

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

No. 18-1298

BALTIMORE GAS AND ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

RESPONSE IN OPPOSITION TO PETITION FOR PANEL REHEARING

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INTRODUCTION

In 2016, Baltimore Gas sought recovery of deferred taxes dating back 12 years to 2005. The panel correctly held that Baltimore Gas failed to address accumulated deferred taxes “*by its next rate case*”—i.e., in its 2005 rate filing—“as required by Order No. 144” (i.e., the “Tax Rule”). Slip op. at 6–7.

Baltimore Gas does not challenge that holding. Instead, hoping for partial relief, it now insists it is entitled to seven years’ (rather than twelve years’) worth of recovery for the deferred taxes it accumulated in prior years. But it does so by advancing an alternative argument that garnered only a cursory reference in its

opening brief to this Court. It should get no second chance to make the argument with the requisite specificity post-briefing, post-argument, and post-opinion.

But even if Baltimore Gas *had* made a reasoned alternative argument at the merits stage, the panel should still deny rehearing. A petition for panel rehearing requires a showing that the Court “overlooked or misapprehended” a “point of law or fact.” Fed. R. App. P. 40(a)(2). The panel did not misapprehend or overlook the record or the law on the relevant issue: whether the Commission provided a rational explanation for denying Baltimore Gas’s requested recovery, where it had granted recovery to other utilities in other circumstances. *See* slip op. at 13. The panel correctly held, on arbitrary and capricious review, that the Commission satisfied its burden of showing some reason for the differential treatment. *See id.*

Critically, Baltimore Gas does not explain why *the Commission’s* reasons for treating Baltimore Gas’s application for recovery differently are inadequate. Instead, it simply doubles down on *its own belief* that it should receive the same consideration as one particular utility in one particular case. That fails to show the Commission’s decision was arbitrary and capricious.

To the extent the panel’s decision warrants a second look, it is in Part III.B. There, the panel majority found—contrary to this Court’s well-established precedent and unnecessarily in light of Part III.C—that the Commission was required to distinguish prior uncontested orders on an issue neither raised nor resolved in those proceedings. In effect, the panel majority elevated prior,

summary orders as precedent on an issue they did not even address, over the governing Tax Rule that squarely does address that issue.

ARGUMENT

I. Baltimore Gas failed to assert its alternative argument—advanced in its petition for rehearing—with specificity in its opening brief

This Court “decline[s] to consider any arguments not specifically discussed in [a petitioner’s] opening brief.” *United States v. Machado-Erazo*, 901 F.3d 326, 332 n.1 (D.C. Cir. 2018) (citing Fed. R. App. P. 28(a)(8)(A)), *cert. denied*, 139 S. Ct. 2036 (2019). A “specifically discussed” argument requires more than a “conclusory” statement unadorned with any citations to the record or authorities. *See CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014) (deeming such challenge waived). “Federal Rule of Appellate Procedure 28(a)[(8)](A) requires that the appellant’s argument ‘contain [its] contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.’” *SEC v. Banner Fund Int’l*, 211 F.3d 602, 613 (D.C. Cir. 2000) (quoting Fed. R. App. P. 28(a)[(8)](A)). Nor will the Court consider an inchoate argument in an opening brief that only fully forms on reply. *Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996). A contrary rule would result in “sandbagging of ... respondents,” effectively “depriv[ing] the [respondent] of the opportunity to respond.” *Id.*

Baltimore Gas failed to argue with specificity in its opening brief what it now demands at the thirteenth hour: an entitlement to partial recovery in the form of seven years' worth of recoupment, dating back to 2010. Pet. at 5. At most, it made two "fleeting," conclusory assertions. See *Banner Fund*, 211 F.3d at 613. It alleged that the Commission's "rationale" of denying Baltimore Gas recovery because it waited longer than utilities in "other cases" would not "justify denying [Baltimore Gas's] request in its entirety." Opening Br. at 41. And it observed—in the Summary of Argument—that, "[t]o the extent other utilities were permitted to recover [deferred taxes] accrued years before filing, so too [Baltimore Gas] should be permitted to reach back a commensurate amount of time." Opening Br. 29–30.

Baltimore Gas's bare assertions constitute "asserted but unanalyzed argument," rather than the requisite "specifically discussed" argument. See *Banner Fund*, 211 F.3d at 613; *Machado-Erazo*, 901 F.3d at 332 n.1. Baltimore Gas's opening brief made no specific "contention" that it was entitled to what it demands here: seven years' worth of recovery, dating back to 2010. See *Banner Fund*, 211 F.3d at 613. Rather, Baltimore Gas argued for 12 years' worth of recovery, dating back to 2005. Opening Br. at 21, 30–31. Nor did Baltimore Gas offer any specific "contention" explaining *how* its partial back-tax recovery should be assessed on future ratepayers—i.e., whether it should be amortized over the originally proposed 28-year period, see *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,173, at P 26

(2018) (“Rehearing Order”), JA 216, or over a shorter (or longer) period. *See Banner Fund*, 211 F.3d at 613.

Further, Baltimore Gas provided no “reasons” why it was entitled to the same amount of deferred tax recovery as any of the four cited utilities, notwithstanding that it waited nearly twice as long to seek recovery as the next nearest-in-time utility. *See id.* And it included no “citations to the authorities and parts of the record on which [it] relie[d].” *See id.*

In short, Baltimore Gas’s gossamer glance at an argument in its opening brief, made “in conclusory fashion and without visible support,” did not suffice to put the Commission on fair notice. *Bd. of Regents*, 86 F.3d at 1221. As a result, the Commission did not address Baltimore Gas’s alternative, seven-years-of-recovery argument in its answering brief. The panel should deny rehearing on this basis alone.

But even if the panel found—against the Court’s precedent and fairness to the Commission—that Baltimore Gas was entitled to advance a well-reasoned argument for the first time in its reply brief, Baltimore Gas did not do so. At most, it parroted the assertion from its opening brief, while adding a numerical value—seven years—to its alternative request for partial recovery. *See Reply Br.* at 20–21. The argument itself, however, remained conclusory: Baltimore Gas has never explained why it was entitled to the same period of recovery as Duquesne.

II. Baltimore Gas failed to show that the Commission’s explanation for differential treatment “cannot be justified”

Even had Baltimore Gas argued with specificity an entitlement to seven years’—as opposed to 12 years’—deferred tax recovery in its opening brief, that does not somehow defeat *the Commission’s* reasoned explanation for denying it *any* recovery. Embedded in Baltimore Gas’s argument for panel rehearing is the novel—and incorrect—notion that a regulated entity’s explanation for why an agency is wrong defeats an agency’s rational explanation for why it is right.

That is not the law: where an agency proffers a rational basis for treating two allegedly similarly situated entities differently, the burden shifts to *the petitioner* to “show that there is *no reason* for the difference,” *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000) (emphasis added), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002), and that any differential treatment “cannot be justified,” *State Corp. Comm’n of Kan. v. FERC*, 876 F.3d 332, 335 (D.C. Cir. 2017). Baltimore Gas never did so—and still hasn’t, not even in its rehearing petition.

The panel majority correctly held that the Commission gave a reasoned explanation for treating Baltimore Gas differently. Slip op. at 13. First, Baltimore Gas waited nearly twice as long to seek recovery as the next nearest-in-time utility (Duquesne at seven years), and failed to explain why it did not “act[] more expeditiously” in filing its application to recover those amounts. Rehearing Order

PP 21, 28–29, JA 213–14, 217–18; *see also* slip op. at 13; FERC Br. at 52 (explaining that “Baltimore Gas ... failed to explain why waiting 12 years was reasonable, when the next-longest delay was Duquesne’s at seven years”). In other words, Baltimore Gas saddled future ratepayers with payments for past accruals beginning in 2017, *see* Rehearing Order P 37, JA 221, rather than, say, 2012 (which would have been seven years after its “next rate case” in 2005). Thus, Baltimore Gas ensured that ratepayers paying for its deferred tax deficiency would be even further mis-matched from the corresponding facility expense than Duquesne’s ratepayers. *See* Rehearing Order PP 21, 25, 29 (explaining that matching requires “the tax reducing effect of an expense (or revenue increase) [to be] allocated to the same customers who pay the expense *during the same period*,” and holding that Baltimore Gas failed to normalize its rates to achieve matching within a “reasonable period of time” (emphasis added)), JA 213–16, 218. And that would hold true even if Baltimore Gas received only seven years’ worth of recovery—it would still be ratepayers 12 years hence—in 2017 and beyond—paying the expense. *Cf. id.* P 21, JA 213–14.

Second, Baltimore Gas had operated under full tax normalization since 1976, whereas Duquesne (and PPL) only transitioned from flow-through accounting to tax normalization in the mid-2000s. *Id.* P 28 n.86, JA 218; *see also* slip op. at 13. Indeed, Baltimore Gas had practiced tax normalization—required by the Tax Rule for federally-approved rates—for *three decades* by the time it

abandoned the practice with its 2005 rate filing. By contrast, Duquesne and PPL had *no experience* with tax normalization when they filed their “next rate case[s]” in 2006 and 2008, respectively. Rehearing Order P 28 n.86, JA 218; Duquesne Light Co. Federal Power Act Section 205 Filing, FERC Dkt. No. ER13-1220, at 5 (Apr. 1, 2013); PPL Elec. Utils. Corp. Federal Power Act Section 205 Filing, FERC Dkt. No. ER12-1397, at 6 (Mar. 30, 2012).

Third, as the panel majority correctly acknowledged, Baltimore Gas sought “permissive” treatment “*notwithstanding* the requirement[] of [the Tax Rule]” that a utility seek deferred tax recovery in its next rate case. *See slip op.* at 7 (emphasis added). Baltimore Gas’s “next rate case” was its 2005 filing. *Id.* at 4, 6–7; Rehearing Order P 16, JA 208–09. Tellingly, in seeking panel rehearing, Baltimore Gas abandons any argument that it complied with the “next rate case” requirement, thus conceding that its application with FERC for deferred tax recovery—in any amount—violates the Tax Rule. *See slip op.* at 7.

Baltimore Gas’s concession is not surprising. The Commission explained at length why its proposed recovery violated the Tax Rule’s “next rate case” requirement and, indeed, the matching principle anchoring the Rule itself. *See, e.g.,* Rehearing Order PP 18–19, 21–22, 25, JA 210–16. And because Baltimore Gas’s proposal violated the Rule to an even greater degree than Duquesne’s, the Commission reasonably found it was not obligated to *further* depart from the Rule by granting Baltimore Gas’s application, even in part. *Cf. Gulf South Pipeline Co.,*

LP v. FERC, No. 19-1074, slip op. at 15–16 (D.C. Cir. Apr. 10, 2020) (finding that FERC’s distinctions between two pipelines, receiving different Commission treatment, did not exist, and that FERC failed to provide *any* reasoned basis for treating the subject pipeline differently); *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024–25 (D.C. Cir. 2018) (holding that FERC failed to explain differential treatment between two “virtually indistinguishable” natural gas competitors).

Indeed, accepting Baltimore Gas’s proposal would do precisely what the Tax Rule—and the orders on review—prevent: invite utilities to wait an unlimited amount of time to address deferred taxes, knowing they can recoup at least the last seven years from ratepayers. Utilities could game the system, declining to address deferred taxes when the accumulated amounts favored ratepayers, and making a rate filing years later if and when the balance flipped to favor the utility. *See* FERC Br. at 31. Ironically, Baltimore Gas sought to “prevent[]” just this type of “gamesmanship” in its merits briefing. Opening Br. at 13.

To defeat the Commission’s reasoned explanation for denying recovery, Baltimore Gas had to show why the Commission’s rationale was, in fact, *unreasonable*. *See* *Transmission Access*, 225 F.3d at 721; *State Corp. Comm’n of Kan.*, 876 F.3d at 335. It never did. Indeed, Baltimore Gas *still* has not explained why the Commission’s explanation that “[Baltimore Gas] waited far longer than the other four utilities to collect accumulated [deferred taxes] and failed to offer an adequate reason for the delay” is unreasonable. *See* slip op. at 13; Rehearing Order

PP 21, 28–29, JA 213–14, 217–18. Simply asserting it is entitled to retrospective recovery for as many years as the next-longest delaying utility (Duquesne) does not explain why *the Commission’s* contrary conclusion “cannot be justified.” *State Corp. Comm’n of Kan.*, 876 F.3d at 335.

Nor does Baltimore Gas gain traction by criticizing the Commission for not responding to its alternative request for seven years’ worth of recovery. Pet. at 8. In fact, the Commission did respond: it explained why Baltimore Gas was not entitled to *any* retrospective recovery.

For all these reasons, the panel majority correctly held that the Commission provided some “reason for the difference” in treatment between Baltimore Gas and Duquesne, *see Transmission Access*, 225 F.3d at 721, such that its determination withstands arbitrary and capricious review, *see Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010) (explaining that the Court “will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned” (internal quotations omitted)).

III. To the extent the panel majority erred, it was in requiring the Commission to distinguish prior uncontested, unexplained orders

Upholding the Commission’s orders, as the panel did, comports with its unanimous holding—unchallenged by Baltimore Gas in the instant petition—that “Baltimore Gas simply failed to comply with 18 C.F.R. § 35.24 *by its next rate case*, as required by [the Tax Rule].” Slip op. at 6–7. By contrast, granting

Baltimore Gas partial recovery would mean agreeing with the Commission that Baltimore Gas violated the Tax Rule, while nevertheless elevating summary dispositions that depart from the governing rule over the Rule itself.

It is axiomatic that an agency’s rules and regulations “bind[] private parties [and] the agency itself.” *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (internal quotations omitted). As the panel majority correctly explained, “[w]hen an agency seeks to change policy,” it must, among other things, “display awareness that it *is* changing position.” Slip op. at 12 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).

The Commission displayed no awareness it was changing the policy set forth in the Tax Rule in its *VEPCO*, *Duquesne*, and *PPL* orders¹—indeed, it did not even consider the Tax Rule’s “next rate case” requirement in those decisions, nor was that issue raised in the underlying agency proceedings. Thus, those decisions do not establish policy or precedent on the question of retrospective recovery of deferred taxes where the utility failed to seek recovery “in its next rate case.” See slip op., Partial Dissent at 1. *A fortiori*, those decisions do not bind the Commission in future agency matters. As Judge Williams correctly noted in his partial dissent, “[g]iven the number of uncontested issues that an agency typically

¹ The fourth order cited by Baltimore Gas, *Midcontinent Independent System Operator, Inc.*, 153 FERC ¶ 61,374 (2015), was consistent with the Tax Rule’s “next rate case” requirement. FERC Br. at 49–50.

resolves,” it is unreasonable to require an agency to distinguish a past decision on a “proposition[]” that was not “clearly asserted” in that prior case. Partial Dissent at 2.

Moreover, to the extent the Commission has departed from prior *orders*, it did so in the handful of decisions cited by Baltimore Gas, not in the Commission orders on review here. Prior to *VEPCO*, *Duquesne*, *PPL*, and *Midcontinent*, the Commission issued a published order doing precisely what it did here: it disallowed recovery of deferred taxes where the applicant-utility failed to seek recovery “in its next rate case.” In *Stingray*, the Commission held that the utility-applicant could not make-up a deferred tax account deficiency that existed at the time of its 1985 rate settlement—its “next rate case”—that it did not seek to address *in* that rate case. *Stingray Pipeline Co.*, 49 FERC ¶ 61,240, at 61,859 (1989), *reh’g denied in relevant part*, 50 FERC ¶ 61,159 (1990); *see also PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,163, at P 19 n.25 (2017) (“Initial Order”) (explaining that, in *Stingray*, “rate recovery of a portion of Stingray’s deficiency in its deferred tax account” would have run afoul “‘of the regulations’ clear requirement that normalization be employed” (quoting *Stingray*, 50 FERC ¶ 61,159, at 61,469)), JA 94. Expressly invoking the Tax Rule, the Commission allowed *Stingray* to recover the deficiency only “to the extent that ... such deficiency is reduced to take into account the amortization of that deficiency that should have occurred between April 1, 1985 and the April 1, 1988 effective date of

the rates in [the newly proposed rate case].” *Stingray*, 49 FERC ¶ 61,240, at 61,859.

The panel majority correctly explained that “an agency applying existing policy must explain how an outcome coheres with previous decisions.” Slip op. at 12. The Commission’s determination in the orders on review here “coheres” with its decision in *Stingray*—and, indeed, with the Tax Rule itself: the Commission disallowed recovery that “should have occurred between [Baltimore Gas’s 2005 rate settlement] and the [2017] effective date of the rates in” its 2016 proposed rate case. *See Stingray*, 49 FERC ¶ 61,240, at 61,859.

Finally, granting Baltimore Gas partial recovery would create an inconsistency in this Court’s precedent. As Judge Williams correctly found in his partial dissent, the panel majority should not have reached the question of whether the Commission adequately distinguished the four orders cited by Baltimore Gas. Partial Dissent at 1. Just last year, this Court reaffirmed what it has said before: for an administrative decision to establish policy or precedent on an issue, that issue must have been raised (e.g., through protests) and decided by the agency. *See id.*; *San Diego Gas & Elec. v. FERC*, 913 F.3d 127, 142 (D.C. Cir. 2019), *reh’g denied*, No. 16-1433 (D.C. Cir. Apr. 19, 2019). The panel majority in Part III.B of its opinion attempts to sidestep this aspect of this Court’s precedent, but does so by erroneously minimizing the relevant discussion in *San Diego* as *dicta* and misinterpreting binding case law.

The panel majority correctly explained that, in *San Diego*, the Court “held” that the Commission was “not *required* by prior orders” to approve a pre-order incentive “because earlier decisions [approving such an incentive] ‘did not amount to policy or precedent.’” Slip op. at 11 (quoting *San Diego*, 913 F.3d at 142). But the majority then asserted that *San Diego* was correct only because a case it relied on—*Gas Transmission Northwest Corp. v. FERC*, 504 F.3d 1318 (D.C. Cir. 2007)—“required FERC to explain inconsistencies” with prior agency orders. Slip op. at 11.

The panel majority’s statement misses the mark. First, as Judge Williams correctly explained, *San Diego* itself did not require FERC to explain any inconsistencies with prior orders. Partial Dissent at 6 (citing *San Diego*, 913 F.3d at 142). Second, in *Gas Transmission Northwest*, the Commission treated allegedly similarly situated entities differently on the same grounds the majority deemed inadequate here. As the Court explained there—quoting the Commission at length—“*in the absence of protests*, the Commission may simply have accepted these [tariff] provisions without examining whether they conformed to Commission policy and precedent. Under such circumstances, accepting another pipeline’s provisions does not necessarily establish a generic Commission policy or precedent regarding similar tariff provisions.” 504 F.3d at 1320 (emphasis added) (quoting *North Baja Pipeline, LLC v. PG&E Transmission*, 117 FERC ¶ 61,146, at

61,786 (2006)). The Court deemed this both an “adequate[] expla[nation]” and even “eminently reasonable.” *Id.*

The panel majority recited that determination in its opinion by characterizing the Commission’s differential treatment in *Gas Transmission Northwest* as “adequately explained.” Slip op. at 11. But it then contradicted that statement, asserting that FERC could not avoid providing a reasoned explanation for contrary treatment of Baltimore Gas “solely because those [prior] decisions”—i.e., *VEPCO*, *Duquesne*, *PPL*, and *Midcontinent*—“were uncontested or unreasoned.” *Id.* at 13.

San Diego is also consistent with *ANR Storage*—a case discussed by the panel majority. *Id.* at 11. *ANR Storage* involved proceedings concerning two natural gas companies. The resulting Commission orders resolved the same, “squarely presented” issue (the natural gas companies’ market power) for two “virtually indistinguishable” competitors, and accorded different treatment for each. *San Diego*, 913 F.3d at 142 (quoting *ANR Storage*, 904 F.3d at 1025–26); *see also* Partial Dissent at 4–5. Further, no governing rule compelled a particular outcome in either proceeding. *See ANR Storage*, 904 F.3d at 1022–23.

The instant matter differs from *ANR Storage* in three crucial ways. First, the only issue presented in *VEPCO*, *Duquesne*, *PPL*, and *Midcontinent* was whether allowing retrospective recovery of accumulated deferred taxes would balance the utilities’ books. *See* Oral Arg. at 20:25–21:06. The Commission determined that it would. The separate question of whether that recovery was *timely*—the disputed

issue in Baltimore Gas’s proceeding—was never raised, let alone decided. *Cf.* slip op. at 6–7 (explaining that the Tax Rule addresses two issues: whether a utility properly “recover[ed] ... deferred tax amounts,” and whether it did so “*by its next rate case*”).

Second, the record includes no evidence that Baltimore Gas competes with any of the four cited utilities. *See* Partial Dissent at 4. And third, the Tax Rule’s “next rate case” requirement limits the Commission’s discretion to award retrospective recovery, regardless of what the agency might have decided in prior cases. In *ANR Storage*, by contrast, the Commission was not so constrained: it had broad discretion to weigh various “relevant factors” on a case-by-case basis. *See ANR Storage*, 904 F.3d at 1022–23. *Cf. San Diego*, 913 F.3d at 137–41 (assessing the challenged Commission order against the governing rule, which reasonably prohibited the type of recovery allowed in prior Commission orders). These three points show why *San Diego*, and not *ANR Storage*, should have guided the panel’s decision in this case.

CONCLUSION

For the foregoing reasons, the panel should deny the petition for rehearing.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 35(b), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,774 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief 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 brief has been prepared in Times LT Std 14-point font using Microsoft Word 2013.

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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 21st day of April 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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