

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1141

September Term, 2017

FILED ON: JUNE 28, 2018

AMEREN SERVICES COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

DUKE ENERGY SHARED SERVICES, INC., ET AL.,
INTERVENORS

Consolidated with 16-1223, 16-1224, 16-1225

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: TATEL, GRIFFITH and WILKINS, *Circuit Judges*.

J U D G M E N T

This cause came to be heard upon two petitions for review from the Federal Energy Regulatory Commission, and was briefed and argued by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petitions for review be denied.

This consolidated appeal arises from two proceedings, one under Federal Power Act (“FPA”) § 205 and one under FPA § 206, concerning how the Midcontinent Independent System Operator (“MISO”) calculates and assesses charges in its energy markets. 16 U.S.C. § 824d(d); 16 U.S.C. § 824e(a). MISO is a Regional Transmission Organization (“RTO”) that runs two electricity markets: a day-ahead market in which parties buy and sell energy a day in advance of when it will be delivered, and a real-time market in which energy transactions are completed as needed within each hour of the operating day. MISO permits “virtual supply offers” in its day-

ahead markets. Virtual traders “never actually transmit or take delivery of electricity. . . . Instead, they have either profited or lost based on price fluctuations in the time between their purchases and their sales.” *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 236 (D.C. Cir. 2013). Such virtual transactions “provide important benefits to bid-based markets by helping to ensure that [day-ahead] and [real-time] prices do not diverge significantly, as well as by providing price discovery and liquidity to the market.” *ISO New England, Inc.*, 113 FERC ¶ 61,055 P 30 (2005). To ensure that sufficient generation capacity is available during the operating day, and to make up any shortfall between the supply committed in the day-ahead market and the demand to be met in real time, MISO guarantees that generators will at least break even for their real-time generation costs. MISO does this by paying generators the revenue from a “Guarantee Charge,” which MISO collects from energy-market participants whose day-ahead commitments deviate from their real-time performance, as determined by calculations set out in MISO’s tariff. At the inception of MISO’s markets in April 2005, its FERC-approved tariff provided that: “On any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time revenue sufficiency guarantee charge” and included “Virtual Supply for the Market Participant in the Day-Ahead Energy Market” as a factor in calculating the Guarantee Charge. J.A. 288.

This case concerns FERC’s review of MISO’s calculation and assessment of Guarantee Charges in numerous orders issued over the course of a decade. In October 2005, MISO initiated an FPA § 205 proceeding to amend its tariff to remove virtual supply from the calculation of the Guarantee Charge. MISO revealed that it had not previously included virtual supply offers in its Guarantee Charge calculation despite its tariff language to the contrary. *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108 (Apr. 25, 2006). MISO explained that its business practice manuals had represented to market participants that virtual offers would not be included when calculating the Guarantee Charge, and argued that refunds would be inappropriate because parties had relied on MISO’s manuals, not the tariff. *Id.* ¶ 61,396-97. The Commission concluded that MISO’s failure to include virtual supply in the Guarantee Charge calculation was a tariff violation and ordered refunds to reflect the correct allocation of Guarantee Charges dating back to the opening of the markets. *Id.* ¶ 61,398-99. FERC also stated that the tariff’s phrase “On any Day when a Market Participant actually withdraws any Energy” meant that the Guarantee Charge “only applied to market participants withdrawing energy in real time” and, therefore, only to participants that physically withdraw energy. *Id.* ¶ 61,398, P 26.

Upon rehearing, the Commission reversed its refund order, explaining that its view of how to balance the equities had changed because virtual traders had reasonably relied on MISO’s representations when placing transactions. *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, 61,603-04 (Oct. 26, 2006). The Commission “agree[d] with market participants that, as a general matter, an RTO [like MISO] should be considered a credible source when it comes to an accurate interpretation of its own tariff.” *Id.* ¶ 61,599, P 58. In addition, the Commission explained that it “has declined refunds in instances when refunds ‘would create substantial uncertainty in the . . . markets and would undermine confidence in them’ and when ‘customers cannot effectively revisit their economic decisions.’” *Id.* ¶ 61,604, P 95 (quoting *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073, 61,307 (2000)). It found that “ordering refunds

would create substantial uncertainty and undermine faith in [MISO's] markets,” and that MISO's “market participants cannot revisit economic decisions” made based on incorrect information provided by MISO. *Id.*

Petitioner Ameren Services Company (“Ameren”) requested rehearing on FERC's refund reversal, arguing that FERC did not adequately justify its changed position and that failure to order refunds created an inequitable windfall for purely virtual traders at the expense of load-serving entities. The Commission disagreed. Its second rehearing order reiterated that “it is unfair to market participants to assume that interpretations made by an RTO in its own publications cannot be regarded as coming from a reliable source.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212, 62,034, P 89 (Mar. 15, 2007) (quotation marks and alterations omitted). The Commission also reasoned that refunds could not be calculated accurately: FERC could only tell the “amount of money at stake in this proceeding,” and not “how many market participants may have overpaid, how many may have underpaid, which market participants fall into which category, or how many dollars they may have gained or lost.” *Id.* ¶ 62,036, P 97. Therefore, “the Commission ha[d] considered the evidence of potential harm and concluded that there is an insufficient record to conclude that market participants suffered or enjoyed an inequitable windfall[.]” *Id.* Finally, the Commission acknowledged that “the [tariff] violation was disruptive . . . [but] the remedy Ameren proposes is also disruptive since [MISO] would need to develop software to perform the market resettlement automatically or develop alternative manual procedures in order to make the refunds initially ordered.” *Id.* ¶ 62,036, P 98.

Separately, the Commission misstated the formula for calculating the Guarantee Charge in one part of its second rehearing order: It erroneously stated that the tariff's Guarantee Charge calculation included all virtual supply, rather than only virtual supply that physically withdrew energy. FERC clarified this misstatement in a fourth rehearing order and ordered refunds between the date of its first order on the Guarantee Charge (April 25, 2006) and the date before the second rehearing order (March 14, 2007). Upon further rehearing, the Commission decided to waive refunds for the period between the date of its first order on the Guarantee Charge (April 25, 2006) and the day before it issued a separate compliance order clarifying the Guarantee Charge numerator/denominator calculation (November 4, 2007). *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241 (June 12, 2009). The Commission reasoned that the confusion caused by FERC's misstatement led MISO to assess Guarantee Charges incorrectly, but that this confusion was clarified “comprehensively” in the separate compliance order. *Id.* ¶ 62,059-60. The Commission proceeded to deny rehearing of its refund reversal order in the face of several challenges, including from Ameren and from Petitioner Westar Energy (“Westar”). *Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,126 (May 2, 2016). In particular, Westar challenged the order because its dates differed from refund dates set in a separate, then-ongoing FPA § 206 proceeding initiated to revise the MISO tariff and, in Westar's view, treated similarly situated parties differently in a discriminatory manner. Westar objected to the interaction of this § 205 order with a separate order issued in the § 206 proceeding, arguing that, together, these orders made Westar unexpectedly responsible for far more in Guarantee Charges than it had anticipated based on FERC's previous orders, resulting in a retroactive surcharge. FERC disagreed, explaining that its decisions in the § 205 and § 206 proceedings were separate and

“based on specific facts and considerations relevant to” each proceeding. *Id.* P 33. FERC also characterized Westar’s challenge to its requirement of refunds after November 5, 2007, as an out-of-time request for rehearing of the fourth rehearing order, which had originally ordered this set of refunds. *Id.* P 34.

In this series of rehearing orders, FERC also rejected Ameren’s challenge to the Commission’s interpretation of MISO’s tariff as applying the Guarantee Charge only to entities physically withdrawing energy. Ameren argued that the tariff’s definition of “Energy” encompasses virtual transactions, and therefore the phrase “actually withdraws Energy” includes all virtual traders, not just those who physically withdraw energy. Ameren further argued that assessing Guarantee Charges only to entities engaged in virtual transactions that also physically withdraw energy would create a “mismatch” between the group of entities included in the charge calculation and the group of entities upon which the charge is assessed, resulting in under-recovery of generation costs and an inequitable shift of costs from market participants who did not physically withdraw energy to those who did. The Commission disagreed, explaining that the tariff language regarding Guarantee Charges specifically applies only to payments for real-time transactions, which are necessarily physical. 117 FERC ¶ 61,610-11.

In 2007, Ameren and other MISO market participants filed a complaint under FPA § 206 alleging that the MISO tariff was unjust, unreasonable, and unduly discriminatory to the extent that it allocated Guarantee Charges only to market participants that physically withdrew energy. The Commission agreed, as virtual traders that did not physically withdraw energy could also cause real-time generation costs and, therefore, should be responsible for Guarantee Charges under cost-causation principles. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161, 61,830 (Nov. 10, 2008). The Commission ordered MISO to delete the “actually withdraws energy” phrase from the tariff and to make refunds from the date of this § 206 order (November 10, 2008) back to the date of the § 206 complaint (August 10, 2007). In ordering refunds, the Commission noted that market participants had notice from the § 205 proceeding that the tariff could be deemed unjust and unreasonable in this manner. Many parties requested rehearing, arguing that FERC should reverse this refund order because it had significantly reduced virtual trading, and because it had led to payment defaults and some market participants going out of business. The Commission agreed. In May 2009, it reversed the refund order and directed MISO not to provide refunds for the period up to its November 10, 2008 order, acknowledging that the refund requirement had “caused difficulties and market uncertainty well in excess of the financial impact the Commission anticipated.” *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, 61,522, P 156 (May 6, 2009).¹ The Commission concluded that “it was unreasonable for us to expect market participants to adjust their economic decisions to correctly accommodate the eventual rate change” because even if they knew refunds were a possibility, “it would not have been possible for market participants to accurately predict the significant increase in costs,” which are a “function of a wide range of factors” whose

¹ We note with some concern that this was the third time FERC reversed itself on a refund order in proceedings regarding MISO’s Guarantee Charge. While we acknowledge the propriety of granting rehearing when warranted, both confusion in the MISO markets and the expenditure of significant resources – by the agency and by the parties – may have been avoided with more careful refund decisions in the first instance.

“interaction . . . is difficult to predict.” *Id.* P 155.

Ameren’s present petition challenges the scope of FERC’s remedial authority to decline to require refunds when a tariff has been violated or when the Commission amends a tariff. Ameren argues that the Commission failed to engage in reasoned decisionmaking based on substantial evidence when it refused to require refunds for each of the three time periods discussed: First, when FERC declined to require a refund in the § 205 proceeding after MISO violated its original tariff; second, when FERC waived a refund for the period during which FERC’s misstatement of the Guarantee Charge formula created confusion among MISO and market participants; and third, when FERC declined to require refunds based on the new Guarantee Charge rate it set in the § 206 proceeding. Ameren also renews its challenge to FERC’s interpretation of “actually withdraws Energy” in the original MISO tariff. Petitioner Westar, for its part, reiterates its arguments that the Commission has unreasonably treated similarly situated market participants differently and imposed an unjustified retroactive surcharge on Westar through the interaction of its order in the § 205 and § 206 proceedings.

We deny both petitions. This Court reviews FERC orders under the Administrative Procedure Act’s arbitrary-and-capricious standard, asking whether FERC has “articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted). We have held repeatedly that “the breadth of agency discretion is, if anything, at its zenith” when fashioning remedies. *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000) (quotation marks omitted). “The agency need only show that it considered relevant factors and struck a reasonable accommodation among them, and that its order granting or denying refunds was equitable in the circumstances of this litigation.” *Town of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (cleaned up). We conclude that Ameren’s challenge to FERC’s refund decisions is foreclosed by *Louisiana Public Service Commission v. FERC*, 883 F.3d 929, 934 (D.C. Cir. 2018), where we acknowledged FERC’s “general tendency to deny refunds in cost allocation cases” because of the “high correlation” between “that type of case” and the reasonable reliance interests that can be inequitably upset by retroactive refunds such as those sought by Ameren.

Under the highly deferential standard of review applied to FERC’s remedial choices, none of the Commission’s decisions to deny refunds was an abuse of discretion. All were well-reasoned and supported by substantial evidence regarding the reasonable reliance interests of market participants, the difficulty of accurately calculating refunds, and the adverse impact on market participants – and, therefore, on the stability and efficiency of the markets themselves – that could and did result from the refund orders. “[T]he difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion.” *La. Pub. Serv. Comm’n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 2014) (quotation marks omitted). The Commission considered all parties’ arguments in the seven orders under review here (and in many others issued in the course of these proceedings), and reasonably balanced the equities to market participants and concerns for market stability as a whole.

As this Court recently explained, FERC generally denies refunds in such cost-allocation cases because “customer firms that had made operational decisions in reliance on one set of rates would be unable to ‘undo’ those transactions retroactively in light of the new, corrected rates; a refund would, at least in part, pull the economic rug out from under those transactions.” *La. Pub. Serv. Comm’n*, 883 F.3d at 933. Equity weighs both on the side of Ameren, which may well have overpaid its share of Guarantee Charges, as well as on the side of virtual traders, who relied on MISO’s interpretation of its own tariff and on market conditions as they existed at the time of trading. FERC reached its decision reasonably by balancing these equities and considering the difficulty of accurately calculating refunds. FERC’s decisions to reverse its refund orders were also based on substantial evidence of the adverse impact of refunds on MISO markets, including payment defaults and business failures, which FERC by its own admission had not anticipated accurately when initially ordering refunds. Considering new facts that reduce an agency’s guesswork or “undercut an old rationale” is entirely proper on rehearing. *Cf. Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003). It was therefore not unreasonable for FERC to follow its general policy of denying refunds in cost-allocation cases, and we find it appropriate, in these circumstances, to defer to the Commission’s reasonable balancing of the equities and evaluation of the impact of refunds on the MISO markets.

We also reject Ameren’s challenge to FERC’s interpretation of the original MISO tariff. “[T]his circuit gives substantial deference to [FERC’s] interpretation of filed tariffs” under the same standard of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). We agree with FERC that the phrase “actually withdraws” may reasonably be interpreted to require that “virtual supply should be assessed [Guarantee Charge] costs only on those days the market participant withdraws energy,” particularly in light of the fact that in the real-time market, all transactions are physical regardless of how “Energy” is defined elsewhere in the tariff. 118 FERC ¶ 61,212, 62,024 P 17.

Finally, we conclude that, despite FERC’s arguments to the contrary, Westar has standing to challenge FERC’s refund decisions, but its arguments fail on the merits. Westar alleges it suffered the financial harm of overpaying real-time generation costs – harm that is fairly traceable to the refund decisions Westar challenges and redressable by this Court regardless of whether Westar sought rehearing of the § 206 orders. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). This is sufficient for Article III standing. On the merits, like Ameren, Westar has reasonable arguments that it overpaid its fair share of generation costs. Yet, as FERC concluded, it might also be unfair to other market participants to upset their reasonable reliance interests with retroactive refunds of dubious accuracy. Balancing such equities is precisely what Congress intended FERC, not this Court, to do. *See La. Pub. Serv. Comm’n v. FERC*, 772 F.3d at 1302. Westar complains that FERC improperly held purely virtual market participants and “physical” market participants to different standards, but any dissimilar treatment arose from the original tariff’s language, not from arbitrary and capricious decision-making on FERC’s part. That tariff language remained in effect until it was revised in the § 206 proceeding, and any refund decisions based on that language in the § 205 proceeding would necessarily be separate from refund

decisions based on the revised language following the § 206 proceeding. Thus, FERC reasonably based its decisions on facts and considerations specific to each proceeding.

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Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk