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

REPLY BRIEF OF PETITIONERS ON RETURN ISSUES

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. 20-1248
Resale Power Group of Iowa

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*Authorities upon which the brief chiefly relies are marked with asterisks.

GLOSSARY

Amici	Central Maine Power Company Eversource Energy Service Company Fitchburg Gas and Electric Light Co. and Unitil Energy Systems, Inc. New England Power Company d/b/a National Grid New Hampshire Transmission LLC Vermont Transco LLC Versant Power (f/k/a Emera Maine) The United Illuminating Company
Briefing Orders	*Ass'n of Businesses Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc.*, Order Directing Briefs, 165 FERC ¶ 61,118 (2018) (R.525) and *Martha Coakley, Att'y General of Mass. v. Bangor Hydro-Electric Co.*, Order Directing Briefs, 165 FERC ¶ 61,030 (2018)
Capital model	Capital Asset Pricing Model (referred to as "CAPM" in proceedings below)
Commission/FERC	Federal Energy Regulatory Commission
Discount model	Discounted Cash Flow model (referred to as "DCF" in proceedings below)
FPA	Federal Power Act
GDP	Gross Domestic Product
Ibbotson model	A form of Capital Asset Pricing Model authored by Dr. Roger G. Ibbotson of the Yale School of Management, and utilized in the "Stocks, Bonds, Bills, and Inflation (SBBI) Yearbook" published successively by Morningstar and then Duff & Phelps
Ibbotson 2019	Article cited in Opinion 569, n.634: Roger G. Ibbotson & James P. Harrington, *Using a Non-Beta-Adjusted Size Premium in the Context of the CAPM Will Likely*

	Overstate Risk and Understate Value
Owners	MISO Transmission Owners (referred to as "MISO TOs" in proceedings below)
Opinion 569	*Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) (R.560)
Opinion 569-A	*Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020) (R.611)
Opinion 569-B	*Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Opinion No. 569-B, 173 FERC ¶ 61,159 (2020) (R.651)
Opinion 531	*Martha Coakley, Att'y General of Mass. v. Bangor Hydro-Electric Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014)
Opinion 531-B	*Martha Coakley, Att'y General of Mass. v. Bangor Hydro-Electric Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015)
Opinion 551	*Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016) (R.466)
Risk model	Risk Premium model (referred to as "RP" in the proceedings below)
Return	Return on Equity (referred to as "ROE" in proceedings below")
S&P	Standard & Poor's

SUMMARY OF ARGUMENT

FERC's vacillating course to its new, Opinion 569-A method for estimating Owners' equity cost strayed from reasoned decision-making. Key elements of all three methods used therein—"Discount," "Capital," and "Risk"[1]—and FERC's use of "midpoints" to distill them lack substantial evidentiary support, contradict themselves, are inadequately explained, and are otherwise arbitrary and capricious.

The "Presumption" through which FERC dismissed the Second Complaint is unlawful. It violates statutory and reasoned-decision standards, because it creates a proof asymmetry that is contrary to the Federal Power Act ("FPA") and precedents thereunder, and forces customers to litigate blindly.

ARGUMENT

Customers' Return Brief recited numerous specific respects in which FERC's as-finalized new method violates reasoned-decision standards. FERC, Owners, and Amici largely ignore these specific showings, resting instead on broad claims that equity cost estimation involves deference-worthy agency expertise. *See* FERC Br. at 24 (citing *Emera Maine v. FERC*, 854 F.3d 9, 20 (D.C. Cir. 2017) ("*Emera*"), and similar prior cases, as conferring methodological "discretion"); *id.*

[1] For definitions of these and other capitalized terms, see the Glossary and our prior briefs.

at 37 (citing *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021), as holding that agency decisions need not be "perfect"); Owners Br. at 17 (demanding judicial deference to FERC's "overall outcome," insofar as it favors Owners); Amici Br. at 22-26 (supporting the only aspect of FERC's method they address).

But "[i]n determining whether FERC's ROE decision is just and reasonable, [this Court] … examine[s] 'the method employed in reaching that result.'" *Emera* at 27.

Accordingly, FERC's discretion does not vindicate its reliance on self-contradictory methods bearing no rational connection to substantial evidence. *See Tenn. Gas Pipeline v. FERC*, 926 F.2d 1206, 1213 (D.C. Cir. 1991) ("*Tennessee*") (reversing FERC's internally inconsistent Discount modeling); *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63-64 (D.C. Cir. 1999) (reversing FERC's chosen growth rate). Regulators' reasons for adopting even highly technical model parameters must "hold[] water," *U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999) ("*Telephone*"), providing a "rational connection between the facts found and the choice made," *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 52 (1983); *see also Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 212 (D.C. Cir. 2018) (complexity "doesn't relieve [FERC] of the requirements of reasoned decisionmaking"). These standards demand internal

consistency: if "FERC's decision is internally inconsistent, it is arbitrary and capricious." *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

FERC's methodology, which favors Owners on all appealed Return issues, fails these standards.

I. Key elements of FERC's defense of its new Capital method are self-contradictory and otherwise arbitrary.

FERC claims the key factor of its new Capital Asset Pricing Model ("Capital") is "analytically sound and supported by the evidence." FERC Br. at 36. But FERC "has given lip service to a theoretical design and then inexplicably distorted the theory in its application," without adequately "address[ing] potentially serious problems with the new … design," requiring remand. *Elec. Consumers Res. Coun. v. FERC*, 747 F.2d 1511, 1514 (D.C. Cir. 1984). Consider, e.g., two of the numerous specific errors FERC ignores.

First, FERC argues that fully diversified stocks will sustain long-term earnings growth "at a short-term growth rate"[2] of 9.46%/year[3] and provide long-term returns of 11.81%/year.[4] By the uncontroverted record, these long-term projections vastly exceed those of financial institutions, economists, and other

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[2] R.611 (Opinion 569-A), P 85; FERC Br. at 33.

[3] R.535:92.

[4] R.535:92.

agencies,[5] and similarly exceed historical experience.[6] The excess reflects illogical and unsupported beliefs, which FERC espoused *sua sponte* in vacated Opinion 531-B:[7]

- That, although "[o]ver the long-run," the "average firm in the economy" cannot grow faster than Gross Domestic Product ("GDP"),[8] the GDP factor FERC applied to model that constraint does not apply to the "overall market"[9]—meaning the overall market is assumed to grow faster than the economy and its firms;
- That the evolving roster of Standard & Poor's ("S&P") 500 companies achieves in aggregate what each company alone cannot: growth far outpacing economy-wide GDP.[10] In reality, roster substitutions do not

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[5] *See* Return Br. at 17-18; R.580:66-70,78-81 (citing textbook, articles, record projections by financial industry sources on which FERC otherwise relied, and parallel lower estimates of Federal Reserve, FCC, Surface Transportation Board, and other regulators); R.560 (Opinion 569), P 272 (related partial recitation).

[6] *See* R.263:37 (historical market risk premium, for S&P 500 returns above long-term Treasury bonds during 1926–2014, was 6.0%—not the 9.12% of R.560 (Opinion 569), P 269).

[7] *See* Opinion 531-B, P 113 (inventing rationales for assuming perpetual short-term growth, while citing no record basis).

[8] *See* R.560 (Opinion 569), P 157 (approvingly quoting Opinion 531).

[9] *Id*., P 263.

[10] *Compare* FERC Br. at 33 (roster updates "allow the S&P 500 to continue to grow at a short-term growth rate") *with* R.560 (Opinion 569), P 159 (finding, correctly, that no company's growth can perpetually outpace GDP); *see also* Return Br. at n.39 (FERC previously found "analysts' short-term forecasts overstate[] investors' long term growth expectations").

accelerate index growth,[11] and the S&P 500 and GDP, having long grown apace,[12] are both now slowing;[13]

- That such fictive growth in the market's S&P 500 subset should drive FERC's estimated long-term returns for the entire market—even though the methodology uses that subset only as a stand-in for "the overall market,"[14] and changing delineations of the market's S&P 500 subset cannot alter the composition or growth path of the overall market;
- That this supposed special, GDP-outpacing growth characteristic of the S&P 500 index—which, FERC must admit,[15] is shared by neither the overall market nor the static list of 370 identified dividend-paying stocks that FERC actually used[16]—supports using those 370 stocks' near-term growth to estimate the overall market's long-term growth;
- That investors expect such fictive growth even though by FERC's own account, "sophisticated investors do in fact consider long-term economic trends, including long-term growth in GDP, when estimating the future

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[11] *See* R.548:30.

[12] *See supra* n.6.

[13] *See* R.580:67-68.

[14] FERC Br. at 33, 35.

[15] *See* R.560 (Opinion 569), P 264 (only "the S&P 500," not "the overall market," is "regularly updated;" moreover, FERC's approach used "the specific companies" that were S&P 500 dividend payers at a specific time).

[16] *See* R.560 (Opinion 569), Appendix C, n.2; R.535:92,152-58.

growth in earnings or dividends,"[17] and the overall market inherently cannot sustain growth outpacing the entire economy;[18]

- That the index's inclusion of mature companies obviates realistic long-term growth rates for the index's less-mature companies;[19]
- That the GDP growth constraint FERC rightly applies to Discount-proxy utility stocks disappears when the S&P 500 indexes the same stocks;[20]
- That an estimate of the return on the overall market is somehow "specific to the electric utility industry;"[21] and
- That a broad-portfolio stand-in for the entire market should exclude declining fossil-fuel stocks because they differ from utility stocks.[22]

Tennessee observed that if stock trading worked as FERC then believed, its members "would do well to abandon their regulatory work and turn to exploitation of their theory."[23] Here, similarly, if investors actually believed S&P index growth will henceforth perpetually outpace the growth of its components, why would they keep buying individual stocks?

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[17] *Id.*

[18] *See* R.560 (Opinion 569), P 153.

[19] *See* Return Br. at 13-14.

[20] *See id.*; R.535:92.

[21] R.611 (Opinion 569-A), P 84.

[22] *See* Return Br. at 14-15.

[23] *Tennessee* at 1211.

Second, FERC's Capital model adds "size adjustments," which were designed to calibrate "Ibbotson" model results for small, typically high-beta stocks to such stocks' historical performance, to a non-Ibbotson model of low-beta stocks that already assumes stocks' future performance will far outpace their historical performance.[24]

II. FERC's adoption of the Risk model remains unjustified.

Instead of engaging Customers' showing that Opinion 569-A's addition of the Risk model to its methodology departs from precedent without adequate explanation or support, FERC merely summarizes its rehearing orders. Owners ignore the issue; Amici's salvage attempt falls short. Accordingly, FERC's adoption of the Risk model remains unjustified.

Opinion 569-A reversed, without adequate explanation, FERC's past rejection of direct reliance on Risk models when determining Returns.[25] FERC says it accepted the "defects of the model" cataloged in Opinion 569 "upon ordering certain modifications to that methodology"[26]—including an imputed

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[24] *See* R.560 (Opinion 569), n.634, *Ibbotson 2019* article cited therein, and accompanying text; R.539:319.

[25] *See* Return Br. at 26-29 and case citations collected at R.623:22-24.

[26] FERC Br. at 43.

range approach that FERC created *sua sponte*,[27] for which it provided no rational explanation.[28] FERC's brief fails to overcome this error by showing how its orders explained and justified its change.

Amici succeed only in underscoring the dearth of record support for FERC's actions, by resorting, improperly, to testimony outside and after closure of the present record.[29] Amici also overstate the Risk model's place in FERC precedent.[30] FERC has long eschewed direct reliance on risk models in setting Returns,[31] notwithstanding Amici's misleading citation of vacated Opinion 531 and overruled aspects of Opinion 551,[32] where FERC described that model as providing only "corroborative evidence" and expressly disclaimed direct reliance thereon.[33] The Risk model's value as corroborative evidence was limited to "periods of

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[27] Return Br. at 26-28.

[28] This is just one of several examples illustrating FERC's unreasoned decisions involving the Risk model. Return Br. at 28-29.

[29] Amici Br. at 23-24.

[30] *Id*. at 22-24.

[31] Return Br. at 26-29.

[32] Amici Br. at 22

[33] Opinion 531, P146; *see* R.466 (Opinion 551), PP 191, 195, 199.

anomalous market conditions,"[34] and became irrelevant when *Emera* vacated Opinion 531.

Amici also claim the Briefing Orders "endorse[d]" the Risk model.[35] But those orders were expressly interlocutory *proposals*, and Opinion 569 soundly rejected them. FERC did not endorse the Risk model until it arbitrarily changed course in Opinion 569-A.

III. FERC's reduced weighting of long-term growth remains unjustified.

Customers have detailed the Opinion 569-A Discount model's arbitrary under-weighting of long-term growth,[36] starting with FERC's stated but illogical comparison between current short-term electric growth projections and 1998 GDP growth projections.[37] FERC now concedes that comparison missed the "relevant metric."[38] FERC also fails to salvage its inadequate other explanations for moving to 4:1 weighting, or to identify any record basis therefor.

FERC says it gives electric utilities' short-term growth more weight than it has given pipelines' short-term growth since 1998, because the former has moved

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[34] R.466 (Opinion 551), PP 191, 199.

[35] Amici Br. at 22.

[36] Return Br. at 21-25.

[37] *Id.* at 22 & n.105 (reciting FERC's comparison of current short-term growth rates to a 1998 GDP growth rate).

[38] FERC Br. at 28.

closer to GDP growth.[39] As Customers showed, however, the relative movement of electric short-term growth is both directionally varied and less pronounced than for pipelines.[40] So "[w]here's the trend?" *Telephone* at 526.

IV. FERC inadequately explained its use of "midpoints" to distill nationwide, multi-model proxy results.

This is the first case wherein FERC determined a region-wide Return using multiple models and national proxies. FERC decided to expand into that context its idiosyncratic use of "midpoints" rather than medians to distill proxy-result distributions to a single representative number, concluding that the Discount and Capital model midpoints produce a First Complaint Return that was *ipso facto* apt for the diverse Owners. FERC viewed this expanded application as dictated by judicial precedent, stating (R.611 (Opinion 569-A), P 171) that varying from the midpoint here would have "revers[ed]" *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1010 (D.C. Cir. 2005) ("*Kentucky*"). As FERC's Brief (at 49) recognizes, however, its decision to use midpoints was a "[c]hoice." Customers have shown that FERC failed to adequately explain that choice.[41]

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[39] *Id*. at 26-27.

[40] Return Br. at 22-24.

[41] *See id*. at 29-35 and citations therein.

FERC argues that the range of proxy group results must be "representative of Owners' risk"[42] because FERC "uses screening criteria that limit proxy group companies to those presenting investment risks comparable to Owners."[43] This argument provides no support for FERC's differential treatment of region-wide and single-utility Returns. In both cases, FERC uses the same screening criteria to limit proxy group companies to those presenting investment risks comparable to the subject utility or utilities, principally "credit ratings no more than one notch above or below *the utility or utilities* whose ROE is at issue."[44] For single utilities, FERC uses medians because "the high and low results represent different risks from the single company at issue," notwithstanding that screening. FERC Br. at 49. Here, the extreme high and low results likewise fail to fairly represent both individual Owners and the Owners collectively. Consequently, emphasizing those extremes produces unreasonable results.

For example, by enlarging the proxy group nation-wide, FERC swept in Black Hills Corp., a non-Midcontinent entity that raised FERC's Capital range. FERC failed to adequately explain why emphasizing Black Hills' high result produced a Return that was reasonable for the least-risky Owners. FERC's finding

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[42] FERC Br. at 51.

[43] *Id.*

[44] R.560 (Opinion 569), P 365 (screen 2; emphasis added); *cf*. FERC Br. at 51.

that Black Hills' credit ratings are "within the *range*" of Owners' credit ratings[45] ignored the screened-in ratings' *distribution*, and thus failed to assess whether FERC's midpoint-based Return fit the Owners collectively.

In this region-wide case, as in the single-utility context, the Commission's risk-based and outlier screens do not obviate the "mathematical principle" that medians reduce, whereas midpoints increase, "the influence of extremes."[46] Medians better reflect the equity cost distributions associated with proxies' diverse risk profiles,[47] and the midpoint is "an obvious place to begin" only when the extremes are the only available relevant information.[48] In *Kentucky*, because all proxies were Midwest-region utility stocks, emphasizing their extremes related the resulting Midwest-wide Return to the most disparate Midwest utilities, which FERC deemed the relevant concern.[49] Here, however, the nation-wide proxy groups' method-specific extremes bear no identified, FERC-assessed relationship to the most disparate Owners. If the high proxy results' relationship to the highest-equity-cost Owner differs from the low proxy results' relationship to the lowest-

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[45] R.560 (Opinion 569), P 412 (emphasis added).

[46] *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 186 (D.C. Cir. 2013).

[47] *Cf. Emera* at 28 (questioning the region-wide fit of a Return that exceeded "35 of the 38 data points FERC used").

[48] *Emera* at 30 (discussing *Tennessee at* 1213).

[49] *See Kentucky* at 1011.

equity-cost Owner, the extremes' midpoint may not provide a balanced fit to the most disparate Owners. It would be "pure happenstance"[50] if they did, given that (a) FERC never identified, compared, and assessed those relationships and fit following its Opinion 569-A changes thereto, and (b) FERC applied different retention-screening criteria to high and low initial proxy results.[51] As in *Petal Gas v. FERC*, 496 F.3d 695, 700 (D.C. Cir. 2007), FERC's change of proxy group formation policy, retention-screening criteria, and other methodological approaches thus necessitated, but failed to elicit, re-evaluation of FERC's policies for distilling proxy group results to a single regional number.

V. The "Presumption" zone remains unjustified.

The Presumption through which FERC dismissed the Second Complaint[52] also[53] departs from *Emera,* bifurcates the FPA's unitary reasonableness standard, and violates due process.

A. *Emera* does not support FERC's Presumption.

FERC fairly paraphrases *Emera* as holding "that evidence that financial models may now produce a cost of equity lower than the existing return is, *without*

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[50] *Id*.

[51] *See* Return Br. at 35 & nn.160-61.

[52] *See* R.611 (Opinion 569-A), P 229.

[53] In addition to standing, quantitatively, on the errors discussed above.

further explanation, insufficient to prove the existing return unlawful."[54] Crucially, however, *Emera* demanded further *explanation*, not further *evidence*. *Emera* took no issue with using the same financial analysis to inform both FPA section 206 steps. But because "FERC must use models to inform, not rigidly to determine its judgment,"[55] FERC's model-based finding of a new reasonable Return did not, "standing alone,"[56] establish that any existing higher Return was *necessarily* unreasonable.[57] Nonetheless, FERC remains free to adjudge, as it did in Opinion 551,[58] that exceeding FERC's updated cost estimate makes a Return unreasonable, provided it states and explains that judgment. FERC's Presumption does not, as FERC argues, "structure[]"[59] the required explanation. Rather, the Presumption *avoids* explanation, by substituting upward-biased rote math for the required qualitative explanation.

The Presumption functions as an evidentiary bar. Within its range, FERC deems its approved financial models non-probative of Returns' unreasonableness,

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[54] FERC Br. at 64 (emphasis added).

[55] *Emera* at 20 (quoting, with emendation, *Boston Edison Co. v. FERC*, 885 F.2d 962 (1st Cir. 1989) ("*Boston Edison*")).

[56] *Emera* at 26.

[57] *Id.*

[58] *See* R.404:9,41 (PP 21,135); R.466:7 (P10); Return Br. at 39-40.

[59] FERC Br. at 64 (paraphrasing R.611 (Opinion 569-A), P 196).

and requires customers to submit "other evidence."[60] FERC states that customers can prove Returns' unreasonableness by "a preponderance of the evidence" and characterizes Opinion 569-B (R.651, PP 177-79) as stating that any "study period[] data" can prove unreasonableness. Yet FERC dismisses the models as Presumption-rebuttal evidence and insists on "other evidence."[61] The financial model results should count towards preponderance of "the evidence." They are key "study period[] data", which FERC considers sufficient both to determine reasonable replacement Returns (under FPA section 206, step two), and to support utility-filed rate increases under FPA section 205. Yet the Presumption deems it non-probative at section 206 step one.

Thus, the Presumption is not, as FERC alleges, just an "*additional* tool to help inform the return analyses."[62] It is a rule that, within its application range, *removes* FERC's approved financial models from the evidence considered in evaluating whether existing Returns remain reasonable, and thereby alters complainants' proof burden. Nothing in section 206 or *Emera* supports that alteration.

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[60] R.611 (Opinion 569-A), PP 196, 199.

[61] *Compare* FERC Br. at 63, 67 *with id*. at 63, 68.

[62] FERC Br. at 63 (emphasis added).

B. The Presumption creates an unlawful asymmetry between FPA sections 205 and 206.

FERC's Presumption creates asymmetry between FPA sections 205 and 206. FERC maintains that this asymmetry is not "unlawful" because it goes to a difference that makes section 206 "stricter"—the unreasonableness showing that must precede rate changes only under that section.[63] But section 206 complainants' burden to show an existing Return is unreasonable, on which FERC relies to bifurcate evidentiary burdens, mirrors section 205 filing utilities' burden to show their proposed Return is reasonable. Nothing in the FPA or precedents thereunder indicates that showing a rate's unreasonableness requires more *evidence* than showing a rate's reasonableness. Both showings go to the same substantive standard,[64] and *Emera* cited *Boston Edison*'s observations regarding ranges and proof of reasonable returns under section 205 as equally applicable to proving existing returns unreasonable under section 206.[65] If results from FERC-approved financial models suffice for utilities to prove the reasonableness of rates they file under section 205, those results likewise suffice as customers' proof that an

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[63] *Id.* at 65.

[64] *See Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1*, 554 U.S 527, 557 (2008) (Stevens, J. dissenting, Souter J. joining); *see also* FPA section 219(d) (embodying Congressional understanding that sections 205 and 206 both require "that all rates…be just and reasonable").

[65] *See Emera* at 20, 24 (citing *Boston Edison* at 969-70).

existing rate is unreasonable under section 206. Requiring more evidence for the latter showing creates an unlawful asymmetry and bifurcates the statute's unitary reasonableness standard.

In any case, the administrative record contains ample "additional evidence" to support the Second Complaint. Customers sponsored additional financial models, and comparisons to state-authorized returns, robustly indicating Second Complaint equity costs below the 10.02% that FERC (erroneously) deemed the existing Return.[66] FERC ignored all that, and instead stated baselessly that it saw "no evidence" rebutting the Presumption.[67] That *ipse dixit* arbitrarily ignored weighty arguments and record evidence.

C. FERC's Presumption is not rebuttable.

FERC claims that if the 10.02% Return it adopted in resolving the First Complaint was unreasonable for the Second Complaint, litigants could have so proved through an anticipatory rebuttal.[68] But FERC's latitude to depart (with

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[66] *See e.g.,* Updated Testimony of Mr. Gorman (R.337) providing a capital model, three discount models, a risk model and evidence of state Returns; Updated Testimony of Mr. Hill (R.334) providing expected Returns and market-to-book ratio data and a discount model; Updated Testimony of Mr. Solomon (R.335) providing a discounted model; and Updated Testimony of Mr. Parcell (R.338) providing a discount model, state Return data and evidence of economic indicators.

[67] R.611 (Opinion 569-A), P 229.

[68] *See* FERC Br. at 67-68.

explanation) from model results in selecting returns[69] fatally undermines that claim, as does FERC's call for "other evidence" such as "testimony regarding the effects of rates on customers."[70] FERC demanded that Customers rebut a Return they could not know.[71]

FERC's Presumption thus raises due process issues by forcing customers to litigate blindly. As it did here, FERC typically sets the replacement Return after the record closes. Under FERC's unlawful definition of the "existing" Return, customers are forced to contest the continued reasonableness of a Return they do not and cannot know.

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[69] *See Emera* at 20.

[70] R.651 (Opinion 569-B), P 45.

[71] FERC's vacillating outcomes here prove that only clairvoyants could foresee FERC's finalized model results. And even clairvoyants cannot know what non-model judgment FERC may apply. Evidence of the impacts of FERC's later-determined Return is impossible.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headers, quotations, and footnotes, but excluding the (i) cover pages, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) signature block, contain approximately 3,517 words, as counted by the word count feature of the latest version of Microsoft Word for Microsoft 365, with which this brief was prepared. Per Fed. R. App. 32(a)(5)-(6), this document has been prepared in a proportionally-spaced typeface in Microsoft Word using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 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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