ORAL ARGUMENT HEARD APRIL 6, 2018; CASE DECIDED JULY 31, 2018

In the United States Court of Appeals for the District of Columbia Circuit

NOS. 15-1098, *ET AL*.

VERSO CORPORATION, *ET AL*.
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

COURT CASES **PAGE**

TABLE OF CONTENTS

COURT CASES **PAGE**

STATUTES:

INTRODUCTION AND SUMMARY

The panel's July 31, 2018 decision in this case affirms Commission orders assuring that customers who paid unlawful rates receive the remedy – refunds – indisputably authorized by the Federal Power Act. On rehearing, Michigan[1] reiterates the same arguments rejected by the panel, claiming that the panel decision, like the Commission's orders before it, conflicts with section 206(a) of the Federal Power Act, 16 U.S.C. § 824e, the Court's decision in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009), and the scope of the Commission's remedial authority under section 309 of the Act, 16 U.S.C. § 825h. Michigan adds that the panel decision also conflicts with the Court's recent decision in *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223 (D.C. Cir. June 15, 2018), *petition for cert. filed* (U.S. Sept. 13, 2018) (No. 18-333).

Michigan is wrong. There is no meaningful conflict between the panel's decision and any decision of the Supreme Court or this Court, nor any issue of exceptional importance warranting the full Court's review. *Cf.* Fed. R. App. P. 35(a). The panel decision strictly follows this Court's precedent, applying long-established, statutorily-grounded principles governing the Commission's remedial authority. *See Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018) (*Verso*) (citations herein are to slip opinion). In the end, the panel found, as this Court has

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[1] The Commission here uses terms as defined in its merits brief.

before, that the Commission may "advance remedies not expressly provided by the Act, as long as they are consistent with the Act." Slip op. at 16 (citing cases). Finding nothing in the Act, and specifically nothing in section 206 of the Act, 16 U.S.C. § 824e, or *City of Anaheim* barring surcharges to fund duly-authorized refunds reallocating costs, the panel affirmed the Commission in all respects. *Old Dominion* involves the same type of retroactive rate increase at issue in *Anaheim*, and is thus similarly "inapt." Slip op. at 17.

At bottom, Michigan merely disagrees with the panel's application of settled legal principles to the facts of this case. Rehearing *en banc* is rarely granted, *see* Fed. R. App. P. 35(a), and Michigan has not demonstrated that such extraordinary review is warranted here.

STATEMENT

In the challenged orders, the Commission addressed costs for three generating resources required for reliability in the American Transmission Zone (specifically, the Upper Peninsula of Michigan) of the Midcontinent Independent System Operator ("Operator"). The Operator traditionally allocated costs for these three resources (known as System Support Resources or SSR units) pro rata among load-serving entities (i.e., customers) in the American Transmission Zone. In the remainder of the Operator's footprint, the same type of costs are allocated to customers requiring the operation of the resources. The Wisconsin Public Service

Commission filed a complaint challenging the application of the pro rata methodology to the three plants at issue, claiming the resulting rates did not follow cost causation principles.

In the first of five orders reviewed by the panel, the Commission agreed, relying on a preliminary study showing a mismatch between costs and benefits. In that same order, as authorized by Federal Power Act section 206(b), 16 U.S.C. § 824e(b), the Commission ordered refunds to reallocate the costs from the date of the filing of Wisconsin's complaint. The Commission also ordered a final study to determine the appropriate cost allocation. Ultimately, the Commission required that costs be allocated directly to the benefitting load-serving entities.

In *Verso*, the panel affirmed the Commission's orders in all respects. The panel found that the Commission "reasonably determined that the prior rate methodology was unjust and unreasonable," and "had authority to order refunds and corresponding surcharges under Section 206 [of the Federal Power Act, 16 U.S.C. § 824e] and its broad remedial authority under Section 309" of the same Act, 16 U.S.C. § 825h. Slip op. at 3; *see also id*. at 16. The surcharges are not a retroactive rate increase, of the type barred by FPA section 206 and addressed in *City of Anaheim*, because the "aggregate rate remained the same, divided differently among constituent payers." *Id*. at 16, 17. And, responding to an argument put forward by intervenors, the panel found textual support in FPA

section 206(c), 16 U.S.C. § 824e(c), and its explicit bar on surcharges to fund refunds in certain holding company cases; that specific limit "contemplates the converse is true in all other circumstances." *Id*. at 17. "Because Section 206 supports, rather than negates, FERC's authority to order rate reallocations, the statute does not restrict FERC's Section 309 authority for the remedy ordered here." *Id*. at 18.

ARGUMENT

A. The Panel Decision Is Consistent With This Court's Precedent

The panel decision is consistent with this Circuit's well-established precedent interpreting sections 206 and 309 of the Federal Power Act, 16 U.S.C. §§ 824e, 825h, including its recent decision in *Old Dominion*, 892 F.3d 1223.

1. The Panel Decision Is Consistent With This Court's Interpretation Of Section 206

Michigan claims that the panel decision is inconsistent with *City of Anaheim*, *Old Dominion*, and other cases construing section 206(a) to prohibit retroactive rate increases. Pet. 5-6. Michigan is incorrect. The panel decision identifies the limits on the Commission's otherwise expansive remedial authority, and finds that those limits are inapplicable on these facts. In particular, the panel decision explains that *City of Anaheim* does not apply here, where the surcharges result in a reallocation among customers but not an increase in collections by the utility. The panel had no occasion to address *Old Dominion*: Michigan never cited

Old Dominion to the panel, even after the June 15, 2018 opinion. Nonetheless, it is inapplicable for the same reasons as *City of Anaheim*, and more.

The panel's analysis of the Commission's remedial authority begins by identifying its limits: section 206(a) authorizes FERC to "fix" rates only prospectively, the rule against retroactive ratemaking bars FERC from "correct[ing] rates that were too low," and the rule against retroactive ratemaking and the filed rate doctrine, together, require FERC to enforce only the filed rate. Slip op. at 14-15. But FERC's "remedial authority is otherwise expansive," *id*. at 14, consisting of both specific and general grants of authority: section 206(b) "permits FERC to order refunds where the previous rate was unfairly high, effectively setting the rate as of the date that the Section 206 proceeding began," *id*., and section 309 "permits FERC to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act." Slip op. at 16.

All of this is in lockstep with this Court's precedent. In particular, this Court has often explained that refunds under section 206(b) are not "retroactive" and do not offend either the filed rate doctrine or the rule against retroactive ratemaking. *See Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) ("It is not that notice relieves the Commission of the bar on retroactive ratemaking, but that 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.'") (quoting *Columbia Gas Transmission Co. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990)); *see also*, *e.g.*, *Old Dominion*, 892 F.3d at 1231 (same). Likewise, the Court has held that "[s]o long as the parties had adequate notice that surcharges might be imposed in the future, imposition of surcharges does not violate the filed rate doctrine." *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) (relying on *Canadian Ass'n of Petroleum Producers* in addressing notice provided by complaint).

Against this familiar backdrop, the panel turned to the challenged surcharges, finding that the "reallocation of [these] costs, including through surcharges, is well within FERC's remedial authority under Section 309, read in harmony with Section 206 and the filed-rate doctrine." Slip op. at 16. The panel explained that surcharges do not operate as a "retroactive rate increase" because the utility did not collect more than the filed rate. *Id*. ("the aggregate rate remained the same, divided differently among the constituent payers"). By comparison, *City of Anaheim*, 558 F.3d 521, is "inapt" because FERC there "ordered a rate increase, and applied it retroactively, with surcharges to make up the difference." Slip op. at 17. The panel explained that *City of Anaheim* "thus stands for the unremarkable proposition that FERC cannot order through surcharges what it could not otherwise

accomplish directly." *Id.* But "the surcharges ordered here are part and parcel of" a rate reallocation allowed by FPA section 206(b). *Id.* at 18 ("reallocation is a different animal altogether" and "FERC's remedial authority allows for rate reallocation"); *cf. City of Anaheim*, 558 F.3d at 523-24 (finding section 206(b), authorizing refunds, inapplicable where FERC ordered a rate increase, as opposed to a decrease).

The panel's discussion of *City of Anaheim* is entirely consistent with other precedent cited by Michigan. The Court has already explained that *Anaheim* does not "speak[] to the Commission's power under section 309 or its equivalent." *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 955 (D.C. Cir. 2016). Like *Anaheim*, neither *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1217 (D.C. Cir. 2009), nor *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944, 957 (D.C. Cir. 1979), addresses surcharges to fund section 206(b) refunds or the Commission's authority under FPA section 309.

Having failed to persuade the panel that *City of Anaheim* and like cases bar surcharges in this cost allocation case, Michigan now claims that the *Verso* opinion contradicts the Court's recent decision in *Old Dominion*, 892 F.3d 1226. But *Old Dominion*, applying principles the Court there described as "decidedly routine," is distinguishable for the same reasons the panel distinguished *Anaheim*. *Id.* at 1226. In *Old Dominion*, the Court affirmed the Commission's decision to deny a request,

advanced by a utility seller on equitable grounds, to retroactively waive the filed rate to allow the utility to collect unexpected costs incurred the day before a prospective rate change took effect. 892 F.3d at 1230-32. In other words, just like *Anaheim*, *Old Dominion* involved a request for a straightforward increase in rates paid for a prior rate period.

Michigan makes no effort to draw factual parallels between *Old Dominion* and *Verso*. Such an effort would necessarily fail. As *Old Dominion* establishes, the question whether a rate increase violates the filed rate doctrine or the rule against retroactive ratemaking turns on notice. *See Old Dominion*, 892 F.3d at 1231 ("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'") (quoting *Nat. Gas Clearinghouse*, 965 F.2d at 1075). In *Old Dominion*, notice came too late for the utility: customers "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." 892 F.3d at 1231-32. Here, Wisconsin's complaint put the parties on notice of the possibility that the rate could change from the date of the complaint forward, and the Commission could order refunds and surcharges.[2] Fifth Order P 48, JA 1730. And, as

[2] Michigan does not urge the Court to find that notice was inadequate. *See* FERC Br. 52-53.

discussed further below, while the utility in *Old Dominion* argued that the Commission could invoke equitable factors to skirt the filed rate doctrine, no party offered such an argument here, nor did the Commission or the panel rely on the equities in discerning the scope of the Commission's statutory authority. *See infra* pp. 14-15.

Turning to FPA section 206(c), Michigan devotes nearly half of its argument to challenging the panel's reliance on that provision to "bolster" and "confirm" its statutory analysis. Pet. 6-11; *see* slip op. at 16, 18. Section 206(c), the panel explained, applies in certain holding company cases and "bars refunds in circumstances where 'refunds . . . might otherwise be payable' but where the refund order 'is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies . . . .'" Slip op. at 16-17 (quoting 16 U.S.C. § 824e(c)). The panel read the quoted language as providing that "surcharges to pay for refunds are impermissible in specific, limited circumstances." Slip op. at 17. Such an exception would be "superfluous," the panel held, "[i]f FERC could not ordinarily order surcharge-funded refunds." *Id*.

Michigan first argues that section 206(c) "***does not address surcharges***." Pet. 9 (emphasis in original). But the panel found no need to look beyond the plain language of the statute to discern that section 206(c) addresses both refunds and

surcharges: it prohibits refunds in certain circumstances where surcharges would be required to fund the refunds. *See* slip op. at 17. In any event, Michigan's argument is untenable. If the omission of the word "surcharge" from section 206(c) renders it inapplicable, that same omission extinguishes Michigan's argument that section 206(a) expressly bars surcharges.

Next, Michigan claims that the panel's reading of section 206(c) undermines section 206(a). Pet. 10. But Michigan employs a circular logic rejected by the panel: Michigan assumes that section 206(a) bars surcharges here, and finds section 206(c) inconsistent with that assumption. The panel's analysis is linear: 1) section 206(a) does not expressly bar surcharges to fund refunds authorized by section 206(b); 2) section 309 affords the Commission broad remedial authority, including the use of surcharges in prior cases; and 3) section 206(c) buttresses the panel's determination that the Commission's remedial toolbox includes surcharges in these circumstances. The panel correctly found that "Section 206 supports, rather than negates, FERC's authority to order rate reallocations." Slip op. at 18.

Finally, Michigan asserts that the panel was not permitted to rely on section 206(c), because the Commission did not. Pet. 7 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). But Michigan ignores the panel's ruling that "*Chenery* poses no obstacle when we consider a party's interpretation of other statutory provisions to bolster the interpretation of the statutory language at issue." Slip op.

at 19 (citing *Am.'s Cmty. Bankers v. Fed. Deposit Ins. Corp.*, 200 F.3d 822, 835 (D.C. Cir. 2000) (employing "traditional tools of statutory interpretation," and rejecting a *Chenery* argument, where the Court found that another part of the statute bolstered the agency's interpretation)). The panel opinion makes clear that section 206(c) was neither central nor essential to the panel's analysis. *See* slip op. at 16, 18, 19 (explaining that section 206(c) "confirms," "buttresses," "bolsters," and provides "further textual support" for the panel's statutory interpretation).

In any event, Michigan incorrectly asserts that the panel cannot reach an intervenor's argument that "was never relied upon by FERC."[3] Pet. 7. The panel's consideration of such an argument does not inappropriately "expand the proceedings." *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (citing *Vinson v. Wash. Gas Light Co*., 321 U.S. 489, 498 (1944)).

2. The Panel Decision Is Consistent With This Court's Interpretation Of FPA Section 309

Michigan renews its claim that FPA section 309, 16 U.S.C. § 825h, limits the Commission's remedial authority, and particularly its authority to permit

[3] The argument was "offered" and "vetted" by the parties before the Commission, though the Commission did not reach it. *La. Pub. Serv. Comm'n*, 482 F.3d at 519-20 (asterisked footnote). Michigan points (Pet. 7 n.17) to Wisconsin's argument, in a pleading before FERC, that section 206(c) suggests the Commission has surcharge authority here. Pet. 7 (citing JA 1682-83). Michigan responded to that argument in pleadings before the Commission, and again on brief before this Court. Michigan Answer at 10-11 (Aug. 4, 2016), JA 1699-1700.

surcharges, to cases involving Commission error. Pet. 13-14. Indeed, Michigan must continue to press this argument, notwithstanding contrary precedent, because Michigan has forthrightly acknowledged that "FERC has authority to order retroactive rate increases (surcharges) to put the aggrieved party in the position it would have been in '*but for* the FERC's earlier error.'" Michigan Reply Br. 14-15 (quoting *Nat. Gas Clearinghouse*, 965 F.2d at 1073 (emphasis as quoted)); *see also* Michigan Opening Br. 37. In *Xcel Energy*, 815 F.3d 947, issued just prior to the Commission's final orders on review here, the Court reemphasized this point. *Id.* at 955 ("no precedent is cited, and we are aware of none, for the proposition that the Commission's equitable authority does not encompass refunds as well as surcharges") (citing *Nat. Gas Clearinghouse*, 965 F.2d at 1073). *See also* Fifth Order P 49, JA 1731 (same); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 166 (D.C. Cir. 1993) (following *Natural Gas Clearinghouse* and affirming FERC surcharges). Ultimately, Michigan fails to identify a conflict with this Court's precedent construing the scope of the Commission's section 309 remedial authority.

The panel correctly recognized that section 309 permits the Commission "to advance remedies not expressly provided by the FPA, as long as they are

consistent with the Act."[4] Slip op. at 16 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967)). The panel cited a range of cases involving a variety of remedies, *id*., and considered the statutory language itself: "The provision itself allows for 'any and all acts' 'necessary or appropriate' to carry out the FPA's statutory ends, 16 U.S.C. § 825h, not merely to fix mistakes by the Commission." Slip op. at 18 (citing *Niagara Mohawk*, 379 F.2d at 158).

Michigan does not attempt to rebut the panel's textual analysis. Instead, Michigan cites three cases to support its claim that "[a]ll of the precedents cited in *Verso* in support of the decision were part of a well-recognized line of 'legal error' cases . . . ." Pet. 13 (citing *Tenn. Valley Mun. Gas Ass'n v. FPC*, 470 F.2d 446, 452-53 (D.C. Cir. 1972); *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1139 (D.C. Cir. 1987); and *Nat. Gas Clearinghouse*, 965 F.2d at 1073)). None of these cases is cited in *Verso*.

Setting Michigan's error aside, *Verso* in fact relies on cases where the Court has affirmed the Commission's exercise of section 309 authority in the absence of a legal error. *See* slip op. at 16, 18 (addressing *Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (holding that the Commission's authority to order

[4] Michigan also continues to claim that the Commission may not rely on FPA section 309 to require surcharges here, because FPA section 206(a) is a "specific statutory stricture" prohibiting such surcharges. Pet. 12 (citing *TNA Merchant Projects v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017)). As discussed above, the panel found that section 206(a) does not bar surcharges here.

refunds following a violation of the filed rate "may also be inferred from section 309 of the Act"), and *Niagara Mohawk*, 379 F.2d at 158 (holding that section 309 authorizes agency "to establish effective dates of licenses earlier than the date of issuance")). The U.S. Court of Appeals for the Ninth Circuit has done the same. *See Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) (holding that, where a case is initiated with a section 206 complaint, the Commission may invoke its section 309 authority to order additional remedies (there, restitution for tariff violations), not subject to the time limit on refunds in section 206(b)).

Finally, Michigan mispresents the role of equitable factors in the panel decision. Pet. 15-17. The panel found that the Commission has statutory authority to require surcharges to fund refunds; nothing in the panel's analysis of the Commission's authority, detailed above, hinges on the equities. *See* slip op. at 14-19; *see also Old Dominion*, 892 F.3d at 1231 (noting the standard rule that FERC has "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"). Instead, the panel's analysis reflects ordinary principles of statutory construction, relying in substantial part on this Court's decisions interpreting the Federal Power Act. Only *after* confirming the Commission's statutory authority to require surcharges did the panel consider whether the Commission properly weighed the equitable factors in

deciding to exercise its authority to require surcharges here. Slip op. at 19-22. Such remedial decisions, including those arising in cases of legal error, are always grounded in equity. *See La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1306 (D.C. Cir. 2014) (remanding where the Court determined the Commission had inadequately considered the equitable factors); *Xcel Energy*, 815 F.3d at 953 (holding, in a legal error case, that the Commission erred in declining to weigh the equities).

B. There Is No Issue Of Exceptional Importance Warranting *En Banc* Review

Michigan has not demonstrated that this case involves an issue of exceptional importance warranting the full Court's review. Michigan claims that the panel committed a factual error "mischaracterizing a utility's 'revenue requirement' as the 'aggregate rate.'" Pet. 14. As a result, Michigan asserts, sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d, 824e, no longer apply to cost allocation cases, Pet. 3, and the panel opinion "seriously undermine[s] the consumer protection goals of the FPA." *Id*. at 15.

Michigan is mistaken. As an initial matter, even if the panel had relied upon a factual error (which it did not), such an error would not warrant the full Court's attention, and could have been addressed in a petition for panel rehearing. *See* Fed. R. App. P. 40(a)(2).

In any event, the Commission's orders on review in fact assure ratepayer protection consistent with "primary aim" of the Act — "the protection of consumers from excessive rates and charges." Fifth Order P 55, JA 1734 (citing *Xcel Energy*, 815 F.3d at 952-53 (quoting *Mun. Light Bds. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)). Michigan essentially advocates a rule by which refunds will never be paid in cost allocation cases where the utility is a "non-profit that itself lacks any funding to cover the costs of refunds." Slip op. at 21. To be clear, the Commission's decision whether to grant refunds is based on the equities of each specific case; not all cost allocation cases involving a non-profit system operator will warrant refunds and surcharges. *See* slip op. at 22 (noting this is an "atypical remedy"). But in *Xcel Energy*, issued just prior to the Commission's final orders on review, the Court held that the Commission had "misapprehended its remedial powers and thus arbitrarily declined to weigh the equities" to assess whether a remedy was appropriate. Fifth Order P 49, JA 1731 (quoting *Xcel*, 815 F.3d at 953). The Commission appropriately heeded that guidance. Nothing in the panel decision suggests that cost allocation cases are no longer subject to the regulatory requirements of the Federal Power Act.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and Circuit Rules 35 and 40, I certify that this response complies with the type-volume limitation in the Court's order of September 21, 2018 because it contains 3,821 words, excluding the parts of the pleading exempted by Fed. R. App. P. 32(f).

I further certify that this pleading complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this pleading has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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October 9, 2018

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 9th day of October 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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