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## Reasoned Decisionmaking? Survey of 2019 Decisions on Cost Allocation Remedies

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# The Old Hard Part: Matching Costs and Benefits

- “All rates and charges . . . shall be just and reasonable.”
  - 16 U.S.C. § 824d(a); *see also* 16 U.S.C. § 824e(a).
- “No public utility shall . . . make or grant any undue preference or advantage [or] maintain any unreasonable difference in rates . . . .”
  - 16 U.S.C. § 824d(b); *see also* 16 U.S.C. § 824e(a).
- “Simply put, it has been traditionally required that all approved rates reflect some degree of the costs actually caused by the customer who must pay them.”
  - *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

# The Old Hard Part, *cont.*

- “Not surprisingly, [courts] evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.”
  - *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).
- FERC is not required “to allocate costs with exacting precision.”
  - *Id.*
- “FERC is not bound to reject any rate mechanism that tracks the cost-causation principles less than perfectly.”
  - *Sithe/Indep. Power Partners, L.P. v. FERC*, 285 F.3d 1, 5 (D.C. Cir. 2002).
- In sum, determining whether costs and benefits are “roughly commensurate.”

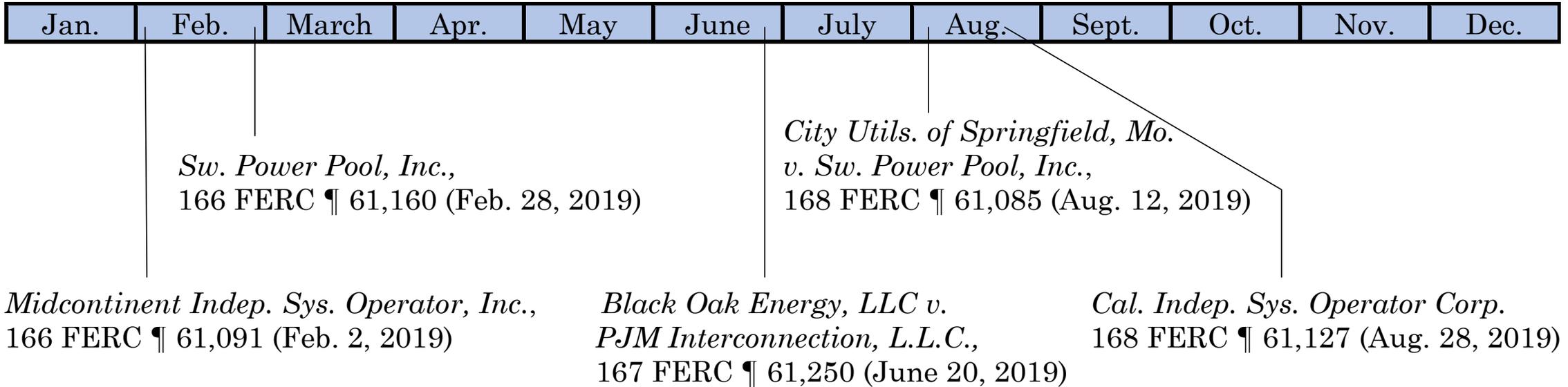
# The New Hard Part: The Filed Rate Doctrine and its Exceptions

- “[E]very public utility shall file. . . and shall keep open in convenient form and place for public inspection schedules showing all rates and charges.”
  - *See* 16 U.S.C. § 824d(c); *see also* 16 U.S.C. § 824d(d) (requiring notice for rate changes); 16 U.S.C. § 824e(a), (b).
- “Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.”
  - *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).
- “The filed rate doctrine and the rule against retroactive ratemaking leave the Commission 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.”
  - *Old Dominion Elec. Coop.*, 892 F.3d 1223, 1231 (D.C. Cir. 2018).

## The New Hard Part, *cont.*

- “[T]he filed rate doctrine and bar on retroactive ratemaking are satisfied, in keeping with their functions, ‘when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or where they have agreed to make a rate effective retroactively.’”
  - *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (quoting *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003)).
- “[In] a cost allocation case, the limitations surrounding retroactive rate changes do not come into play” because FERC’s broad authority under Federal Power Act Section 309.
  - *Verso Corp. v. FERC*, 898 F.3d 1, 9 (D.C. Cir. 2018) (quoting FERC’s brief).
- It shouldn’t be that hard, but . . .

# Survey of 2019 Decisions



# Orders Applying *Verso*

- *Midcontinent Indep. Sys. Operator, Inc.*, 166 FERC ¶ 61,091 at P 12 (2019)
  - Rehearing order addressing refund report for cost allocation regarding System Support Resource service.
  - Found surcharges to correct implementation of prior unjust and unreasonable cost allocation methodology are not contrary to filed rate doctrine or rule against retroactive ratemaking.
- *Black Oak Energy, LLC v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,250 at PP 14-26 (2019)
  - Order on voluntary remand addressing over-collections of marginal line loss amounts.
  - Ordered PJM to recover over-payments and “pay refunds of misallocated marginal line loss over-collection amounts in excess of those that would have been paid under the just and reasonable rate.”
- *Cal. Independent Sys. Operator Corp.*, 168 FERC ¶ 61,127 at PP 14, 23 (2019)
  - Rehearing order addressing informational reports for must-offer generation requirement
  - Found “reallocation of . . . costs . . . was well within [FERC’s] expansive remedial authority” under FPA Sections 206(b) and 309 and ordered refunds.

# Orders Applying *Old Dominion*

- *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 at P 57 (2019)
  - Order on voluntary remand regarding previously approved waiver of OATT provision limiting billing adjustments to one year to ensure revenue credits under Attachment Z2 could be allocated for a historical period.
  - Recognized refund authority under *Verso* and Section 309 but found granting the waiver would be “inappropriate” because the filed rate doctrine and rule against retroactive ratemaking preclude waivers.
- *City Utils. of Springfield, Mo. v. Sw. Power Pool, Inc.*, 168 FERC ¶ 61,085 at P 53 n.113 (2019)
  - Complaint under Sections 206 and 309 seeking a surcharge to address imbalanced cost allocation results identified in SPP’s Regional Cost Allocation Review studies.
  - Never addressed *Verso* or Section 309 but relied on *Old Dominion* to find that correcting unjust and unreasonable cost allocation results “would be contrary to the filed rate doctrine and rule against retroactive ratemaking.”

# FERC's Reasoning for Different Results?

- FERC has never analyzed or explained the difference results.
- Some Observations:
  - Two of the five cases involved Section 206 complaints or investigations.
  - Three of the five cases involved Section 205 filings.
  - Three of the five cases involved reversal of prior orders or rehearing or voluntary remand.
  - Two of the three decisions relying on *Verso* involved allocation of generation costs to transmission.
  - The two decisions where FERC did not apply *Verso* involved SPP.
  - One of the two decisions relying on *Old Dominion* did not mention *Verso* or Section 309 at all. The other mentioned *Verso* but seemed to rely on *Old Dominion* because of the waiver request.
  - The threshold question of whether remedial action is appropriate comes before (i.e., appears unrelated to) FERC's discussion of its general policy of not requiring refunds in cost allocation cases).

# Appendix

# Resources

- Federal Power Act Sections 205, 206, and 309
  - <https://www.law.cornell.edu/uscode/text/16/824d>
  - <https://www.law.cornell.edu/uscode/text/16/824e>
  - <https://www.law.cornell.edu/uscode/text/16/825h>
- *KN Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992).
  - [https://scholar.google.com/scholar\\_case?case=11142520744638012671&q=968+F.2d+1295&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=11142520744638012671&q=968+F.2d+1295&hl=en&as_sdt=20006)
- *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004).
  - [https://scholar.google.com/scholar\\_case?case=4795467903982041648&q=373+F.3d+1361+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=4795467903982041648&q=373+F.3d+1361+&hl=en&as_sdt=20006)

# Resources, cont.

- *Sithe/Indep. Power Partners, L.P. v. FERC*, 285 F.3d 1 (D.C. Cir. 2002).
  - [https://scholar.google.com/scholar\\_case?case=5995603922763625240&q=285+F.3d+1+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=5995603922763625240&q=285+F.3d+1+&hl=en&as_sdt=20006)
- *Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981).
  - [https://scholar.google.com/scholar\\_case?case=9071381816657426529&q=453+U.S.+571+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=9071381816657426529&q=453+U.S.+571+&hl=en&as_sdt=20006)
- *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007).
  - [https://scholar.google.com/scholar\\_case?case=8329296764950353341&q=481+F.3d+794+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=8329296764950353341&q=481+F.3d+794+&hl=en&as_sdt=20006)
- *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003).
  - [https://scholar.google.com/scholar\\_case?case=12262383737644281350&q=481+F.3d+794+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=12262383737644281350&q=481+F.3d+794+&hl=en&as_sdt=20006)

# Resources, cont.

- *Old Dominion Elec. Coop.*, 892 F.3d 1223 (D.C. Cir. 2018).
  - [https://scholar.google.com/scholar\\_case?case=10113413100222955511&q=892+F.3d+1223+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=10113413100222955511&q=892+F.3d+1223+&hl=en&as_sdt=20006)
- *Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018).
  - [https://scholar.google.com/scholar\\_case?case=9888125321623744337&q=898+F.3d+1+&hl=en&as\\_sdt=20006](https://scholar.google.com/scholar_case?case=9888125321623744337&q=898+F.3d+1+&hl=en&as_sdt=20006)
- *Midcontinent Indep. Sys. Operator, Inc.*, 166 FERC ¶ 61,091 (2019).
  - <https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=15154933>
- *Black Oak Energy, LLC v. PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,250 (2019).
  - <https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=15278922>

## Resources, cont.

- *Cal. Independent Sys. Operator Corp.*, 168 FERC ¶ 61,127 (2019).
  - <https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=15336565>
- *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019).
  - <https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=15172057>
- *City Utils. of Springfield, Mo. v. Sw. Power Pool, Inc.*, 168 FERC ¶ 61,085 (2019).
  - <https://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=15325292>