

ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1325
(consolidated with Nos. 16-1326, 20-1182, 20-1240, 20-1241,
20-1248, 20-1251, 20-1267, 20-1513)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MISO TRANSMISSION OWNERS, *et al.*
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

INITIAL BRIEF OF PETITIONERS ON REFUND ISSUES:

Case No. 20-1267

DTE Electric Company
Consumers Energy Company
Alliant Energy Corporate Services, Inc.

Case Nos. 20-1251 & 20-1513

Association of Businesses Advocating Tariff Equity
Coalition of MISO Transmission Customers
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Minnesota Large Industrial Group
Wisconsin Industrial Energy Group
American Municipal Power, Inc.
Cooperative Energy
Hoosier Energy Rural Electric Cooperative, Inc.
Mississippi Public Service Commission
Missouri Public Service Commission
Missouri Joint Municipal Electric Utility Commission
Organization of MISO States, Inc.
Southwestern Electric Cooperative, Inc.
Wabash Valley Power Association, Inc.

Case No. 20-1248
Resale Power Group of Iowa

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with District of Columbia Rule 28(a)(1), the undersigned hereby certify as follows:

A. Parties and Amici

1. *Parties Before the Federal Energy Regulatory Commission*

The following parties appeared before the Federal Energy Regulatory Commission in the underlying administrative proceedings:

AEP Indiana Michigan Transmission Company, Inc.
ALLETE, Inc.
Alliant Energy Corporate Services, Inc.
Ameren Services Company
American Electric Power Service Corporation
American Municipal Power, Inc.
American Public Power Association
Arkansas Cities
Arkansas Electric Cooperative Corporation
Arkansas Electric Energy Consumers, Inc.
Arkansas Public Service Commission
Association of Businesses Advocating Tariff Equity
Clarksdale Public Utilities Commission
Coalition of MISO Transmission Customers
Consumers Energy Company
Council of the City of New Orleans, Louisiana
Dairyland Power Cooperative
DATC Midwest Holdings, LLC
DTE Electric Company
Duke-American Transmission Company, LLC
Edison Electric Institute
Entergy Services, Inc.
Exelon Corporation
FirstEnergy
FirstEnergy Service Company
Great Lakes Utilities

Great River Energy
Hoosier Energy Rural Electric Cooperative, Inc.
Illinois Commerce Commission
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Indiana Municipal Power Agency
International Transmission Company
Iowa Office of Consumer Advocate
Jo-Carroll Energy, Inc. (NFP)
Joint Complainants
Joint Consumer Advocates
Joint Customer Complainants
Lafayette Utilities System
Louisiana Public Service Commission
Maryland Public Service Commission
Michigan Electric Transmission Company, LLC
Michigan Public Power Agency
Michigan Public Service Commission
Michigan South Central Power Agency
Midcontinent Independent System Operator, Inc.
Midcontinent MCN, LLC
Midwest Municipal Transmission Group
Midwest TDUS
Minnesota Large Industrial Group
Minnesota Municipal Power Agency
MISO Transmission Owners
Mississippi Delta Energy Agency
Mississippi Public Service Commission
Mississippi Public Utilities Staff
Missouri Joint Municipal Electric Utility Commission
Missouri Public Service Commission
Missouri River Energy Services
National Rural Electric Cooperative Association
Northern States Power Company (Minnesota)
Northern States Power Company (Wisconsin)
NRG Companies
Old Dominion Electric Cooperative
Organization of MISO States, Inc.
People of the State of Illinois
Powerlink Transmission Company LLC

PPL Electric Utilities Corporation
Public Service Commission of Yazoo City
Public Service Electric and Gas Company
Resale Power Group of Iowa
San Diego Gas & Electric Company
Cooperative Energy f/k/a South Mississippi Electric Power Association
Southern Indiana Gas and Electric Company, d/b/a Vectren Energy Delivery
of Indiana, Inc.
Southern Minnesota Municipal Power Agency
Southwestern Electric Cooperative, Inc.
Trans Bay Cable LLC
Transmission Access Policy Study Group
Transource Energy, LLC
Upper Peninsula Power Company
Wabash Valley Power Association, Inc.
Wisconsin Electric Power Company
Wisconsin Industrial Energy Group
Wisconsin Public Service Corporation
Wolverine Power Supply Cooperative, Inc.
WPPI Energy
Xcel Energy Services Inc.

2. *Parties, Intervenors, and Amici Before the Court*

The following is a list of all parties, movant-intervenors, and *amici curiae* who have appeared before the Court in this case:

Petitioners:¹

Case Nos. 16-1325, 16-1326, and 20-1182:

MISO TOs
ALLETE, Inc.
Ameren Services Company
American Transmission Company, LLC
Cleco Power LLC

¹ This brief is filed by Petitioners for Case Nos. 20-1248, 20-1251, 20-1513, and 20-1267.

Duke Energy Corporation
Entergy Arkansas, Inc.
Entergy Louisiana, LLC
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Texas, Inc.
Indianapolis Power & Light Company
International Transmission Company, d/b/a ITC Transmission
ITC Midwest LLC
Michigan Electric Transmission Company, LLC
MidAmerican Energy Company
Montana-Dakota Utilities Co.
Northern Indiana Public Service Company
Northern States Power Company
Northwestern Wisconsin Electric Company
Otter Tail Power Company
Southern Indiana Gas & Electric Company
Wolverine Power Supply Cooperative, Inc.

Case Nos. 20-1251 and 20-1513:

Association of Businesses Advocating Tariff Equity
Coalition of MISO Transmission Customers
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Minnesota Large Industrial Group
Wisconsin Industrial Energy Group
American Municipal Power, Inc.
Cooperative Energy
Hoosier Energy Rural Electric Cooperative, Inc.
Mississippi Public Service Commission
Missouri Public Service Commission
Missouri Joint Municipal Electric Utility Commission
Organization of MISO States, Inc.
Southwestern Electric Cooperative, Inc.
Wabash Valley Power Association, Inc.

Case No. 20-1240:

Transource Energy, LLC

Case No. 20-1241:

Ameren Services Company
Union Electric Company d/b/a Ameren Missouri

Ameren Illinois Company d/b/a Ameren Illinois
Ameren Transmission Company of Illinois
International Transmission Company d/b/a ITC Transmission
ITC Midwest LLC
Michigan Electric Transmission Company, LLC

Case No. 1248:

Resale Power Group of Iowa

Case No. 20-1267:

DTE Electric Company
Consumers Energy Company
Alliant Energy Corporate Services, Inc.

Respondent: Federal Energy Regulatory Commission

Intervenors for Petitioners:

Case No. 16-1325:

MISO
PPL Electric Utilities Corporation

Case No. 16-1326:

MISO

Case No. 20-1182:

PPL Electric Utilities Corporation

Case No. 20-1241:

Alliant Entergy Corporate Services, Inc.

Intervenors for Respondent:

Case No. 16-1325:

American Municipal Power, Inc.
Citizens' Utility Board of Wisconsin
Hoosier Energy Rural Electric Cooperative, Inc.
Illinois Citizens Utility Board
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Indiana Office of Utility Consumer Counselor
Iowa Office of Consumer Advocate
Michigan Citizens' Against Rate Excess
Organization of MISO States, Inc.

Association of Businesses Advocating Tariff Equity
Coalition of MISO Transmission Customers
Minnesota Department of Commerce
Minnesota Large Industrial Group
Mississippi Public Service Commission
Missouri Joint Municipal Electric Utility Commission
Transource Energy, LLC
Missouri Office of Public Council
Resale Power Group of Iowa
Cooperative Energy f/k/a South Mississippi Electric Power
Association
Southwestern Electric Cooperative, Inc.
Wisconsin Industrial Energy Group
Consumers Energy Company
Louisiana Public Service Commission
Missouri Public Service Commission

Case No. 16-1326:

American Municipal Power, Inc.
Association of Businesses Advocating Tariff Equity
Citizens Utility Board of Wisconsin, Inc.
Coalition of MISO Transmission Customers
Hoosier Energy Rural Electric Cooperative, Inc.
Illinois Citizens Utility Board
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Indiana Office of Utility Consumer Counselor
Iowa Office of Consumer Advocate
Michigan Citizens Against Rate Excess
Minnesota Department of Commerce
Minnesota Large Industrial Group
Missouri Office of Public Counsel
Organization of MISO States, Inc.
Resale Power Group of Iowa
Cooperative Energy f/k/a South Mississippi Electric Power
Association
Southwestern Electric Cooperative, Inc.
Wisconsin Industrial Energy Group

Case No. 20-1182:

Association of Businesses Advocating Tariff Equity

Coalition of MISO Transmission Customers
Consumers Energy Company
Hoosier Energy Rural Electric Cooperative, Inc.
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Louisiana Public Service Commission
Minnesota Large Industrial Group
Missouri Public Service Commission
Organization of MISO States, Inc.
Resale Power Group of Iowa
Wisconsin Industrial Energy Group

Amici: No *amicus curiae* has yet appeared before the Court.

B. Rulings Under Review

1. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Op. No. 569, Order on Briefs, Rehearing, & Initial Decision, Dkt. Nos. EL14-12-003 & EL15-45-000, 169 FERC ¶ 61,129 (Nov. 21, 2019) (“Opinion 569”) (R.560);
2. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Op. No. 569-A, Order on Rehearing, Dkt. Nos. EL14-12-004 & EL15-45-013, 171 FERC ¶ 61,154 (May 21, 2020) (“Opinion 569-A”) (R.609); and
3. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Op. No. 569-B, Order on Rehearing, Dkt. Nos. EL14-12-004 & EL15-45-013, 173 FERC ¶ 61,159 (Nov. 19, 2020) (“Opinion 569-B”) (R.651).

C. Related Cases

Petitioners are unaware of any other cases related to the current consolidated cases.

Dated: March 10, 2021

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and District of Columbia Rule 26.1, Petitioners Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Indiana Industrial Energy Consumers, Inc., Minnesota Large Industrial Group, Wisconsin Large Industrial Group, American Municipal Power, Inc., Cooperative Energy, Hoosier Energy Rural Electric Cooperative, Inc., Mississippi Public Service Commission, Missouri Public Service Commission, Missouri Joint Municipal Electric Utility Commission, Organization of MISO States, Inc., Southwestern Electric Cooperative, Inc., Wabash Valley Power Association, Inc., Resale Power Group of Iowa, DTE Electric Company, Consumers Energy Company, and Alliant Energy Corporate Services, Inc., submit the following required disclosure statements. Each of the undersigned counsel submits the disclosure statement(s) with respect to the petitioner(s) they represent.

Association of Businesses Advocating Tariff Equity is a voluntary association of large industrial businesses that are located in and doing business in the state of Michigan. Association of Businesses Advocating Tariff Equity has been formed for the express purpose of participating in regulatory proceedings to protect the interests of businesses in connection with energy and utility matters. Members of Association of Businesses Advocating Tariff Equity consume substantial quantities of

electricity and natural gas, and, in Michigan alone, their combined gas and electric bills are approximately \$1.2 billion per year. Association of Businesses Advocating Tariff Equity has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Association of Businesses Advocating Tariff Equity.

Coalition of MISO Transmission Customers is a continuing *ad hoc* association of large industrial and commercial end-users of electricity in the Midwest operated for the purposes of representing the interests of industrial energy consumers before regulatory and legislative bodies. Coalition of MISO Transmission Customers members have facilities throughout the Midcontinent Operator region, and Coalition of MISO Transmission Customers is a Midcontinent Operator member. Coalition of MISO Transmission Customers has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Coalition of MISO Transmission Customers.

Illinois Industrial Energy Consumers is an association of large industrial customers in the State of Illinois. They are eligible to choose a retail supplier other than their electric utility under Illinois law and eligible for transmission service under the applicable Regional Transmission Organization and Independent System Operator tariffs. They consume approximately 13 billion kilowatt-hours (“kWh”) of electricity and employ approximately 90,000 people in the State of Illinois.

They have members served by Ameren Illinois, a member of Midcontinent Operator. They also have manufacturing facilities located within Midcontinent Operator. Illinois Industrial Energy Consumers has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Illinois Industrial Energy Consumers.

Indiana Industrial Energy Consumers, Inc. is a not-for-profit 501(c)(6) corporation incorporated and doing business in the State of Indiana. Indiana Industrial Energy Consumers, Inc. was formed to provide large energy users an independent voice in regulatory and legislative matters that impact utility rates and energy policies. Indiana Industrial Energy Consumers, Inc.'s 22 member companies' electric spend is over \$566.6 million annually. Indiana Industrial Energy Consumers, Inc. has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Indiana Industrial Energy Consumers, Inc.

Minnesota Large Industrial Group is a continuing *ad hoc* consortium of large industrial end-users of electricity in Minnesota, consuming more than 6.5 billion kWh of electricity each year and functioning to represent large industrial interests before regulatory and legislative bodies. Minnesota Large Industrial Group has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Minnesota Large Industrial Group.

Wisconsin Industrial Energy Group is a voluntary member association consisting of large industrial and commercial customers in the State of Wisconsin. As key drivers of economic growth and development throughout the state, Wisconsin Industrial Energy Group members collectively employ approximately 50,000 people in Wisconsin and consume approximately 3.6 billion kWh of electricity each year. Wisconsin Industrial Energy Group has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Wisconsin Industrial Energy Group.

American Municipal Power, Inc. is a non-profit Ohio corporation organized in 1971. AMP has 135 members, including 134-member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with nine members that is headquartered in Smyrna, Delaware. American Municipal Power, Inc. provides wholesale energy supply and related services to its members. American Municipal Power, Inc. issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Cooperative Energy is an incorporated, non-profit cooperative electric power association, organized and operating under and pursuant to Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, *et seq.*, Vol. 4A Recompiled, Mis-

Mississippi Code of 1942; and is a public utility under the laws of the State of Mississippi. Cooperative Energy is owned and controlled by its members, which are distribution rural electric power associations, serving rural areas in Mississippi at retail. Cooperative Energy is a transmission-owning member of Midcontinent Operator and its operations are integrated into Midcontinent Operator. Cooperative Energy has no parent corporation, and no publicly held corporation has any ownership interest in Cooperative Energy.

Hoosier Energy Rural Electric Cooperative, Inc. (“Hoosier”) is a member-owned generation and transmission cooperative organized under the laws of the state of Indiana. Hoosier’s purpose is to provide generation and transmission service to its eighteen distribution cooperative members in Indiana and Illinois. Hoosier is a non-profit electric generation and transmission cooperative organized pursuant to Indiana law. Hoosier has no parent corporation and issues no stock. Accordingly, no publicly held corporation owns 10% or more of Hoosier’s stock.

Mississippi Public Service Commission is a governmental entity organized under the laws of the state of Mississippi. It does not issue securities to the public and is not owned by any publicly-held company.

Missouri Public Service Commission is a governmental entity organized under the laws of the state of Missouri. It does not issue securities to the public and is not owned by any publicly-held company.

Missouri Joint Municipal Electric Utility Commission is a joint action agency and a political subdivision of the State of Missouri authorized by legislation to construct, operate, and maintain jointly owned transmission and generation facilities for the production and transmission of electric power for its members, to purchase and sell electric power and energy, and to enter into agreements with any person for transmission of electric power. Missouri Joint Municipal Electric Utility Commission is not a nongovernmental corporate party, does not issue securities to the public, and is not owned by any publicly-held company.

The Organization of MISO States, Inc. is a Non-Profit Domestic Corporation (under the Indiana Nonprofit Corporation Act of 1991), and is a self-governed, member-based organization comprised of representatives from entities with regulatory jurisdiction over utilities participating in the Midcontinent Operator region. The purpose of the Organization of MISO States, Inc. is to promote the public interest and social welfare by providing means for its members to act in concert when deemed to be in the common interest of their affected publics. The Organization of MISO States, Inc. does not issue securities to the public and is not owned by any publicly held company.

Southwestern Electric Cooperative, Inc. is an electric distribution cooperative that serves rural consumers in Bond, Clinton, Effingham, Fayette, Macoupin, Madison, Marion, Montgomery, Shelby, and St. Clair counties in the State of Illi-

nois. Located approximately 45 miles east of St. Louis, Missouri and 85 miles south of Springfield, Illinois, Southwestern Electric Cooperative, Inc. serves over 20,000 members and operates over 3,500 miles of energized electric line. Southwestern Electric Cooperative, Inc. is a Midcontinent Operator transmission customer located within the Ameren Illinois Company rate zone. Southwestern Electric Cooperative, Inc. has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Southwestern Electric Cooperative, Inc.

Wabash Valley Power Association, Inc. (“Wabash Valley”) is a not-for-profit generation and transmission cooperative formed in 1963 under Indiana law to enable its member cooperatives to obtain reliable long-term all-requirements power at least-cost, stable cost-based rates as part of a not-for-profit enterprise that the Members owned and controlled. Wabash Valley’s twenty-five Members are both owners and customers of Wabash Valley. Twenty-three Members are not-for-profit distribution electric cooperatives that provide electric energy to their members at retail across the States of Indiana, Illinois, and Missouri.² The other two

² Wabash Valley’s 23 not-for-profit distribution cooperatives are: Boone REMC, Carroll White REMC, Citizens Electric Corporation, Corn Belt Energy, EnerStar Electric Cooperative, Fulton County REMC, Heartland REMC, Hendricks Power Cooperative, Jasper County REMC, Jay County REMC, Kankakee Valley REMC, Kosciusko REMC, LaGrange County REMC, M.J.M. Electric Cooperative, Mar-

Members are a Wabash Valley subsidiary, Wabash Valley Energy Marketing, Inc., and J. Aron & Company, Inc., neither of which has retail load-serving obligations. Wabash Valley is a transmission owner and transmission customer of Midcontinent Operator, a transmission customer of PJM Interconnection, L.L.C., and a market participant in both Midcontinent Operator and PJM. Wabash Valley has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Wabash Valley.

Resale Power Group of Iowa is a special-purpose governmental entity organized pursuant to Chapter 28E of the Code of Iowa to purchase electric supply, transmission, and related services as an agent for its members. Resale Power Group of Iowa does not issue stock or debt securities and does not have a parent company. RPGI's members are 24 Iowa municipal utilities, one cooperative, and one privately-owned utility.³

shall county REMC, Miami-Cass REMC, Newton County REMC, Ninestar Connect, Noble REMC, Parke county REMC, Steuben County REMC, Tipmont REMC, and Warren County REMC.

³ Resale Power Group of Iowa's members are: Amana Society Service Co., Anita, Municipal Utilities, City of Afton, City of Buffalo, City of Danville, City of Guttenberg, City of Pocahontas, City of West Liberty, City of West Point, Coggon Municipal Utilities, Dysart Municipal Utilities, Farmers Electric Cooperative—Kalona, Grand Junction Municipal Utilities, Hopkinton Municipal Utilities, La Porte City Utilities, Long Grove Municipal Electric Utilities, Mt. Pleasant Municipal Utilities, New London Municipal Utilities, Ogden Municipal Utilities, Sibley Municipal Utilities, State Center Municipal Utilities, Story City Municipal Electric

DTE Electric Company (“DTE Electric”) is a Michigan corporation and wholly-owned subsidiary of DTE Electric Holdings, LLC, which is in turn a wholly-owned subsidiary of DTE Energy Company (“DTE Energy”). DTE Electric is a public utility operating company that generates and distributes electric energy in Michigan. DTE Electric provides retail electric service to approximately two million customers throughout portions of southeastern Michigan. In addition, DTE Electric is a non-transmission owning member of the Midcontinent Operator. DTE Energy is a publicly traded company with no parent corporation; no publicly held corporation owns 10% or more of its stock.

Consumers Energy Company (“Consumers Energy”) is a Michigan corporation and wholly-owned subsidiary of CMS Energy Corporation (“CMS Energy”). Consumers Energy is a public utility and member of the Midcontinent Operator. Consumers Energy generates and distributes electricity to over 1.8 million residential, commercial, and industrial customers in Michigan’s Lower Peninsula. Consumers Energy is wholly-owned by CMS Energy; it has no other parent corporations or publicly held corporations that own 10% or more of its stock.

Alliant Energy Corporate Services, Inc. is wholly-owned by Alliant Energy Corporation (“Alliant Energy”). Alliant Energy Corporate Services, Inc. is a ser-

Utility, Tipton Municipal Utilities, Traer Municipal Utilities, Vinton Municipal Electric Utility, and Whittemore Municipal Utilities.

vice company affiliate of Interstate Power and Light Company and Wisconsin Power and Light Company (collectively “Alliant Energy Operating Companies”). Interstate Power and Light Company is a load-serving entity that owns and operates electric facilities that generate, purchase, distribute, and sell electric power and energy in Iowa. Wisconsin Power and Light Company—a load-serving entity—owns and operates electric facilities that generate, purchase, distribute, and sell off electric power and energy in Wisconsin. The Alliant Energy Operating Companies are Midcontinent Operator market participants. Alliant Energy has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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GLOSSARY

Chronology	Graphic timeline of refund periods and FERC orders (<i>see infra</i>)
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Midcontinent Operator	Midcontinent Independent System Operator, Inc. (referred to as “MISO” in proceedings below)
Owners	Midcontinent Operator Transmission Owners (referred to as “MISO TOs” in proceedings below)
Return	Return on Equity (referred to as “ROE” in proceedings below)

STATEMENT OF JURISDICTION

Petitioners seek review of FERC's determination in Opinion 569, affirmed on rehearing in Opinion 569-A (and later reiterated in Opinion 569-B), to deny refunds in its Docket No. EL15-45, the "Second Complaint." Petitioners timely sought rehearing of Opinion 569⁴ and, on July 20, 2020, timely petitioned for review of Opinions 569 and 569-A. The Federal Power Act, 16 U.S.C. § 825l(b), therefore confers jurisdiction.⁵

STATEMENT OF THE ISSUE

Section 206(b) of the FPA permits FERC to order refunds after "any proceeding" where "amounts paid" were "in excess of" the just and reasonable rate that FERC "ordered to be thereafter observed and in force," subject only to a limit on the refund period.⁶ Here, even though excess amounts were paid compared to the FERC-ordered rate, FERC asserted that the FPA prohibited refunds on the Second Complaint because the "proceeding" for the Second Complaint did not set a new rate (the proceeding for the First Complaint did so). The issue is whether FERC's denial of refunds on the Second Complaint was arbitrary, capricious, an

⁴ See R.565; R.567; R.579; R.580.

⁵ Out of abundant caution, several Petitioners re-challenged FERC's refund denial on rehearing of Opinion 569-A, and further petitioned for review of Opinion 569-B, thereby reinforcing jurisdiction.

⁶ 16 U.S.C. § 824e(b).

abuse of discretion, and contrary to the plain language of section 206(b), which authorizes refunds for “*any proceeding*” that otherwise meets the refund criteria.

STATUTORY PROVISION

Relevant portions of the pertinent statute—FPA section 206—appear in the Addendum.

STATEMENT OF THE CASE

This appeal concerns two separate complaints filed under section 206 of the FPA. FERC must determine thereunder whether an existing rate is unjust or unreasonable, and if so, set a new rate that is just and reasonable.⁷ FERC may order refunds of any amounts paid exceeding the just and reasonable rate that FERC “orders to be thereafter observed and in force” for a fifteen-month period following each complaint’s initiation.⁸

The First Complaint, filed on November 12, 2013 by multiple industrial customers, alleged that Owners’ 12.38% Return was unjust and unreasonable.⁹ FERC convened a hearing and established a refund period extending fifteen months from that filing date, to February 12, 2015.¹⁰

⁷ *Id.* § 824e(a).

⁸ *Id.* § 824e(b).

⁹ R.1 at 1 (identifying complainants).

¹⁰ *See* R.93 at 188 (hearing order, 149 FERC ¶¶ 61,049, 61,335); R.414 (on rehearing thereof, 156 FERC ¶¶ 61,060); *infra*, Chronology.

Other parties (consumer-owned utilities)¹¹ filed the Second Complaint on February 12, 2015, alleging that Owners' 12.38% Return was unjust and unreasonable based upon new facts, and seeking a new refund period. FERC determined that the Second Complaint was a separate proceeding from the First Complaint, set the matter for hearing, and established a refund period extending fifteen months from that filing date, to May 12, 2016.¹²

Both Complaints were fully and separately litigated, over periods exceeding seven years. FERC did not issue final orders on either Complaint until well after both 15-month refund periods had expired.¹³

On September 28, 2016, FERC ruled on the First Complaint in Opinion 551, holding that Owners' 12.38% Return was unjust and unreasonable. Three years later, FERC *sua sponte* responded to *Emera Maine*¹⁴ with Opinion 569, addressing both Complaints. FERC again found Owners' 12.38% Return unjust and unreasonable, but modified its replacement Return determination to 9.88%.¹⁵

¹¹ R.125 at 2 (identifying complainants).

¹² See R.199 at 1 (hearing order, 151 FERC ¶ 61,219, 62,417), R.415 (on rehearing thereof, 156 FERC ¶ 61,061); *infra*, Chronology.

¹³ See *infra*, Chronology.

¹⁴ See *Emera Maine v. FERC*, 854 F.3d 9, 27-30, (D.C. Cir. 2017) (vacating FERC Opinion 531, which FERC had relied upon in Opinion 551, after finding that aspects of FERC's methodology violated FPA Section 206).

¹⁵ R.560 at P 20 (*Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Sys. Op-*

For the First Complaint's 15-month refund period, FERC ordered refunds reflecting the difference between the 12.38% Return actually charged, and the 9.88% Return that FERC found reasonable.¹⁶ But FERC declared itself statutorily powerless to order refunds for the Second Complaint's fifteen-month refund period.¹⁷ Commissioner Glick dissented in relevant part, stressing that Owners charged the same unjust and unreasonable 12.38% Return during that period, and that section 206 gave FERC authority to issue refunds in the Second Complaint proceeding.¹⁸

In Opinion 569-A, FERC (beyond modifying its replacement Return determination for the First Complaint to 10.02%)¹⁹ confirmed its decisions to dismiss the Second Complaint and order no refunds.²⁰ Commissioner Glick dissented again from that dismissal and denial.²¹

erator, Inc., 169 FERC ¶ 61,129 (2019)) (“Op. 569”).

¹⁶ *Id.*

¹⁷ *Id.* at P 568.

¹⁸ *Id.* at P 3 (Glick, C., dissenting in part) (“Glick Dissent”).

¹⁹ *See infra*, Chronology.

²⁰ R.609 at P 268 (*Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,154 (2020)) (“Op. 569-A”).

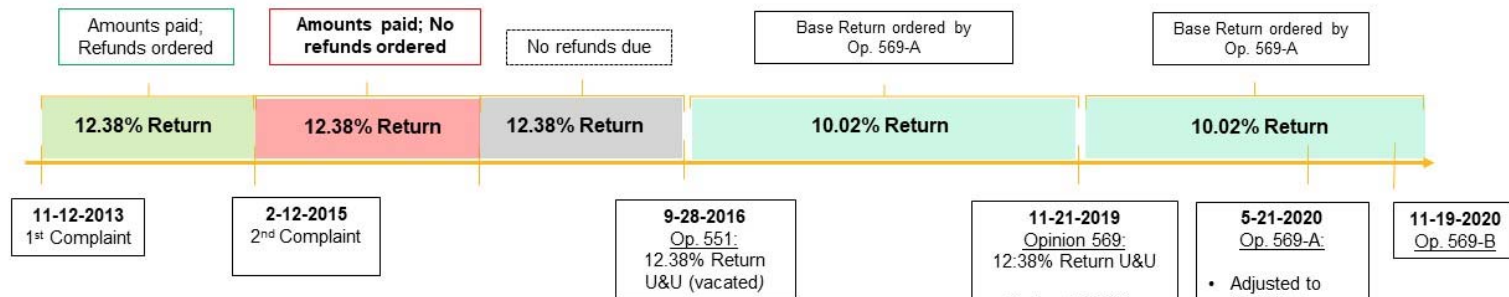
²¹ *Id.*, Glick Dissent, PP 23-33.

Opinion 569-B denied rehearing of the 10.02% Return set in Opinion 569-A.²² FERC reiterated its Second Complaint dismissal and denial, from which Commissioner Glick dissented a third time.²³

²² R.651 at P 169 (*Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,159 (2020)) (“Op. 569-B”).

²³ *Id.*, Glick Dissent, PP 26-38.

Refund Chronology



Legend & Definitions:

	1st Refund Period (11/12/2013 through 2/11/2015)
	2nd Refund Period (2/12/2015 through 5/11/2016)
	No Refunds Due – Past 15 month Return Period of 2 nd Complaint
	New Base Return
U&U	Unjust and Unreasonable

SUMMARY OF ARGUMENT

FERC’s interpretation of section 206 “stumbles on *Chevron*’s first step because it conflicts with the [FPA’s] plain language.”²⁴ FERC erroneously concluded that it “cannot order refunds in the Second Complaint proceeding because of the limits of [its] statutory authority under FPA section 206.”²⁵ Section 206(b) unambiguously authorizes FERC to issue refunds in “*any* proceeding”—an expansive phrase that includes proceedings in which FERC dismisses a complaint under section 206(a)²⁶—by computing the difference between (1) “amounts paid” during the refund period, and (2) the just and reasonable rate that FERC “orders to be thereafter observed and in force.”²⁷

Those elements were met here. FERC found that the “amounts [customers] paid” during the Second Complaint refund period were based on an unjust and unreasonable Return (12.38%). FERC then ordered (at the conclusion of a “proceeding”) that the just and reasonable rate “to be thereafter observed and in force” include the just and reasonable Return (10.02%). Accordingly, the “excess” for purposes of calculating refunds under section 206(b) is the difference between those

²⁴ *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1257 (D.C. Cir. 2007).

²⁵ R.560 (Op. 569), P 568.

²⁶ Petitioners do not concede that dismissal of the Second Complaint was proper. *See* Return Brief at 10.

²⁷ 16 U.S.C. § 824e(b) (emphasis added).

two figures (worth *tens or even hundreds of millions of dollars*). Under a straightforward statutory reading, FERC was authorized to order Second Complaint refunds. By contrast, FERC’s interpretation “comports neither with the statutory text nor with the [FPA’s] ‘primary purpose’ of protecting consumers.”²⁸

STANDING

Petitioners are directly impacted by FERC’s denial of refunds in the Second Complaint. They are (or constitute associations or governmental regulators for) customers who paid transmission rates embodying a Return that FERC itself found unreasonable. FERC’s refusal to remedy that over-payment caused Petitioners concrete and particularized injury that is ongoing, traceable to FERC’s actions, and redressable through this appeal.²⁹

All Petitioners actively participated in the underlying FERC proceedings and sought rehearing of FERC’s decisions denying Second Complaint refunds.³⁰

STANDARD OF REVIEW

This Court reverses any FERC action “that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’”³¹ and “reviews challenges

²⁸ *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004).

²⁹ *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000).

³⁰ *See* 16 U.S.C. § 825l.

³¹ *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001) (quoting

to [FERC's] interpretation of the FPA under the familiar two-step framework of *Chevron*["]³² Under *Chevron*, if “‘Congress has directly spoken to the precise question at issue,’ and ‘the intent of Congress is clear, that is the end of the matter.’”³³ But if “‘the statute is silent or ambiguous with respect to the specific issue,’ then the court must determine ‘whether the agency’s answer is based on a permissible construction of the statute.’”³⁴ This Court has stressed that, “[d]espite our highly deferential standard of review, it bears repeating that ‘courts have never given regulators carte blanche.’”³⁵ Moreover, FERC’s “erroneous conception of the bounds of the law” is not due *any* judicial deference.³⁶ Here, FERC concluded that it “cannot order refunds in the Second Complaint proceeding because of the limits of [its] statutory authority under FPA section 206.”³⁷ If FERC statutorily *can*

5 U.S.C. § 706(2)(A)).

³² *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

³³ *Id.* (quoting *Chevron*, 467 U.S. at 842).

³⁴ *Id.* (quoting *Chevron*, 467 U.S. at 843).

³⁵ *Emera Maine v. FERC*, 854 F.3d at 22.

³⁶ *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985) (“[J]udicial deference is not accorded a decision of the [agency] when [it] acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress.”).

³⁷ R.560 (Op. 569), P 568 (emphasis added).

order refunds, the Court should remand, so that FERC, freed of that false constraint, can evaluate whether to do so.

ARGUMENT

I. Section 206 authorizes FERC to issue refunds in the Second Complaint.

Section 206 unambiguously authorizes FERC to issue refunds in the Second Complaint. “In addressing issues of statutory interpretation, the court must begin with the text[.]”³⁸ Because the text of section 206(b) is unambiguous, this Court’s inquiry ends at *Chevron* step 1.

Section 206(b) provides:

At the conclusion of *any proceeding* under [section 206], [FERC] may order refunds of any *amounts paid*, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, *in excess of those which would have been paid under the just and reasonable rate ... which [FERC] orders to be thereafter observed and in force[.]*³⁹

FERC can thus order refunds where three elements are present: (1) the conclusion of “any proceeding” and (2) the existence of “amounts paid” (3) “in excess of those which would have been paid under the just and reasonable rate ... which

³⁸ *S.C. Pub. Serv. Auth.*, 762 F.3d at 55; *City of Anaheim, Cal. v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009) (“[W]e give no deference to an agency interpretation that fails to comport with the plain statutory language. The precise words of the statutory text matter.”).

³⁹ 16 U.S.C. § 824e(b) (emphasis added).

[FERC] orders to be thereafter observed and in force.”⁴⁰ Because all three elements are met here, FERC erred by concluding that it lacked authority to order refunds in the Second Complaint.⁴¹

A. *FERC has discretion to order refunds at the conclusion of “any proceeding”—not just those that set a new rate.*

Section 206(b) broadly authorizes refunds in “any proceeding,”⁴² including one (as here) in which FERC does not grant a complaint. This Court has recognized that “the word ‘any’ has an expansive meaning, that is, ‘one or some *indiscriminately of whatever kind*,’ and that courts must give effect to each word of a statute.”⁴³ Therefore, “any proceeding” includes the Second Complaint, which FERC concluded was a separate proceeding.⁴⁴

⁴⁰ *Id.*

⁴¹ See R.565 at PP 6-8; R.580 at PP 27-30.

⁴² 16 U.S.C. § 824e(b) (emphasis added).

⁴³ *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (emphasis added) (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997) & *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); accord *North Dakota v. EPA*, 730 F.3d 750, 764 (8th Cir. 2013); see *Nat. Res. Def. Council v. EPA*, 489 F.3d at 1257-58 (holding that a Clean Air Act provision was unambiguously expansive under *Chevron* step 1 because “[t]he word ‘any’ is usually understood to be all inclusive” (citations omitted)); *S.C. Pub. Serv. Auth.*, 762 F.3d at 55 (“[U]se of the word ‘any’ amplifies the breadth of the delegation to [FERC].” (citation omitted)).

⁴⁴ See R.415 (*Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 156 FERC ¶ 61,061, PP 32, 37 (2016) (emphasis added)).

As Commissioner Glick explained, “Congress surely understood that not every section 206 proceeding would be resolved against the public utility and, had it so desired, it could have conditioned [FERC’s section 206(b)] refund authority accordingly.”⁴⁵ That Congress did not do so is significant. By comparison, Congress *did* limit FERC’s authority to set new rates under section 206(a) to only certain proceedings. Specifically, section 206(a) requires FERC to set a new just and reasonable rate in a proceeding only where it first “find[s] that any rate ... is unjust, unreasonable, unduly discriminatory or preferential[.]”⁴⁶ Section 206(b), by contrast, broadly permits refunds in “any proceeding” so long as customers overpaid. “[W]hen Congress includes particular language in one section of a statute but omits it in another,” Congress ‘intended a difference in meaning.’ ”⁴⁷

FERC’s attempt to rewrite the phrase “any proceeding” to mean “only proceedings in which a new rate is set” would require adding language to otherwise clear statutory text. That is impermissible.⁴⁸ Because the Second Complaint falls

⁴⁵ R.609 (Op. 569-A), Glick Dissent, P 26.

⁴⁶ 16 U.S.C. § 824e(a).

⁴⁷ *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citation omitted).

⁴⁸ See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (describing the “problem with ... most incorrect interpretations of statutes” as “ask[ing] us to add words to the law to produce what is thought to be a desirable result”); *Pub. Citizen, Inc. v. Rubber Mfrs. Ass’n*, 533 F.3d 810, 816-17 (D.C. Cir.

within the broad ambit of “any proceeding,” this Court should rely on the FPA’s plain language and “decline FERC’s invitation to mangle the statute[.]”⁴⁹

B. *The amounts customers paid were based on the 12.38% Return FERC concluded was no longer just and reasonable.*

The statute authorizes “refunds of any *amounts paid* ... in excess of those which would have been paid under the just and reasonable rate.”⁵⁰ The benchmark for purposes of refunds is thus the “amount[.]” customers *actually* “paid.” Here, FERC acknowledged that the Second Complaint refund period “precedes the September 28, 2016 date when the 9.88[% Return] established in the First Complaint proceeding took effect,” and “[t]hus, during the entire 15-month refund period, the pre-existing 12.38[% Return] was in effect.”⁵¹ 12.38% is the benchmark under the statute and should have been the benchmark FERC used for determining a refund.

Yet FERC used a fictitious benchmark of “the 9.88[% Return] in effect as of the date [it was] acting on the Second Complaint,” *i.e.*, the Return FERC set in the

2008) (declining to “add[] words that are not in the statute that the legislature enacted” (citation omitted)).

⁴⁹ *Anaheim v. FERC*, 558 F.3d at 525 (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006))).

⁵⁰ 16 U.S.C. § 824e(b) (emphasis added).

⁵¹ R.560 (Op. 569), P 559.

First Complaint.⁵² (Opinion 569-A increased that Return to 10.02%.) FERC’s tortured analysis is laid bare in the passage below, where FERC—despite acknowledging that the rate set in the First Complaint had not yet been demanded, observed, charged, or collected during the Second Complaint refund period—used the new rate as the “amounts paid” under section 206(b):

While at the time the Second Complaint was filed, *the new just and reasonable rate established in the First Complaint proceeding had not yet been demanded, observed, charged or collected*, [FERC]’s decision in the First Complaint proceeding made the new base [Return] established in that proceeding the rate that was demanded, observed, charged and collected for the First Complaint proceeding’s refund period. Therefore, when [FERC] analyzed the new just and reasonable rate established in the First Complaint proceeding in making its determination in the Second Complaint proceeding, *that rate was the one demanded, observed, charged and collected for the First Complaint proceeding’s refund period*].⁵³

FERC’s “regulatory fiction” has no basis in the text of the statute or reality.⁵⁴

By “pretend[ing] that customers paid lower rates than they actually did,”⁵⁵

FERC disregarded two principles enshrined in case law construing the FPA.

⁵² *Id.* at P 568. As discussed in the Return Brief, FERC also made refunds contingent on that difference exceeding a wide and arbitrary margin. *See* Return Brief, Section V.

⁵³ R.609 (Op. 569-A), P 264 (emphasis added).

⁵⁴ *See* R.651 (Op. 569-B), Glick Dissent, P 34.

⁵⁵ *Id.* at P 26.

First, FERC cannot retroactively re-settle tariffed charges outside a statutory refund period.⁵⁶ By assuming the rate set in the First Complaint was effective after the conclusion of the refund period for that proceeding—but before the date on which FERC issued Opinion 551—FERC assumed authority it does not have.⁵⁷ “Suffice it to say, it is arbitrary and capricious for [FERC] to deny refunds by assuming that it did that which it was legally prohibited from doing.”⁵⁸

Second, issuing refunds does not “reset rates” even within a refund period.⁵⁹ “Section 206 separates the power to set rates in § 206(a) from the power to order refunds in § 206(b);” “Section 206(a), not § 206(b), authorizes FERC to set rates and ... it does not permit retroactive ratesetting.”⁶⁰ Under section 206(b), FERC states retroactively what a reasonable rate “would have been,”⁶¹ and orders time-limited refunds commensurate with that subjunctive rate—but it does not thereby change the actual filed rate even for the 15-month refund period, much less for

⁵⁶ See *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (“[T]he rule against retroactive ratemaking leave[s] [FERC] no discretion to ... retroactively change or adjust a rate[.]” (citation omitted)).

⁵⁷ See *supra*, Chronology.

⁵⁸ R.651 (Op. 569-B), Glick Dissent, P 35.

⁵⁹ See *City of Redding, Cal. v. FERC*, 693 F.3d 828, 841 (9th Cir. 2012).

⁶⁰ *Id.* at 840 (citing *Anaheim v. FERC*, 558 F.3d at 522).

⁶¹ *Id.* at 841.

subsequent months. Despite ultimately acknowledging that it had not actually reset Owners' rates prior to September 2016,⁶² FERC acted as though it had.

In sum, the statute permits refunds of amounts actually paid. FERC's attempt to contort reality and the statutory text should be rejected.

C. *At the conclusion of the Second Complaint, FERC ordered a just and reasonable rate to be thereafter observed and in force.*

At the conclusion of the Second Complaint, FERC "ordered" what it had determined was a just and reasonable rate "to be thereafter observed and in force."⁶³ In Opinion 569-A (and Opinion 569-B), FERC "order[ed]" that the "base [Return] is set at 10.02%[.]"⁶⁴ Clearly, FERC intended the 10.02% Return "to be thereafter observed and in force."⁶⁵ That is all section 206(b) requires.

FERC asserted that the phrase "thereafter observed and in force" confines refunds to proceedings where FERC "grants prospective relief in that proceeding because section 206 only permits refunds in proceedings where [FERC] sets a new rate to be 'thereafter observed and in force.'"⁶⁶ But section 206(b) does *not* say, as

⁶² R.651 (Op. 569-B), P 172.

⁶³ 16 U.S.C. § 824e(b).

⁶⁴ R.609 (Op. 569-A), P 268, Ordering Paragraph (B); R.651 (Op. 569-B), P 183 Ordering Paragraph (B).

⁶⁵ 16 U.S.C. § 824e(b).

⁶⁶ R.609 (Op. 569-A), P 262.

FERC improperly assumes, “where FERC *sets a new rate* to be thereafter observed and in force.” Rather, it simply refers to the “just and reasonable rate ... order[ed] to be thereafter observed and in force.”

As Commissioner Glick noted, FERC’s “bizarre and overly complex interpretation [of section 206(b)] is not a reasonable way to read an otherwise straightforward statute.”⁶⁷ The “thereafter observed and in force” language of section 206(b)—by mirroring section 206(a)—simply clarifies that refunds under section 206(b) are to be calculated as the difference between the “amounts paid” during the refund period and a just and reasonable rate to which a FERC order gives prospective effect.⁶⁸ It does not specify that the just and reasonable rate must be a new rate established through the same section 206 complaint.

D. *FERC’s contention that granting refunds in the Second Complaint would extend the refund period in the First Complaint is inconsistent with the FPA, FERC’s prior conclusions in this case, and FERC’s precedents.*

FERC disclaimed its refund authority on the ground that issuing refunds would unlawfully extend the 15-month refund period of the First Complaint.⁶⁹ That

⁶⁷ R.651 (Op. 569-B), Glick Dissent, P 31.

⁶⁸ R.609 (Op. 569-A), Glick dissent, P 29.

⁶⁹ *Id.* at P 260.

position cannot be squared with the plain statutory text, FERC's prior conclusions in this case, or its precedent.⁷⁰

Not only does nothing in the statutory text prohibit successive complaints,⁷¹ but FERC's rationale also contradicts its own finding that both complaints were separate proceedings with separate refund periods:

[D]ifferent groups of complainants have filed two separate complaints, based on different facts, thereby commencing two separate proceedings. ... Because the 15-month refund limitation in FPA section 206 is linked to the refund effective date in *each proceeding*, the 15-month refund limitation imposed by FPA section 206 separately applies to the [First] Complaint proceeding and the [Second] Complaint proceeding. ... [T]he 15-month refund limitation in FPA section 206 affects only [FERC]'s refund authority in a particular proceeding at the conclusion of that proceeding[.]⁷²

FERC's later conclusion—that issuing refunds for both complaints would improperly extend the First Complaint refund period—inexplicably departs from these findings.⁷³ It also disregards Owners' position before FERC that “the result

⁷⁰ R.565 at PP 7-8; R.580, PP 34-46, 52-53.

⁷¹ See *Cal. ex rel. Lockyer*, 383 F.3d at 1017 (“FERC’s construed limitations on its own authority are not supported by a careful examination of the FPA.”).

⁷² R.415 (*Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 156 FERC ¶ 61,061, PP 32, 37 (2016) (emphasis added)).

⁷³ See *Mo. Pub. Serv. Comm’n v. FERC*, 601 F.3d 581, 582 (D.C. Cir. 2010) (holding that FERC’s decision was “arbitrary and capricious” because it was “plainly inconsistent with its own precedents”).

reached in one complaint has no bearing on the result reached in a separate complaint,” as each successive Return complaint constitutes “an independent claim.”⁷⁴

Nor can FERC’s own decision in *Golden Spread Elec. Coop. v. Sw. Pub. Serv. Co.* be distinguished on this issue.⁷⁵ That case involved two consolidated complaints, filed in 2012 and 2013 by the same customer, alleging that the same rates included excessive Returns, and recommending the same reduced Return.⁷⁶ FERC was asked to dismiss the 2013 complaint because, given the consolidation, it would produce the same Return as the 2012 complaint and merely extend that complaint’s refund period.⁷⁷ Yet FERC concluded it had a statutory obligation to consider refunds for the 2013 second complaint even if only the 2012 complaint could produce a prospective rate reduction.⁷⁸ That conclusion cannot be squared with FERC’s assertion that it cannot grant refunds in the Second Complaint.

Attempting to distinguish *Golden Spread* and other similar decisions,⁷⁹

⁷⁴ R.174 at PP 49-50.

⁷⁵ 151 FERC ¶ 61,126 (2015) (“*Golden Spread*”).

⁷⁶ *Id.* at PP 2-6.

⁷⁷ *Id.* at P 12.

⁷⁸ *See id.* at P 20.

⁷⁹ *See, e.g., Bangor Hydro-Elec. Co.*, 120 FERC ¶ 61,093 (2007); *Blue Ridge Power Agency v. Appalachian Power Co.*, 57 FERC ¶ 61,100 (1991).

FERC states erroneously these cases involved FPA section 205.⁸⁰ In fact, *Golden Spread* arose purely under section 206. Regardless, FERC's attempted distinction misses the point. Even by FERC's account, these decisions ordered section 206(b) refunds because the rate charged during a refund period exceeded the reasonable rate, without acting under section 206(a).

In sum, because the 12.38% Return "amount[] paid" was "in excess of" the 10.02% Return that would have been paid under the rate to which FERC gave prospective effect, FERC could order refunds. FERC's contrary interpretation of section 206 cannot be countenanced as a discretionary interpretation of an ambiguous statute,⁸¹ as FERC did not find section 206 to be "silent or ambiguous"⁸² regarding eligibility for refunds.⁸³ FERC misread the statute. Its resulting refund authority abdication was unambiguously contrary to law.⁸⁴

⁸⁰ R.651 (Op. 569-B), P 176.

⁸¹ *See Chevron*, 467 U.S. at 842-43.

⁸² *Id.* at 843.

⁸³ R.609 (Op. 569-A), P 260 ("[F]or purposes of deciding whether a rate charged by a public utility is unjust and unreasonable and determining a new just and reasonable rate 'to be thereafter observed' pursuant to section 206(a) of the FPA, we *must* assess whether the public utility's currently effective rate is unjust and unreasonable, not some earlier rate that may have been in effect when the complaint was filed[.]" (emphasis added)).

⁸⁴ *Prill*, 755 F.2d 941, 942 (D.C. Cir. 1985) ("[J]udicial deference is not accorded a decision of the [agency] when [it] acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress.").

II. Denying refunds in the Second Complaint was inconsistent with the FPA's purpose.

The FPA's "primary aim is the protection of consumers from excessive rates and charges."⁸⁵ FERC's denial of refunds—despite recognizing that customers paid the unjust and unreasonable 12.38% Return during the entire refund period⁸⁶—flouts the FPA's core aim of protecting consumers from excessive rates and disregards a "common sense application" of the FPA's underlying principles.⁸⁷ As Commissioner Glick explained, FERC impermissibly rejected the straightforward interpretation of Section 206 that would "protect customers by ordering refunds for any duly established refund period in which a public utility collected a rate in excess of the just and reasonable rate."⁸⁸ Instead, FERC opted for a convoluted and unsupported reading that "requires [FERC] to pretend that customers paid lower

⁸⁵ *Mun. Light Bds. of Reading & Wakefield, Mass. v. Fed. Power Comm'n*, 450 F.2d 1341, 1348 (D.C. Cir. 1971) (citations omitted); *see Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952) ("A major purpose of [the FPA] is to protect power consumers against excessive prices."); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 781 (2016), *as revised* (Jan. 28, 2016) (same); *Nex-tEra Energy Res., LLC v. FERC*, 898 F.3d 14, 21 (D.C. Cir. 2018) ("[FERC] must 'protect consumers from excessive rates and charges.'" (emphasis added) (citation omitted)).

⁸⁶ R.560 (Op. 569), P 559.

⁸⁷ *See Cal. ex rel. Lockyer*, 383 F.3d at 1017 ("[O]ur statutory construction of FERC's authority is dictated by the plain language and words of the Federal Power Act, ... a common sense application of the principles underlying the FPA[,] as well as the FPA's "fundamental purpose[.]").

⁸⁸ R.560 (Op. 569), Glick Dissent, P 6; *see also id.*, Glick Dissent, P 1.

rates than they actually did,”⁸⁹ and which allowed public utilities to keep revenues collected during the Second Complaint refund period that FERC has found excessive. That result undercuts Congress’s intent in granting FERC refund authority.⁹⁰

FERC erroneously concluded, based on the unambiguous statutory text, that it “cannot order refunds in the Second Complaint proceeding because of the limits of [its] statutory authority under FPA section 206.”⁹¹ That mistake directly resulted in the denial of refunds.⁹² Because FERC failed to exercise its discretion, its decision is entitled to no deference. Remand is proper for FERC to exercise the discretion it erroneously disclaimed.

III. FERC failed to acknowledge and support its sequencing decision.

On rehearing of Opinion 569-A, numerous Petitioners argued that FERC had, and should, exercise discretion to act on the Second Complaint before the First Complaint, thereby triggering Second Complaint refunds even under FERC’s

⁸⁹ R.651 (Op. 569-B), Glick Dissent, P 26.

⁹⁰ See S. Rep. No. 491, 100th Cong., 2d Sess. 3-4 (1988), reprinted in 1988 U.S.C.C.A.N. 2685 (“Under present law, public utilities keep revenues collected during the pendency of a section 206 proceeding, even if those revenues are subsequently determined to be excessive. H.R. 2858 would correct this problem by giving FERC the authority to order refunds[.]”).

⁹¹ R.560 (Op. 569), P 568 (emphasis added).

⁹² See *Prill*, 755 F.2d at 956 (“This is not a case in which the ‘mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached.’” (citation omitted)).

decisional framework.⁹³ FERC summarized these arguments, but failed to address them.⁹⁴ FERC's only response was to deny that it had exercised discretion—claiming instead that its decision was statutorily “dictated.”⁹⁵ Elsewhere, by contrast, FERC acknowledged its “broad discretion to structure its proceedings so as to resolve a controversy in the way it best sees fit.”⁹⁶ Again, remand is proper for FERC to exercise the discretion that, as to customers' sequencing request, it erroneously disclaimed.

CONCLUSION

FERC's orders should be vacated and remanded for further consideration.

⁹³ R.623 at 56-59.

⁹⁴ *See* R.651 (Op. 569-B), P 162.

⁹⁵ *Id.* at P 182.

⁹⁶ R.609 (Op. 569-A), P 263 & n.424 (citing cases).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure (“Rule”) 32(a)(7)(B) because it contains 4,885 words, excluding the parts exempted by Rule 32(f). I further certify that the brief complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. All participants in this case registered with CM/ECF will be served by the CM/ECF system.

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ADDENDUM

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, provides in relevant part:

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as

provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.