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

BRIEF OF INTERVENORS FOR RESPONDENT ALIGNED WITH REMAINING 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 Industrial Energy Group, American Municipal Power, Inc., Cooperative Energy, Hoosier Energy Rural Electric Cooperative, Inc., Mississippi Public Service Commission, Louisiana Public Service Commission, Missouri Public Service Commission, Missouri Joint Municipal Electric Utility Commission, Organization of MISO States, Inc., Southwestern Electric Cooperative, Inc., the Resale Power Group of Iowa, Consumers Energy Company, and Joint Consumer Advocates

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The list of parties and amici to this case appears in the Initial Briefs for Petitioners. Following the filing of Initial Briefs, the following entities filed an Amici Brief and were granted Amici Status in support of Owners: Central Maine Power Company; Eversource Energy Service Company on behalf of The Connecticut Light and Power Company, NSTAR Electric Company, and Public Service Company of New Hampshire; New England Power Company d/b/a National Grid; New Hampshire Transmission LLC d/b/a NextEra; The United Illuminating Company; Unitil Energy Systems, Inc. and Fitchburg Gas and Electric Light Company; Vermont Transco, LLC; and Versant Power.

(B) Rulings Under Review

Reference to rulings under review appear in the Initial Briefs for Petitioners.

(C) Related Cases

Intervenors are unaware of any pending cases related to the current consolidated case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and District of Columbia Rule 26.1, Intervenors in support of Petitioners Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Indiana Industrial Energy Consumers, Inc., Wisconsin Industrial Energy Group, Minnesota Large Industrial Group, American Municipal Power, Inc., Cooperative Energy, Hoosier Energy Rural Electric Cooperative, Inc., Mississippi Public Service Commission, Louisiana Public Service Commission, Missouri Public Service Commission, Missouri Joint Municipal Electric Utility Commission, Joint Consumer Advocates, Organization of MISO States, Inc., Southwestern Electric Cooperative, Inc., Resale Power Group of Iowa, and Consumers Energy Company submit the following required disclosure statements. Each of the undersigned counsel submits the disclosure statement(s) with respect to the intervenor(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 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 the Midcontinent Operator's region. 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 kilowatt-hours of electricity annually 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.

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.

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 kilowatt-hours of electricity annually. 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. American Municipal Power, Inc. has 135 members, including 134-member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, 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, 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.

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; Consumer's Energy is aware of one passive institutional investor group, Vanguard Group, that owns 10% or more of CMS Energy's stock.

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.

The Louisiana Public Service Commission is a political subdivision of the State of Louisiana. No corporate disclosure is required.

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 non-governmental 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. 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 Illinois. 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.

Resale Power Group of Iowa ("Resale Group") 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 Group's members are 24 Iowa municipal utilities, one cooperative, and one privately-owned utility. Resale Group does not issue stock or debt securities and does not have a parent company.

The Illinois Citizens Utility Board is a non-profit, nonpartisan organization that represents the interests of residential-utility customers of Illinois. It has no parent corporation and does not issue stock.

The Indiana Office of Utility Consumer is a state agency representing ratepayer interests in cases before state and federal utility regulatory commissions. The Indiana Office of Utility Consumer is not a non-governmental entity. It has no parent corporation and does not issue stock.

The Iowa Office of Consumer Advocate is a division of the Iowa Department of Justice and responsible for the investigation of the legality of rates and practices of all utility companies subject to the jurisdiction of the Iowa Utilities Board, and represents consumers and the public generally before state and federal agencies concerning those matters. The Iowa Office of Consumer Advocate is not a non-governmental entity. It has no parent corporation and does not issue stock.

Michigan Citizens Against Rate Excess is a consumer watchdog group that focuses on utility rates. It has no parent corporation and does not issue stock.

The Minnesota Department of Commerce regulates more than 20 different industries, including insurance, state-chartered banks, credit unions, securities, and real estate. The Minnesota Department of Commerce licenses franchises, collection agencies, and currency exchanges. The Minnesota Department of Commerce is charged with the duty to advocate for all ratepayers regarding the public interest for state, regional, and national levels pursuant to Minn. Stat. §216A.07. subd. 3a. The Minnesota Department of Commerce is an arm of Minnesota's Executive Branch and is one of the Energy Policy Agencies in the State of Minnesota responsible for enforcing state statutes regarding the evaluation of public utilities. It is not a non-governmental entity, has no parent corporation and does not issue stock.

The Missouri Office of Public Counsel represents the public and the interests of utility customers in proceedings before the Missouri Public Service Commission and in investor-owned electric, natural gas, telephone, water, sewer and steam heat utilities, including safety issues, adequate and quality service, complaints and disputes, connections and disconnections, and billing and collection practices. The Missouri Office of the Public Counsel is independent from the PSC and has a separate budget and staff. It is not a non-governmental entity and has no parent corporation and does not issue stock.

The Citizens Utility Board of Wisconsin is a member-supported, non-profit organization that advocates for reliable and affordable utility service on behalf of residential and small business customers of electric, natural gas, and water utilities before the Wisconsin Public Service Commission, the legislature, and the courts. It has no parent corporation and does not issue stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

AGENCY DECISIONS

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

GLOSSARY

FERC	Respondent Federal Energy Regulatory Commission
First Complaint	The complaint filed in FERC Docket No. EL14-12 on November 12, 2013 (R.1)
FPA	Federal Power Act
Owners	Petitioners ALLETE, Inc., for its operating division Minnesota Power (and its subsidiary Superior Water, L&P); Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois, and Ameren Transmission Company of Illinois; American Transmission Company LLC; Cleco Power LLC; Duke Energy Corporation for Duke Energy Indiana, LLC; Entergy Arkansas, LLC (f/k/a Energy Arkansas, Inc.); Entergy Louisiana, LLC; Entergy Mississippi, LLC (f/k/a Entergy Mississippi, Inc.); Entergy New Orleans, LLC (f/k/a 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 LLC (f/k/a Northern Indiana Public Service Company); Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wolverine Power Supply Cooperative, Inc.
Return	Return on Equity
Second Complaint	The complaint filed in FERC Docket No. EL15-45 on February 12, 2015 (R.125)

STATEMENT OF THE CASE

Intervenors adopt the statement of the case in the initial refund brief of customer-side petitioners.

SUMMARY OF THE ARGUMENT

The Federal Power Act ("FPA") authorizes the Federal Energy Regulatory Commission ("FERC") to order refunds as of the refund date established in Opinion 551.[1] Once FERC has found an existing rate unreasonable and fixed a new replacement rate prospectively, it may revise on rehearing any part of its decision, including the replacement rate. Owners' contention that rehearing reductions can take effect only after FERC grants rehearing lacks merit. Once FERC has established a replacement rate, a rehearing request challenging that rate notifies all parties that FERC may revise its replacement rate. Such revision may entail a rate reduction or rate increase, and corresponding refunds or surcharges.

Moreover, FPA section 309 gives FERC ample authority to fix legal errors. This Court vacated as arbitrary in *Emera*[2] FERC's Opinion 531[3] decision to place Amici's Return at the proxy results' upper midpoint. Opinion 551 suffered the same

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[1] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion 551, 156 FERC ¶ 61,234 (2016) (R.466).

[2] *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera*").

[3] *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion 531, 147 FERC ¶ 61,234 (2014).

flaw, as Petitioners explained in requesting rehearing. FERC was authorized to correct its legal error on rehearing by revising the replacement rate while retaining the effective date established in Opinion 551.

Owners further claim that FERC cannot set for hearing a complaint that seeks to update a Return to fit current equity costs when a prior Return-updating complaint remains unresolved. There is no basis for such a claim. Nothing in the FPA precludes customers from seeking lower rates simply because an earlier challenge to the same rate remains pending. In fact, section 206(b) expressly ties the 15-month refund limit to individual proceedings. One proceeding's refund limit does not extend to subsequent proceedings. Moreover, the market cost of equity changes constantly. For the replacement rate ultimately set by FERC to reasonably track the changing cost of equity, customers must be able, during the (typically lengthy) pendency of complaint proceedings, to seek lower rates through FPA section 206 just as utilities can seek rate increases through overlapping section 205 filings.

ARGUMENT

I. FERC Can Correct Errors on Rehearing and Order Refunds Accordingly.

FERC has "undoubted" section 206 power to reduce existing rates "*whenever*" it finds them unreasonable. *Emera* at 24. "Indeed, upon finding an existing rate unreasonable, FERC "has the duty—not the option—to reform" it.[4] FERC's September 2016 Opinion 551 found Owners' 12.38% Return unreasonable, and made a reduced Return of 10.32% effective thereafter. But, FERC's reasoning followed Opinion 531 in applying the "upper midpoint"—the same approach *Emera* found arbitrary. On rehearing and considering *Emera*, FERC granted rehearing in part, [5] revising its equity cost estimate and Return allowance—initially to 9.88%,[6] and then to 10.02%[7]—while retaining the effective date.

Owners and Amici claim that FERC cannot revise Opinion 551's Return without discarding Opinion 551's effective date—meaning that FERC's finding on rehearing that the reasonable return is *below* the 10.32% established in Opinion 551, somehow obliged FERC to retroactively *raise* Owners' Return for the lengthy

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[4] *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).

[5] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion 569, 169 FERC ¶ 61,129 at P 20 (2019) (R.560); *order on reh'g*, Opinion 569-A, 171 FERC ¶ 61,154 (2020) (R.611); *further reh'g*, Opinion 569-B, 173 FERC ¶ 61,159 (2020) (R.651).

[6] Opinion 569, P 20.

[7] Opinion 569-A, P 3.

interval separating Opinions 551 and 569-A (September 2016 to May 2020), to the 12.38% that FERC found unreasonable in all four of its First Complaint Opinions.[8] But, the statute and precedents amply support FERC's decision to retain the September 2016 effective date.

As FERC's Brief explains (at 52-57), FERC's authority to cure its legal error in setting the Return authorizes relief dated to September 2016, when FERC should have replaced Owners' Return *without* repeating Opinion 531's error. *See, e.g., Tenn. Valley Mun. Gas Ass'n v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972) (erroneous complaint dismissal rectified by back-dating rate reduction); *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136 (D.C. Cir. 1987) (same where complaint delayed); *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 431 (D.C. Cir. 2017) (error-correcting remedy likewise back-dated). *See also Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950 (D.C. Cir. 1983) ("*Papago*") (related to *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) ("*Electrical District*,") discussed *infra*, and likewise authored by then-Circuit-Judge Scalia), which makes clear that to correct legal error, section 206(a) rate changes may be made effective back to the same day a prior return was previously found to be unreasonable, thus fulfilling the statute's

[8] Initial Brief of Owners filed on March 10,2021 at 18-40 ("Owners Brief"); Brief for *Amici Curiae* in Support of Transmission Owning Petitioners filed on March 17, 2021, at 16-20 ("Amici Brief").

"substantial purpose."[9] Opinion 551 could have set Owners' Return at or below 9.90% (the averaged midpoints of the Discounted Cash Flow (9.29%), Capital Asset Pricing Model (10.06%), and (if used) Risk Premium (10.36%) methods as recited therein),[10] but instead erroneously adopted the Discount method's upper midpoint. Opinions 569 and 569-A merely placed ratepayers in positions they should have occupied absent that error.

Moreover, FERC was authorized to further reduce Owners' Return on rehearing even without a legal error. On rehearing, FERC may "modify or set aside, in whole *or in part*, any finding or order."[11] Accordingly, the Supreme Court has left intact FERC's authority to "make retrospective as well as prospective adjustments" that "reopen any part of its orders, including those affecting revenues from gas already delivered." *Mobile Oil Corp. v. FPC*, 417 U.S. 283, 314-15 (1974); *see also In re Southwest Area Rate Case*, 484 F.2d 469, 482 & n.28 (5th Cir. 1973) (the Commission may "alter the total refund obligations accordingly"). Rate adjustments made on rehearing, therefore, commonly and permissibly retain the effective date of the order reheard. Consider *National Rates for Jurisdictional Sales of Natural Gas*, 52 F.P.C. 1693, 1693 & n.2 (1974) (establishing proceeding under Gas Act §§5 *et al*.

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[9] *Papago* at 957.

[10] Opinion 551, PP 139, 270, 280.

[11] 16 U.S.C. § 8251 (emphasis added).

[12]), *final order*, Opinion 770, 56 F.P.C. 509, Opinion 770-A, 56 F.P.C. 2698, 795-96 (1976), *aff'd sub nom. American Pub. Gas Ass'n v. FPC*, 567 F.2d 1016, 1061-63 (D.C. Cir. 1977). Opinion 770 reduced on rehearing (from $1.42 to $0.93) the rate for gas from existing wells previously sold intrastate, effective on the past (July 1976) issuance date of the order reheard—with refunds. This Court affirmed.

Owners contend, however, that rate changes re-quantified on rehearing cannot take effect until the rehearing order issues because FERC may set a prospective ("thereafter") rate only at the very end ("[a]t the conclusion") of complaint proceedings.[13] But the word "conclusion," on which Owners rely, appears in and relates to only section 206(b), not the section 206(a) provision for "thereafter" rate changes, which FERC invoked.[14]

Under section 206(a) FERC may, for example, fix Returns through interim orders with prompt effect, while deferring further reductions, *Panhandle Eastern Pipe Line Co. v. FPC*, 143 F.2d 488, 491 (8th Cir. 1944), *aff'd*, 324 U.S. 635 (1945), or addressing other issues, *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85 (1942); *Kansas Cities v. FERC*, 723 F.2d 82, 90-96 (D.C. Cir. 1983). Section 206(a) requires only that reductions follow "a hearing," as Opinion 551 did; it permits on

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[12] Undisputedly, precedents thereunder apply equally to FPA §206. *See* Owners Brief at 20 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)).

[13] Owners Brief at 29.

[14] Opinion 569, P 529.

rehearing both new evidence (*compare* Owners Brief at 32 *with NYPSC v. NYISO*, 174 FERC ¶ 61,110, PP 3-4 (2021)) and Return reductions, *see, e.g., Sw. Pub. Serv. Co.*, 53 FERC ¶61,084, at 61,240 (1990), *otherwise reviewed, sub nom. Sw. Pub. Serv. Co. v. FERC* 952 F.2d 555 (D.C. Cir. 1992). Symmetrically, FERC on rehearing may increase allowed Returns (and correspondingly decrease refunds), as it did here in Opinion 569-A, and previously in *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,265, PP 7-23 (2008), *aff'd sub nom. Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30 (D.C. Cir. 2010). *Contra* Amici's mistaken construction of FPA section 206(a) (Brief at 19), both FERC's Opinion 569 Return reduction to 9.88% and Opinion 569-A Return increase to 10.02% followed a hearing held "upon complaint", neither opinion was a *sua sponte* investigation initiated by FERC's "own motion."

Owners claim *Electrical District* bars rehearing orders that modify prior rate orders while keeping their effective date. But there, FERC failed to specify *any* rate in its initial order.[15] Here, Opinion 551 fully and finally specified (subject only to rehearing and appeal), *i.e.*, "fixed," a replacement Return. *See Electrical District* at 492, 494 (by "specif[ying]" rates, FERC may "fix the rates in its initial order"). Owners concede that the pendency of what became Opinion 569-B did not prevent

[15] Owners Brief at 28 ("[c]entral[ly]… the FERC order[] reviewed in *Electrical District* did not fix a rate; it only set forth principles").

Opinion 569-A from fixing a rate,[16] but Owners fail to recognize that the prior pendency of what became Opinion 569 likewise did not prevent Opinion 551 from fixing a rate.

Of course, the specification approach and Return level that FERC chose in Opinion 551 erred—as Customer rehearing requests argued[17]—in following Opinion 531's arbitrary adoption of the Discount method's upper midpoint. *Emera* so confirmed, compelling FERC to revisit that approach and Return on rehearing. But, the effective date part of Opinion 551 remains valid. Opinion 551 was no less specific for specifying an erroneous Return, and Customers' rehearing requests constituted notice that FERC might keep its effective date while modifying its Return.[18] FERC's subsequent orders did not, as Owners maintain,[19] mean that Opinion 551 left the replacement Return unspecified. But if it had, that too would have been legal error, violating FERC's judicially-confirmed duty to reform excessive rates,[20] and reinforcing FERC's above-cited error-correction authority. Thus, while Opinion 551 was both specific and erroneous (*contra* Owners Brief at 39-40), it was inarguably at least one of those, and either suffices for affirmance.

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[16] Owners Brief at 24 (FERC "finally fixed the rate in Opinion 569-A").

[17] *See, e.g.*, Customers' Request for Rehearing at 16-29 (R.482).

[18] *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1031 (9th Cir. 2007) (parties assuming rehearing denial do so "at their own risk").

[19] Owners Brief at 32-33.

[20] *See supra* note 4.

II. The FPA Does Not Preclude Successive Complaints.

Owners argue that FPA section 206(b) precludes customers from filing complaints challenging a rate subject to an ongoing complaint proceeding. The FPA contains no such bar.

1) The FPA Unambiguously Permits Successive Complaints.

Owners claim that by setting the Second Complaint for hearing, FERC failed the first step of *Chevron* analysis, which asks "whether Congress has directly spoken on [the] precise question at issue."[21] Owners thus claim that FPA section 206(b)[22] explicitly forbids FERC's considering a second complaint while an earlier complaint remains pending. But, nothing in section 206(b) bars customers from seeking lower rates simply because another customer's complaint remains pending.

In relevant part, section 206(b) provides that FERC must establish a refund effective date whenever it "institutes ***a*** [section 206] proceeding," and may order refunds following "any" proceeding thereunder, for the fifteen-month period following that refund effective date.[23]

Owners' claim that this language unambiguously limits their total refund exposure from multiple complaints to fifteen months ignores the statute's plain language, which references the initiation of "a proceeding" and provides for refunds

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[21] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984).
[22] 16 U.S.C. § 824d(b).
[23] *Id.* (emphasis added).

following "any proceeding." The statute's repeated use of the singular word "proceeding" is not arbitrary. It denotes clear legislative intent to restrict the refund limit to individual proceedings. Contrary to Owners' strained arguments, nothing in section 206(b) immunizes a complaint-respondent utility from further complaints until the first complaint is concluded, or forbids refunds in subsequent proceedings. Sections 206(a) and (b) unambiguously require FERC to evaluate each complaint on its own merit and the latter authorizes refund (of payments exceeding the rate found reasonable) "[a]t the conclusion of any proceeding." Nothing in this text indicates a Congressional judgment that the initiation of a section 206 proceeding, whether by complaint or by FERC itself, diminishes other potential complainants' rights.

Under Owners' statutory re-write, if any entity (or FERC itself) initiates Section 206 review of a utility's rates, no other aggrieved party may file a complaint against the same utility, until the first complaint concludes. This construction is radical, as illustrated by Amici's timeline (Brief at page 9), showing that the first complaint against their 11.14% Return has been pending for nearly a decade without reaching a final resolution, even though FERC found this Return unreasonable in 2014. Similarly, Owners' 12.38% Return was first challenged as no longer reasonable in 2013, and found unreasonable in 2016.[24] Owners thus posit that section 206(b) precludes customers from filing complaints seeking lower rates for a large

[24] Opinion 551, PP 7, 9.

and open-ended number of years, regardless of market conditions. This reading of section 206(b) is inconsistent with the Supreme Court's holding that "[a] rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."[25]

2) FERC's Interpretation of the Statute was Reasonable.

Even if the statute were ambiguous, FERC's statutory interpretation is reasonable because its orders did not "extend" the refund period, and Owners' remaining arguments are meritless.

a) Successive Complaints do not extend the refund period.

Owners claim that successive complaints serve only to unlawfully extend the FPA's fifteen-month refund period.[26] Actually, such complaints serve to update the cost-based Return, as equity costs continue their long downward trend. The Second Complaint here further served to test the continued applicability of Opinion 551's determination (echoing Opinion 531, which predated the Second Complaint's filing) that Owners' Return should be raised to the upper midpoint due to "anomalous" market conditions of unspecified character and duration.[27] The fact that FERC later

[25] *Bluefield Waterworks Improvement Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 693 (1923).

[26] Owners' Brief at 42.

[27] Opinion 551, P 67.

abandoned that arbitrary determination does not make challenges to its continued applicability retrospectively improper.

The First Complaint and the Second Complaint proceedings were not consolidated. They were separately litigated and resulted in separate initial decisions, with different Return recommendations based on separate evidentiary records. The Second Complaint thus did not "extend" the statutorily limited fifteen-month refund period of the First Complaint; it triggered a distinct refund period for that separate complaint.

It is Owners, not Customers, who seek an unlawful extension. To insulate themselves from market conditions that no longer support their wished-for Returns, they seek to unlawfully extend the First Complaint's refund limit beyond the proceeding-specific scope of section 206(b). With the cost of equity trending downwards, Customers brought more recent market data to FERC's attention. By setting the Second Complaint for hearing, FERC was able to analyze market data for a period ending December 2015. The study period in the First Complaint closed in June 2015.

b) The Regulatory Fairness Act requires symmetry between utility-initiated section 205 rate increases and customer-initiated rate reductions.

As FERC explained, "[t]he Regulatory Fairness Act was 'intended to add symmetry' between FERC's treatment of section 205 rate-increase filings and

section 206 complaints seeking rate decreases."[28] "Utilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints."[29] In fact, while the First Complaint remained pending, numerous Owners successfully filed to increase their overall Return through an incentive adder, which was granted.[30]

Owners would dismiss FERC's symmetry concern based on tangential differences between other aspects of sections 205 and 206, such as the proof burden and the refund period.[31] But, FERC's symmetry concern goes to the core issue of utilities' and customers' ability to seek just and reasonable rates. Under Owners' position, while a first complaint remains pending, customers could not file even for a purely *prospective* further rate reduction under section 206(a), which preceded the 1988 addition of section 206(b) refunds.

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[28] *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 156 FERC ¶ 61,061, at P 33 (2016) (R.415).

[29] *Id.*

[30] *Midcontinent Independent System Operator, Inc.*, 150 FERC ¶ 61,004 (2015); *order on reh'g*, 151 FERC ¶ 61,269 (2015); *see also Midcontinent Independent System Operator, Inc.*, 150 FERC ¶ 61,252, *order on reh'g*, 154 FERC ¶ 61,004 (2016).

[31] Owners Brief at 49.

The Supreme Court has found that a rate increase filing by a utility and a rate decrease complaint by a customer are subject to the same "character" and "scope" of review.[32] Owners' proposed interpretation of section 206(b) would destroy this symmetry, leaving utilities able to invoke data of rising costs to increase rates under section 205, while precluding customers from presenting updated data of declining costs to reduce rates under section 206. Consequently, for the years–long pendency of each Return complaint, utilities would be shielded from seeing their Returns adjusted to reflect reductions in market costs, while remaining able to seek increased rates when costs rise. This outcome flies in the face of the core FPA purpose of affording customers "a complete, permanent and effective bond of protection from excessive rates and charges."[33]

c) Consideration of the Second Complaint comported with precedent.

Amici argue that FERC's merit consideration of the Second Complaint violated precedent.[34] Amici cite *Allegheny Elec. Coop., Inc v. Niagara Mohawk Power Corp*., 58 FERC ¶ 61,096 (1992) and *EPIC Merchant Energy NJ/PA v. PJM Interconnection*, 136 FERC ¶ 61,041 (2011), which dismissed complaints whose factual and legal allegations, and requested relief, all tracked those of a pending prior

[32] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341- 343 (1956).

[33] *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959).

[34] Amici Brief at 13-14.

complaint. Here, however, the Second Complaint sought to update Owners' Return to match a later period's equity cost. It presented different market-based analyses, showing a lower Return for the Second Complaint, and sought commensurately different relief. Neither the allegations advanced in, nor the relief sought by, the First and Second Complaints were identical. If this Court cures what Customers have submitted are arbitrary aspects of Opinion 569-A, the equity cost indicated for the Second Complaint will likewise be below that of the First Complaint. *Contra* Amici at 14, the Second Complaint and the updated financial data it involves represent "new evidence or changed circumstances."

Amici also argue that the "different issue" standard for entertaining the Second Complaint was not met, citing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W. Va. v. Allegany Generating Co.*, 67 FERC ¶ 61,288, *order on reh'g*, 68 FERC ¶ 61,207 (1994). Therein, FERC accepted a successive Return complaint, ruling that:

> [A] return on equity found to be reasonable at one time may be unreasonable at a later time. So, while the issue in the 1992 complaint proceeding and in the instant proceeding may nominally be the same, i.e., return on equity, in substance it is a different issue in each of the proceedings.[35]

Here, the application of either a fully reasoned methodology (as supported in Customers' Return Brief), or FERC's adopted methodology, produces distinct

[35] 68 FERC ¶ 61, 207, at 61,998 (citations omitted).

Returns for each complaint, based on its own study-period record. For example, applying the same method each time, the separate Initial Decisions recommended Returns of 10.32% for the First Complaint,[36] and 9.7% for the Second Complaint.[37]

Owners obfuscate the differences in the study periods and associated market data used by FERC for each complaint by noting that the market analysis filed with the Second Complaint was also presented in the First Complaint docket.[38] However, both submissions constituted placeholders for the differently-updated evidence ultimately relied upon by FERC for each complaint. Because the Second Complaint was filed shortly after the February 23, 2015 due date for testimony by First Complaint intervenors, it reduced all parties' litigation costs to submit the same through-January-2015 analysis in both proceedings. But, a completely different analysis, by a different expert, for a different study period, had accompanied the First Complaint in November 2013. And the analyses ultimately relied upon in FERC's decisions for both complaints were different from, and for different study periods than, any of the analyses included with the initial complaint filings.

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[36] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027, at P 2 (2015) (R.310).

[37] *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 at P 2 (2016) (R.404).

[38] Owners' Brief at 41.

Moreover, Owners gloss over the fact that the complaint proceedings were initiated by different complainants. A customer cannot be precluded from seeking lower rates simply because another customer filed an earlier complaint seeking an earlier update of the same rate.

d) Owners suffer no harm from successive complaints.

Amici argue that they are harmed by FERC's policy of allowing successive complaints to proceed to hearing because of the significant litigation costs involved, and because of their increased refund exposure.[39] This argument's effrontery is exceeded only by its inaccuracy. Subjection to the statutory process for determining whether a challenged rate is reasonable does not cause cognizable legal injury. *See Papago Tribal Util. Auth. v. FERC*, 628 F.2d. 235, 240-41 (D.C. Cir. 1980). Moreover, the costs associated with protracted litigation are particularly harmful to customers, which bear costs themselves. In contrast, utilities' litigation costs are (typically, and here) recovered through formula rates charged to customers. Customers in effect pay both sides' litigation costs and, therefore, are already incented not to litigate unnecessarily.

In contrast, Owners' refund exposure during successive fifteen-month refund periods causes no legally cognizable harm. Amici's grievance arises simply because FPA section 206's plain language limits only per-complaint refunds, rather than

[39] Amici Brief at 8-10.

Owners' cumulative refund exposure as they would prefer. The "harm" Owners claim is nothing other than the intended functioning of the statute's balancing of interests. Limiting successive complaints would skew that balance in a way unsupported by the statutory language.

Under FERC's orders, Owners have paid no refunds associated with the Second Complaint, even though they charged an unreasonable 12.38% Return throughout the Second Complaint's fifteen-month refund period. Consequently, the only cognizable harm was suffered by Customers, when the Second Complaint was improperly dismissed.

CONCLUSION

This Court should affirm FERC's decisions to: (1) order refunds resulting from the Return set in Opinion 569-A back to the Refund Date set in Opinion 551; and (2) set the Second Complaint for hearing.

Respectfully submitted,

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ADDENDUM

Section 206 of the FPA, 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.

RULE 32(a)(7)(b) CERTIFICATE OF COMPLIANCE

This 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 3,845, 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 copies of the above and foregoing "Brief of Intervenors for Respondent Aligned with Remaining Petitioners" have been served upon the Solicitor of the Federal Energy Regulatory Commission and all counsel of record through the Court's CM/ECF system.

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