Commission. The Commission explained that it had approved the 1989 amendment that allowed petitioner to extend the termination date, and petitioner's exercise of that already-approved option did not require further Commission approval. *Id.* at 22a-23a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-13a. The court found it "crystal clear" that under the terms of the 1989 amendment, petitioner's letter of July 25, 1990, did extend the power contract through October 31, 2008, at the earliest. *Id.* at 6a.

The court of appeals also rejected petitioner's contention that NEPCO's failure to file the July 25, 1990, letter with the Commission rendered the contract extension ineffective. Pet. App. 7a-11a. The court found nothing in Section 205 of the FPA (16 U.S.C. 824d) or in FERC's regulations that required NEPCO to file the letter. Section 205 and the regulations both require that public utilities file rates and charges, as well as

contracts that affect rates and charges. Pet. App. 8a; see 16 U.S.C. 824d(c) and (d); 18 C.F.R. 35.2. Because the contract extension did not change rates or charges, the issue was whether petitioner's July 25, 1990, letter invoking the contract-extension option was itself a contract (or contract amendment) that had to be filed. Pet. App. 9a. Noting that "it would be a linguistic stretch" to deem petitioner's notice a "contract," the court of appeals held that the issue was, in any event, resolved by the Commission's reasonable determination that neither the FPA nor Commission regulations require electric utilities to file a notice of election that is authorized under a previously filed contract. *Id.* at 9a & n.3.

The court of appeals found no inconsistency between the Commission's holding that the contract extension did not have to be filed and this Court's decision in *Arkla*, *supra*. Pet. App. 10a. That case involved a claim that Arkla's alleged purchase of higher-cost gas from the United States triggered the "most-favored nations clause" in Arkla's contract with private gas suppliers, so that the rate due to the private suppliers under the contract should have been the price Arkla was paying the United States, rather than the lower rate specified in the contract. See 453 U.S. at 573-576. This Court held that the rate schedule in Arkla's filed contract prevailed over Arkla's contingent promise to pay an unspecified higher rate under the most-favored nations clause. *Id.* at 579-584. The Court stressed that regulators' acceptance of Arkla's contract with the private suppliers did not constitute pre-approval of particular rates that might be calculated in the future under the most-favored nations clause. In fact, it was unclear whether a rate increase based on the most-

favored nations clause would have been approved. *Id.* at 580-582 & n.11.

The court of appeals distinguished *Arkla* on the basis that, in this case, "there is no effort by anyone to charge or obtain a rate different than that on file with the Commission. And, as for duration, *all* of the contract terms being given effect by the FERC orders under review are on file with the Commission." Pet. App. 11a. The court of appeals concluded that "[t]his is a situation very different from *Arkla* where, based on a 'favored nations' clause containing no specific rate, the producer sought—over the Commission's expressed objection—to recover from the purchasing utility a rate for natural gas higher than the specific rate on file with the Commission." *Ibid.*

Finally, the court of appeals rejected petitioner's arguments (not renewed in this Court) that the July 1990 extension of the power contract was invalid under the *Mobile-Sierra* doctrine,[2] that the Commission lacked authority to interpret the July 1990 letter, and that the Commission improperly denied petitioner an opportunity to file an additional pleading. Pet. App. 11a-13a.

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 therefore is not warranted.

---

[2] The *Mobile-Sierra* doctrine prohibits a regulated utility from changing the terms of a contract unilaterally, absent a Commission finding that the existing term adversely affects the public interest. See *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353-355 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 343-345 (1956).

1. Petitioner argues (Pet. 8-14) that the court of appeals' decision is inconsistent with the "teachings" (Pet. 9) of *Arkla* and *AT&T Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214 (1998). There is no conflict with either decision.

As the court of appeals explained, *Arkla* established that a properly filed rate is effective until it is replaced by another properly filed rate (or the rate is properly withdrawn), even if the utility's contracts arguably require the utility to replace the filed rate with a new, but unspecified, rate. See 453 U.S. at 578-582.[3] Here, however, the Commission approved petitioner's option to extend the contract termination date in 10-year increments when it accepted the 1989 contract amendment. When petitioner exercised that option in July 1990, it was simply availing itself of a term that had been offered by NEPCO and already approved by the Commission, and no further Commission approval was required. See Pet. App. 22a ("Because the July 25, 1990, letter was [petitioner's] exercise of a preapproved option, it thus was not required to be filed with the Commission.").

Petitioner further claims (Pet. 12-14, 15) that "[t]he real basis for the court of appeals' holding appears to be that the option at issue deals with contract length rather than rates" and, so construed, the decision below

---

[3] All but one of the lower court decisions on which petitioner relies (Pet. 11-12), which pre-date *Arkla* by 20 years or more, are to the same effect as *Arkla*. The exception is *Episcopal Theological Seminary* v. *FPC*, 269 F.2d 228 (D.C. Cir.), cert. denied, 361 U.S. 895 (1959). That decision upheld application of a Federal Power Commission regulation under which every rate change was deemed to be a change in the rate schedule, which required refiling. *Id.* at 233-234. *Episcopal Theological Seminary* has no relevance to the FERC ruling under review in this case.

conflicts with *Central Office Telephone*, *supra*. In *Central Office Telephone*, the Court rejected the argument that the filed rate doctrine, as applied under the Communications Act of 1934 (ch. 652, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*), applies only to rates themselves. Rather, the Court held, the doctrine forbids a utility from providing its customer "discriminatory privileges" that are inconsistent with the terms on file with the regulating agency. 524 U.S. at 223-224. That holding has no application here. Contrary to petitioner's mischaracterization of the decision below, the court of appeals fully recognized the breadth of the filed rate doctrine. The court of appeals simply (and correctly) concluded that "giving effect to the [July 25, 1990] notice does not circumvent any filing requirement or contradict any extant filing" relating to the power contract between petitioner and NEPCO. Pet. App. 11a. That is so because "*all* of the contract terms being given effect by the FERC orders under review are on file with the Commission." *Ibid.* In short, the unremarkable and entirely correct holding of the court of appeals was that the Commission's approval of the 1989 contract amendment constituted approval of the optional contract extension.

2. Petitioner further claims (Pet. 15-17) that, because NEPCO did not file the letter extending the contract termination date, the duration of the power contract between petitioner and NEPCO is no longer deducible from materials on file with the Commission. That result, petitioner argues, fosters uncertainty, allows "secret" agreements between utilities and their customers, and "creates a significant breach in the filed rate doctrine." Pet. 16.

Petitioner is mistaken. As an initial matter, petitioner's claim that the Commission's files historically

have revealed "precisely all of the terms applicable [to a regulated sale of electric power] at a particular time" (Pet. 15), is incorrect. As the court of appeals explained, there always have been "gaps in what could be gleaned from Commission filings." Pet. App. 9a-10a (citing *Towns of Concord & Wellesley* v. *FERC*, 844 F.2d 891 (1st Cir. 1988) (termination of a contract provision through an unfiled letter), and *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 577-579 (D.C. Cir.) (inclusion of a rate formula rather than stated rates in a filed tariff), cert. denied, 498 U.S. 952 (1990)).

In this case, moreover, the Commission's files have revealed at all times what extension options are available to petitioner, and whether the contract is in force. The files contain the original contract, the 1989 amendment, and FERC Tariff No. 1, which collectively provide the relevant terms for extending or terminating the contract. See Pet. App. 15a-16a. The absence of any notice of termination of service in the file shows that the contract is still in force.[4] Thus, the Commission's files presently reveal both petitioner's right to extend the contract in 10-year increments, and that the parties did extend the contract beyond October 31,

---

[4] Commission regulations require, for power contracts executed prior to July 9, 1996, that the Commission be notified at least 60 days in advance when a rate schedule on file is proposed to be canceled or is to terminate by its own terms and no new rate schedule is to be filed in its place. 18 C.F.R. 35.15(a) and (b). July 9, 1996 was the effective date of Commission Order No. 888, in which the Commission took steps to facilitate the development of a competitive wholesale market for electric power. See generally *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), cert. granted *sub. nom. New York* v. *FERC*, No. 00-568 and *Enron Power Marketing, Inc.* v. *FERC*, No. 00-809 (Feb. 26, 2001).

1998. There is nothing "secret" about the terms of the agreement between petitioner and NEPCO.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

KEVIN P. MADDEN
General Counsel

DENNIS LANE
Solicitor

LARRY D. GASTEIGER
Attorney
Federal Energy Regulatory Commission

MARCH 2001