

No. 18-983

In the Supreme Court of the United States

CITY OF MACKINAC ISLAND, MICHIGAN, ET AL.,
PETITIONERS

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 correctly determined that the Federal Energy Regulatory Commission may exercise its remedial discretion under Section 309 of the Federal Power Act (Act), 16 U.S.C. 825h, to authorize surcharges necessary to fund refunds ordered under Section 206(b) of the Act, 16 U.S.C. 824e(b), as part of a reallocation of costs for particular power plants required for the reliable operation of the electricity grid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 898 F.3d 1. Relevant orders of the Federal Energy Regulatory Commission are reported at 148 F.E.R.C. ¶ 61,071 (Pet. App. 40a-131a), 150 F.E.R.C. ¶ 61,104, 152 F.E.R.C. ¶ 61,216, 155 F.E.R.C. ¶ 61,134 (Pet. App. 132a-171a), and 156 F.E.R.C. ¶ 61,205 (Pet. App. 172a-237a).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2018. A petition for rehearing was denied on October 26, 2018. The petition for a writ of certiorari was filed on January 23, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the allocation of costs for the operation of three power plants on the Upper Peninsula of Michigan. The Public Service Commission of Wisconsin (Wisconsin Commission) challenged the former cost-allocation methodology as unjust and unreasonable under the Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, and the Federal Energy Regulatory Commission (FERC or Commission) granted the Wisconsin Commission's complaint. Pet. App. 7a-8a. As a remedy for the FPA violation, FERC awarded refunds to customers who had overpaid under the former cost-allocation methodology, and ordered that those refunds be funded by surcharges on customers who had underpaid under the former cost-allocation methodology. *Id.* at 8a-11a. Petitioners, who were subject to the surcharges, sought rehearing of FERC's order. The Commission denied rehearing. *Id.* at 180a-212a. The court of appeals denied petitions for review. *Id.* at 1a-25a.

1. The FPA vests FERC with jurisdiction to regulate, *inter alia*, the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. See 16 U.S.C. 824 (2012 & Supp. V 2017). Section 206 of the Act requires FERC to ensure that rates are not "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. 824e(a). To facilitate the Commission's performance of that directive, every FERC-regulated utility must file with FERC a schedule of its rates. 16 U.S.C. 824d(c); see 18 C.F.R. Pt. 35. Under the filed-rate doctrine, "a regulated entity" may not "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); see, *e.g.*,

Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251-252 (1951).¹

When FERC determines that a rate is unjust or unreasonable, Section 206(a) of the Act requires the Commission to determine a revised rate “to be thereafter observed and in force.” 16 U.S.C. 824e(a). As that statutory language indicates, FERC’s authority to revise rates generally operates only prospectively. The Commission is thus subject to the filed-rate doctrine and “has no power to alter a rate retroactively.” *Arkansas Louisiana*, 453 U.S. at 578.

FERC does, however, have remedial powers to reallocate costs when it determines that a rate is unjust or unreasonable. Under Section 206(b) of the FPA, FERC has discretion to order refunds for particular time periods. 16 U.S.C. 824e(b). That discretion is limited by FPA Section 206(c), which prohibits a refund to be paid by certain “electric utility companies of a registered holding company,” unless FERC “determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs.” 16 U.S.C. 824e(c).²

¹ *Arkansas Louisiana* 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*, 453 U.S. at 577 n.7 (citation omitted). This Court has long explained that the filed-rate doctrine applies to rates set under the FPA. See, *e.g.*, *Montana-Dakota*, 341 U.S. at 251-252.

² Congress added Subsections (b) and (c) to Section 206 of the FPA in 1988 through the Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299-2300. Petitioners incorrectly state (Pet. 20) that Congress added Section 206(c) to the FPA in 2005.

Section 309 of the FPA provides additional remedial authority, directing that “[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act].” 16 U.S.C. 825h. The remedial discretion conferred by Section 309 has long been understood to “authorize [FERC] to use means of regulation not spelled out in” the FPA, “provided the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.” *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967); accord, e.g., *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017).

2. This case concerns the allocation of costs for the operation of three power plants on the Upper Peninsula of Michigan. Pet. App. 5a-6a. The plants generate electricity that is transmitted on an interstate grid operated by the Midcontinent Independent System Operator, Inc. (MISO), a non-profit regional transmission organization. *Ibid.* “To ensure system stability, MISO requires energy producers in its territory to notify MISO prior to ceasing operation.” *Id.* at 5a. MISO “may require continued operation” of the plants “if necessary for the reliability of energy supply.” *Ibid.* Such “providers are designated” System Support Resources (SSRs), and “they are compensated for the cost of continued operation under SSR agreements with MISO.” *Ibid.* For most of the MISO service area, “SSR costs have long been shared by customers based on” the amount consumed. *Ibid.* For the area including the power plants at issue here, however, MISO “allocated

SSR costs pro rata among all customers,” regardless of consumption. *Ibid.*

3. After FERC approved MISO’s cost-allocation arrangement, the Wisconsin Commission filed a complaint with FERC alleging that the pro rata allocation of SSR costs for the three power plants at issue here was unjust and unreasonable. Pet. App. 6a-7a. FERC granted the Wisconsin Commission’s complaint, concluding that MISO’s cost-allocation methodology for the plants at issue was unjust, unreasonable, and unduly discriminatory because it did not satisfy fundamental cost-causation principles. *Id.* at 82a-86a. In reaching that determination, FERC highlighted a preliminary study for one of the plants showing that more of the benefits of its continued operation would go to customers in the Upper Peninsula of Michigan than in Wisconsin, yet nearly all the costs of its continued operation were allocated to customers in Wisconsin. *Id.* at 82a-88a. As relevant here, FERC directed MISO to remove the pro rata allocation provision from its tariff and to allocate costs to customers that require the continued operation of the plants for reliability purposes. *Id.* at 88a-89a.

FERC subsequently considered whether and how to further exercise its remedial authority. The Commission observed that its general policy in cases involving cost allocation is not to require refunds, because refunds can produce “unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate” and can create a “potential for underrecovery.” Pet. App. 206a. The Commission found those concerns not present here, however, because no party “identified any particular decisions made

in reliance on the previous SSR cost allocation methodology,” and because “MISO can calculate the exact amount of SSR costs that should be assessed to each [customer] that underpaid in order to refund LSEs that overpaid.” *Id.* at 207a-209a. FERC accordingly concluded that refunds are warranted to reflect the difference between the amount each customer paid under the unjust and unreasonable pro rata method, and the amount, if any, that customer would have paid under the benefits-based method that FERC ultimately found to be just and reasonable. See *id.* at 89a-90a, 203a-216a.

In addition, and of particular relevance here, FERC directed that the refunds be funded through surcharges on customers (in Michigan) that underpaid under the former pro rata method. Pet. App. 213a, 233a-234a. The Commission explained that surcharges were appropriate because MISO is a non-profit entity and therefore lacks funds of its own to pay refunds. *Id.* at 232a. The Commission also found that surcharges were necessary because prospective remedies would provide no relief, given that the contracts at issue are short-term and would expire before prospective relief could be granted. *Id.* at 213a-214a.

4. Petitioners, who represent entities subject to surcharges, sought rehearing of the relevant orders. Petitioners contended that FERC had not demonstrated that the former pro rata method was unjust and unreasonable and that FERC lacked statutory authority to direct surcharges in these circumstances. The Commission determined that substantial evidence showed that the former pro rata method was inconsistent with cost-causation principles because it allocated costs to entities without regard to whether they benefitted from the

operation of the SSRs. Pet. App. 82a-83a. The Commission also rejected petitioner’s contention that it lacks authority to authorize surcharges to fund refunds. *Id.* at 210a-212a. The Commission explained that it has broad discretion to award remedies, noting that the D.C. Circuit recently stated that it was aware of no authority for the “proposition that the Commission’s equitable authority does not encompass refunds as well as surcharges.” *Id.* at 211a (quoting *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 955 (D.C. Cir. 2016)).

5. The court of appeals denied petitions for review. Pet. App. 1a-25a. The court first concluded that FERC had reasonably determined that the prior rate methodology was unjust and unreasonable. *Id.* at 12a-16a. The court then rejected petitioners’ contention that “the ordered surcharges effect a retroactive rate increase, violating [FPA] Section 206 and the filed-rate doctrine.” *Id.* at 16a. The court explained that “Section 206’s limitations and the filed-rate doctrine * * * restrict the remedies that FERC may order,” but that “FERC’s remedial authority is otherwise expansive.” *Id.* at 17a.

The court of appeals explained that FPA Section 309’s conferral of authority for FERC “to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act],” 16 U.S.C. 825h, “permits FERC to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act,” Pet. App. 18a. The court concluded that the “reallocation of SSR 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.”

Ibid. The court recognized that “the surcharges at issue here resulted in some customers paying more for past services than they were charged originally,” but concluded that such a “cost increase to a subgroup of ratepayers is not a ‘retroactive rate increase’ as such,” because “the aggregate rate remained the same, divided differently among the constituent payers.” *Ibid.*

Responding to an argument by the Wisconsin Commission, the court of appeals concluded that the explicit bar on surcharges to fund refunds in certain holding-company cases imposed by FPA Section 206(c), 16 U.S.C. 824e(c), “bolster[s]” and “confirms” the court’s statutory interpretation, Pet. App. 18a, 21a. The court explained that Section 206(c)’s creation of a limit on surcharges in certain cases involving holding companies “contemplates that the converse is true in all other circumstances: surcharges to cover retroactive rate design changes are acceptable when those limited circumstances do not apply.” *Id.* at 19a. “Reading the Section 206(c) exception in conjunction with Section 206(b) and against the backdrop of Section 309,” the court concluded, “FERC’s authority to order refunds thus must be understood to encompass surcharges to pay for ordered refunds where the result is a reallocation of an existing rate.” *Ibid.*

The court of appeals rejected petitioners’ reliance on *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009) (Kavanaugh, J.), in which the court had concluded that FERC may not “order[] a rate increase, and appl[y] it retroactively, with surcharges to make up the difference.” Pet. App. 19a. Because the remedy in *City of Anaheim* amounted to an attempt to “increase[] what customers paid during the past period of depressed rates,” the court explained that “*City of Anaheim* * * *

stands for the unremarkable proposition that FERC cannot order through surcharges what it could not otherwise accomplish directly.” *Id.* at 20a. “But,” the court added, “reallocation is a different animal altogether, and the surcharges ordered here are part and parcel of that reallocation.” *Ibid.* “Because FERC’s remedial authority allows for rate reallocation, * * * FERC’s use of surcharges to effectuate the reallocation is squarely within FERC’s authority.” *Ibid.*

Finally, the court of appeals rejected petitioners’ contention that *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), prohibited reliance on FPA Section 309 because the Commission had not expressly invoked that provision in its relevant decisions. Pet. App. 21a. The court explained that “[w]hile FERC did not explicitly mention Section 309 in the challenged orders, it repeatedly cited” cases involving Section 309 remedies and thus “invoked its Section 309 authority, even if not by name.” *Ibid.* The court also concluded that it could properly rely on Section 206(c), even though that provision had been invoked by the Wisconsin Commission rather than FERC, because Section 206(c) provides “only further textual support for the conclusion that Section 206(a) does not preclude and Section 309 affords FERC the remedial authority used here.” *Ibid.*

Having “established that FERC has the statutory authority to order a reallocation of SSR costs through refunds and surcharges,” the court of appeals concluded that FERC had permissibly exercised that authority under the circumstances of this case. Pet. App. 22a.

ARGUMENT

The court of appeals correctly upheld FERC’s determination that the prior cost-allocation scheme for the

three power plants at issue here was unjust and unreasonable, and the court correctly concluded that FERC had authority to remedy that statutory violation by ordering surcharges on customers who underpaid to fund refunds to customers who overpaid. The court’s analysis of FERC’s remedial authority rests on settled principles of statutory interpretation, does not conflict with any decision of this Court or another circuit, and does not announce any broad principles applicable beyond the circumstances of this case. Petitioners’ contrary position lacks support in the statute or other authority, and petitioners’ efforts to broaden the implications of the decision lack merit. The petition for a writ of certiorari should be denied.

1. FERC permissibly determined—and petitioners no longer dispute—that the prior cost-allocation scheme for the power plants in question was unjust and unreasonable, in violation of the FPA. Pet. App. 12a-16a. Petitioners now contend only that FERC lacked authority to remedy that violation by ordering refunds to customers who overpaid under the former scheme, funded by surcharges on customers who underpaid under the former scheme. The court of appeals correctly concluded such a remedy falls “squarely within FERC’s authority.” *Id.* at 20a.

Section 309 of the FPA authorizes FERC “to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act].” 16 U.S.C. 825h. Consistent with that broad text, Section 309 has long been interpreted to confer “expansive” authority for FERC “to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act.” Pet. App.

18a; see, e.g., *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967). Petitioners acknowledge that Section 309 “must be read in a broad expansive manner,” although it “can only be implemented consistently with the provisions and purposes of the legislation.” Pet. 16 (quoting *New England Power Co. v. FPC*, 467 F.2d 425, 430 (D.C. Cir. 1972), aff’d, 415 U.S. 345 (1974)). Because ordering a surcharge remedy falls plainly within Section 309’s broad terms, the remedy FERC ordered here would exceed its authority only if a surcharge is inconsistent with another provision of the statute, such as Section 206, see Pet. 16-17.

As the court of appeals correctly determined, the surcharge remedy FERC ordered here is consistent with Section 206. Pet. App. 12a-16a. Section 206(a) authorizes the Commission to set aside an unjust or unreasonable rate and to fix a just and reasonable rate prospectively. 16 U.S.C. 824e(a). Section 206(b) authorizes the Commission to then order refunds for certain periods of time. 16 U.S.C. 824e(b). Section 206(c) prohibits the Commission from ordering refunds that would be paid by certain “electric utility companies of a registered holding company,” unless FERC makes a particular finding. 16 U.S.C. 824e(c). Although nothing in those provisions expressly authorizes surcharges to fund refunds, nothing in those provisions is inconsistent with surcharges to fund refunds, either. To the extent Section 206 bears on FERC’s authority to order surcharges to fund refunds, it suggests that such surcharges are *not* generally foreclosed, because Section 206(c) prohibits “surcharges to pay for refunds * * * in specific, limited circumstances.” Pet. App. 19a. As the

court explained, “[i]f FERC could not ordinarily order surcharge-funded refunds, the exception” provided by Section 206(c) “would be superfluous.” *Ibid.* The court properly construed the statute to avoid that result. See, e.g., *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018); *Corley v. United States*, 556 U.S. 303, 314 n.5 (2009).

The court of appeals’ approach follows directly from other interpretations of FERC’s authority under Section 309. In *Xcel Energy Services Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016), for example, the court of appeals analyzed Sections 206 and 309 and explained that “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.” *Id.* at 955. Similarly, in *TNA Merchant Projects*, the court held that limits on refunds imposed by Section 205 of the FPA, 16 U.S.C. 824d, did not constrict the Commission’s authority to issue an order requiring recoupment of refunds under Section 309. 857 F.3d at 359. And in *Public Utilities Commission v. FERC*, 462 F.3d 1027 (9th Cir. 2006), the court determined that FERC could invoke its Section 309 authority to order restitution for tariff violations not subject to the time limit on refunds in Section 206(b). *Id.* at 1051. Those similar decisions reinforce the correctness of the interpretive approach applied by the court of appeals here.³

2. Petitioners contend (Pet. 12-27) that the court of appeals’ decision is incorrect for several reasons. Those contentions lack merit.

³ Those decisions also demonstrate the error in petitioners’ assertion (Pet. 7, 16 n.39) that FERC’s Section 309 authority is limited to cases involving legal error. See also Pet. App. 18a, 20a-21a.

a. Petitioners first rely (Pet. 13-15) on FPA Section 206(a), which provides that FERC may fix just and reasonable rates “to be thereafter observed and in force.” 16 U.S.C. 824e(a). Petitioners correctly observe (Pet. 13-14) that Section 206(a), along with the corollary filed-rate doctrine, prohibits retroactive rate increases. But contrary to petitioners’ contention, Section 206(a) poses no obstacle to the surcharge remedy ordered by FERC here. Petitioners do not suggest that Section 206(a) precludes *all* reallocations of costs that have already been incurred. Nor could petitioners make such a claim, given that Section 206(b) expressly authorizes refunds of overpaid rates, 16 U.S.C. 824e(b), a remedy that courts have long held does not violate the filed-rate doctrine so long as parties had adequate notice that refunds of paid rates were possible, see, *e.g.*, *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 794 (2019); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (per curiam).

Surcharges to pay for refunds are equally consistent with the filed-rate doctrine. “So 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). Moreover, as the court of appeals correctly explained, the surcharges ordered by FERC here do not operate as a “retroactive rate increase” because the utility did not collect more than the filed rate. Pet. App. 18a. Rather, “the aggregate rate remained the same, divided

differently among the constituent payers.” *Ibid.* Contrary to petitioners’ contention, that arrangement is consistent with the text of Section 206(a).⁴

b. Petitioners contend (Pet. i, 6, 14, 22-24) that the decision below conflicts with the D.C. Circuit’s decision in *City of Anaheim v. FERC*, 558 F.3d 521 (2009). As an initial matter, this Court’s review would not be warranted to resolve an intra-circuit conflict even if one existed. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, no such conflict exists. In *City of Anaheim*, FERC “ordered a rate increase, and applied it retroactively, with surcharges to make up the difference.” Pet. App. 19a. *City of Anaheim* thus “stands for the unremarkable proposition that FERC cannot order through surcharges what it could not otherwise accomplish directly.” *Id.* at 20a. Here, FERC did not attempt to apply a rate increase retroactively; FERC did not order a rate increase at all. Rather, as explained above, “the surcharges ordered here are part and parcel of” a rate reallocation, and the utility does not collect more than the filed rate. *Ibid.* (explaining that “reallocation is a different animal” than rate increases and that “FERC’s remedial authority allows for rate reallocation”).

⁴ Petitioners assert (Pet. 22-24) that the court of appeals conflated the rate paid by customers and the “aggregate rate.” Pet. 23 (citation omitted). That is incorrect. The decision below acknowledged that “the surcharges at issue here resulted in some customers paying more,” Pet. App. 18a, but those are the same customers who underpaid under the former cost-allocation methodology. In addition, petitioners’ suggestion that the Commission does not regulate the “aggregate rate” is incorrect. See *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1596 (2015) (explaining the relationship between the revenue requirement and rate, both subject to FERC review).

Petitioners also contend (Pet. 13-14) that the decision below conflicts with this Court’s decisions in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), and *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). Petitioners, however, did not cite *Arkansas Louisiana* or *Tennessee Gas* in support of their surcharge argument below. Accordingly, neither FERC nor the court of appeals addressed those cases, and this Court should not address them in the first instance.

Regardless, the decision below is consistent with both precedents. In *Arkansas Louisiana*, this Court held that a state court may not impose damages in a breach-of-contract action that would effectively increase a FERC-jurisdictional rate for sales and transportation of natural gas for a past period. 453 U.S. at 577-584. In *Tennessee Gas*, this Court upheld FERC’s predecessor’s authority to issue an interim order requiring refunds in a bifurcated proceeding on a natural gas company’s proposed rate increase. 371 U.S. at 152-154. Neither *Arkansas Louisiana* nor *Tennessee Gas* involved review of an order directing surcharges, so this Court had no occasion to express any view on that subject. More specifically, neither case addressed whether surcharges could be ordered under FPA Section 309 (or the parallel provision in the Natural Gas Act, 15 U.S.C. 717o), to pay for refunds as part of a cost reallocation. Accordingly, neither decision provides any support for petitioners’ position.

c. Petitioners also contend (Pet. 18) that the decision below improperly “construes subsection (a) of Section 206 as amended by negative implication based on

the relationship between subsections (b) and (c) of Section 206 enacted in 1988 and 2005.”⁵ That argument is misplaced. The court of appeals did not conclude that Section 206(a) had been “amended by negative implication.” *Ibid.* The court relied on the text and structure of Sections 206(b) and (c)—and numerous decisions construing FERC’s authority under Section 309—to conclude that nothing in Section 206 restricts FERC’s authority under Section 309 to order surcharges to fund otherwise-justified refunds. Pet. App. 12a-16a.

Specifically, the court of appeals explained that Section 206(c) provides that “surcharges to pay for refunds are impermissible in specific, limited circumstances,” and that such an “exception would be superfluous” if “FERC could not ordinarily order surcharge-funded refunds.” Pet. App. 19a. That reasoning applied the well-accepted canon against superfluity. See pp. 11-12, *supra*. Contrary to petitioners’ contentions, the court’s reading did not implicate, let alone violate, any “‘cardinal principle’ of statutory interpretation” involving “implied repeals,” or “implied amendments.” Pet. 21-22 (citation omitted). The court, moreover, did not base its decision primarily on Section 206(c), but instead explained that Section 206(c) “confirms,” “buttresses,” “bolster[s],” and provides “further textual support” for the court’s interpretation. Pet. App. 18a, 20a-21a.

Petitioners also briefly assert (Pet. 33) that the court of appeals was not permitted to consider Section 206(c) because FERC did not rely on that provision in its decision. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196

⁵ As noted above (p. 3 n.2, *supra*), Congress added Subsections (b) and (c) to Section 206 of the FPA in 1988. The 2005 amendments are not relevant to this case.

(1947). But a court is always free to consider “the overall statutory scheme” when interpreting statutory language. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). And in any event, the court of appeals did not rely on Section 206(c) as the source of FERC’s authority to undertake the challenged agency action; the court relied on Section 206(c) “only” as “further textual support” for FERC’s conclusion (made and pressed by the Commission throughout the proceedings) that Section 309 authorized the surcharges ordered. Pet. App. 21a. As the court of appeals explained, “*Chenery* poses no obstacle when [a court] consider[s] a party’s interpretation of other statutory provisions to bolster the interpretation of the statutory language at issue.” *Id.* at 21a-22a.⁶

3. Finally, petitioners suggest that this Court’s review is warranted for several reasons beyond the merits of the decision below. None is persuasive. Petitioners identify (Pet. 28-29) other federal statutes that, like Section 309 of the FPA, provide authority for agencies to undertake “necessary or appropriate” actions to carry out their enabling statutes. 16 U.S.C. 825h. But petitioners provide no basis to conclude that the decision below will have any impact on the interpretation of

⁶ Petitioners erroneously suggest (Pet. 24-27) that the court of appeals erroneously relied on equitable factors in determining that FERC had statutory authority to order surcharges in these circumstances. Equitable factors played no role in the court’s analysis of the Commission’s statutory authority. See Pet. App. 16a-22a. Only *after* confirming FERC’s statutory authority to order surcharges did the court consider whether the Commission properly weighed the equitable factors in deciding to exercise its remedial discretion. *Id.* at 22a-25a. FERC would have committed legal error if it declined to weigh the equities in determining the appropriate remedy. See, e.g., *Xcel Energy*, 815 F.3d at 953.

those statutes. The decision below addressed “FERC’s remedial authority under Section 309, read in harmony with Section 206 and the filed-rate doctrine,” to issue “the surcharges at issue here.” Pet. App. 18a. The court of appeals did not announce any generally applicable principles for interpreting Section 309 of the FPA, much less for interpreting other statutes. Petitioners’ characterization (Pet. 29) of the “scope of the precedential consequences” of the decision is thus without merit.

Petitioners’ invocation (Pet. 29-32) of cases involving the “restructuring of the electric industry” is similarly without merit. Unlike *New York v. FERC*, 535 U.S. 1 (2002), and related cases, this case does not involve questions broadly affecting the electricity industry. It involves one component of a remedy tailored to an unreasonable cost-allocation scheme involving three power plants on the Upper Peninsula of Michigan. The court of appeals correctly resolved the narrow question before it. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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