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

GLOSSARY

Chronology	Graphic timeline of refund periods and FERC orders. *See* Refund Brief at 6.
FERC	Federal Energy Regulatory Commission
FERC's Brief	Brief for Respondent 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)
Owners' Intervenor Brief	Joint Brief of MISO Transmission Owners, Transource Energy, LLC, Ameren Services Company, International Transmission Company d/b/s ITC*Transmission*, ITC Midwest LLC, and Michigan Electric Transmission Company, LLC as Intervenors in Support of Respondent
Refund Brief	Initial Brief of Petitioners on Refund Issues
Return Brief	Initial Brief of Petitioners on Return Issues
Return	Return on Equity (referred to as "ROE" in proceedings below)
Opinions	The three rulings under review: (1) Opinion 569 (R.560); (2) Opinion 569-A (R.611); and (3) Opinion 569-B (R.651). *See* Refund Brief at vii.

SUMMARY OF ARGUMENT

Section 206(b) of the FPA unambiguously—and, given its core aim of protecting consumers, unsurprisingly—authorizes FERC to order refunds in "any proceeding" where customers paid in excess of a just and reasonable rate, regardless of whether FERC establishes a new rate in a successive complaint under section 206(a). The Opinions denied consumers refunds worth tens or even hundreds of millions of dollars (and allowed a corresponding windfall to Owners) on the premise that the statute clearly bars FERC from ordering them. That conclusion is riddled with errors that FERC's Brief cannot fix.

First, FERC erroneously concluded in the Opinions that it "*cannot* order refunds in the Second Complaint proceeding *because of the limits of our statutory authority under FPA section 206*."[1] On brief, FERC abandons its sole basis for denying refunds (that it was statutorily precluded from doing so under *Chevron* Step 1), thereby conceding error. FERC's attempt now to justify its action on the *post hoc*, alternative basis that it permissibly interpreted ambiguous statutory language under *Chevron* Step 2 necessarily fails. Agency action must reflect the exercise of its judgment and not an incorrect assumption that the statute compelled the result, even if the agency could have reached the same conclusion in its discretion.

[1] R.560 (Op. 569), P 568 (emphasis added).

See, e.g., *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985). FERC did not exercise its discretion in the Opinions and cannot do so now. Thus, even if the statute were ambiguous (and it is not), the Court would be required to remand to the agency to exercise its discretion in the first instance.

Second, FERC fails to rebut Refund Petitioners' argument that section 206(b) unambiguously authorizes FERC to order refunds on the Second Complaint. FERC (1) does not address the expansive (and important) phrase "any proceeding," which distinguishes sections 206(a) and 206(b); (2) acknowledges that the "amounts paid" by consumers were unjust and unreasonable; and (3) clarifies that the only dispute as to the statutory text narrowly concerns the "thereafter observed and in force" language, which, in FERC's view, refers to a new rate. FERC impermissibly reads language into an otherwise clear statute, reads out other key text, and ignores its own admitted finding in the Second Complaint that the Return found just and reasonable in the First Complaint would remain thereafter observed and in force. The statute's plain language, consistent with its purpose, permits FERC to issue refunds.

Third, FERC's assertion that issuing refunds would "effectively" extend the fifteen-month refund period disregards that under the FPA, each complaint is a separate proceeding with a distinct refund period. FERC's attempt to conflate the

two fifteen-month periods solely on the question of whether it can issue refunds has no basis in the statute or other applicable authority.

The Court should remand for FERC to determine whether to order refunds given its unambiguous authority to do so.

ARGUMENT

I. FERC concedes that it was not statutorily required to deny refunds, contradicting the Opinions and highlighting its reversible error.

FERC implicitly acknowledges that its *sole* basis for denying refunds—that it was statutorily prohibited from ordering them—was erroneous. This Court therefore cannot affirm FERC's denial of refunds on the Second Complaint as an exercise of agency discretion.

FERC denied refunds under *Chevron* Step 1. FERC's Opinions denied refunds on the exclusive ground that the FPA barred it from doing so—*i.e.*, that under *Chevron* Step 1, section 206(b) unambiguously precluded it from issuing refunds: "[W]e find that [FERC] *cannot order refunds* in the Second Complaint proceeding *because of the limits of our statutory authority* under FPA section 206."[2]

[2] R.560 (Op. 569), P 568 (emphasis added).

Repeatedly, FERC asserted that "the application of section 206 to the Second Complaint proceedings *requires us* … not [to] order refunds[.]"[3]

FERC abandons its *Chevron* Step 1 analysis. FERC now—on petition for review—entirely abandons its *Chevron* Step 1 argument. By failing to defend its refund denial based on its alleged lack of statutory authority, FERC has implicitly conceded its legal error.[4] Because FERC admittedly "misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without adequate rationale."[5]

***Prill* bars FERC's *Chevron* Step 2 argument.** FERC now defends its denial of refunds on the ground that FERC reasonably interpreted allegedly ambiguous statutory language—*i.e.*, FERC claims that the FPA is unclear as to its refund au-

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[3] R.611 (Op. 569-A), P 267; *see also id.* at P 262 (reasoning that FERC "did not have authority under section 206 to order refunds in the Second Complaint proceeding"); R.651 (Op. 569-B), P 145 ("[O]rdering refunds … would exceed the statutory authority in section 206[.]"); *id.* at 181 ("[S]ection 206 of the FPA dictates that refunds may be ordered … only when [FERC] grants prospective relief in that proceeding."); Owners' Intervenor Brief ("Owner Br.") at 10-11 ("FERC correctly concluded … that the statute preludes" it from "effectively permitt[ing] thirty months of refunds[.]"). Petitioners' Refund Brief asserted that "FERC declared itself statutorily powerless to order refunds for the Second Complaint's fifteen-month refund period," and FERC did not argue otherwise. Refund Br. at 4; *see also id.* at 9, 20, 22.

[4] Given FERC's failure to defend its own legal reasoning, the Court should decline to rely on Owners' attempt to do so. *See* Owner Br. at 6-8, 10-11.

[5] *See Prill*, 755 F.2d at 942 (holding that "the Board erred when it decided that its new definition of 'concerted action' was *mandated* by the [statute]").

thority, and that its denial of refunds was based on a permissible reading of an ambiguous statute.[6] In FERC's words, its "reasonable interpretation of the scope of its refund authority under the [FPA] is entitled to deference," as "the court will defer to [FERC]'s reasonable interpretation of statutory ambiguities[.]"[7]

But FERC's *Chevron* Step 2 justification for denying refunds, advanced for the first time on appeal, necessarily fails under well-established precedent. As Petitioners argued—and neither FERC nor Owners disputed—FERC's "interpretation of section 206 cannot be countenanced as a discretionary interpretation of an ambiguous statute, as FERC did not find section 206 to be 'silent or ambiguous' regarding eligibility for refunds."[8] *Prill* instructs that:

> [I]t is a fundamental principle of law that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." … [A]n agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it "was not based on the agency's own judg-

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[6] FERC Br. at 68-81; *see Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

[7] FERC Br. at 69 (citation omitted); *see also, e.g.*, *id.* at 3 (framing the issue as "[w]hether [FERC] reasonably … denied additional refunds"); *see also* Owner Br. at 8-16.

[8] Refund Br. at 20.

> ment but rather on the unjustified assumption that it was Congress' judgment that such a regulation is desirable."[9]

Here, "[t]here is not even a hint of discretion being exercised[.]"[10] Nor can FERC retroactively justify its erroneous reasoning based on an alternative ground first advanced on appeal.[11] Accordingly, even if FERC's refund authority were

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[9] *Prill*, 755 F.2d at 947 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) and *FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86, 96 (1953)); *see also, e.g.*, *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.' … *Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face." (citation omitted)).

[10] *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) (rejecting FERC's argument that, "even if it was in error about its authority to order refunds, [it] merely exercised its discretion not to do so," because "courts may not accept appellate counsel's *post hoc* rationalizations for agency action" (citation omitted)); *see Prill*, 755 F.2d at 948 (holding that the NLRB did not exercise its discretion where its "opinion clearly reveal[ed] that it considered its adoption of a narrow test for 'concerted activities' … to be mandated by the NLRA itself").

[11] *See Garland v. Dai*, 141 S. Ct. 1669, 1679 (2021) ("[J]udges generally must assess the lawfulness of an agency's action in light of the explanations the agency offered for it rather than any *ex post* rationales a court can devise."); *Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 996 (D.C. Cir. 2010) (Williams, J., concurring) (referring to the "principle that a *Prill* claim cannot be defeated by litigation-stage assurances that the agency would have chosen its challenged interpretation as a matter of discretion had it realized in the first place that it possessed discretion").

ambiguous under section 206 of the FPA (and it is not),[12] this Court "must vacate and remand to the Agency 'to interpret the statutory language anew.'"[13]

II. The Court need not remand for FERC to interpret section 206(b) because the statute unambiguously authorizes refunds.

The Court should hold as a matter of law that section 206(b) permits refunds on the Second Complaint, "and thus leaves no room for agency discretion."[14] Since Congress has directly spoken to the issue, and its intent is clear, "that is the end of the matter."[15]

As Refund Petitioners argued, section 206(b) permits FERC to order refunds (1) at the conclusion of "any proceeding" if (2) the "amounts paid" by customers were (3) "in excess of those which would have been paid under the just and rea-

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[12] *See infra*, Part II; Refund Br. at 10-22.

[13] *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 944 (D.C. Cir. 2021) (citation omitted); *see Alarm Indus. Commc'ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997) (vacating and remanding where, "[r]ather than having a plain meaning as the Commission thought, we find the disputed language in § 275(a)(2) uncertain"). For the same reason, FERC's *post hoc* justification for its sequencing decision cannot be sustained. *Compare* R.651 (Op. 569-B), P 182 (assertion by FERC that its decision was statutorily "dictated" despite arguments that it "should otherwise exercise its discretion"), *with* FERC Br. at 80-81 (arguing that FERC "has broad discretion to structure its proceedings").

[14] *Teva Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 4-5 (D.C. Cir. 2006) (citation omitted); *see Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (whether agency action is "compelled by statute is a question of law, which we review de novo").

[15] *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (quoting *Chevron*, 467 U.S. at 842).

sonable rate … which [FERC] orders to be thereafter observed and in force."[16] In short, FERC can order refunds where customers overpaid—a straightforward and sensible statutory interpretation that is both compelled by the FPA's plain text and consistent with the statute's mandate of "protect[ing] consumers from excessive rates and charges."[17]

FERC responds that it "reasonably interpreted the reference in section 206(b) of the [FPA] to the rate 'which [FERC] orders to be thereafter observed and in force' to be the same rate referenced in section 206(a)," and that "it did not order a *new* just and reasonable rate to be 'thereafter observed' in the [Second Complaint] proceeding[.]"[18] That is, FERC's denial of refunds hinged exclusively on the phrase "thereafter observed and in force." But FERC's interpretation requires (1) reading nonexistent language into the statute, (2) reading key language out of the statute, and (3) ignoring the FPA's primary purpose. It should be rejected as a matter of law.

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[16] Refund Br. at 7-8, 10-17 (quoting 16 U.S.C. § 824e(b)).

[17] *NextEra 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)); *see Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004) ("[O]ur statutory construction of FERC's authority is dictated by the plain language and words of the [FPA], … a common sense application of the principles underlying the FPA[,]" and "the fundamental purpose and structure of the FPA[.]").

[18] FERC Br. at 71-72 (emphasis added).

"[A]ny proceeding." FERC does not address the "all inclusive" phrase "any proceeding,"[19] but apparently reads it to mean "only proceedings *in which a new rate is set*."[20] As FERC acknowledges, however, Congress contemplated that FERC would address successive complaints under section 206(b), enacted specifically "to add symmetry" to section 205, under which rate-increase filings could be filed successively.[21] Given Congress's focus on successive complaints, it could have (and surely would have) conditioned FERC's refund authority on the grant of a complaint if it intended to impose such a limit; yet it chose not to do so.[22] The Court should give the phrase "any proceeding" its plain meaning and decline to "add[] words that are not in the statute that the legislature enacted."[23]

The Court should also reject Owners' attempt to sidestep the inconvenient phrase "any proceeding"—which they notably refer to as "the wrong part of section 206(b)."[24] Owners contend that it "is unnecessary to evaluate" the meaning of "any proceeding" because "FERC's denial of refunds for the Second Complaint

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

[20] *See* Refund Br. at 12 (emphasis added); *id.* at 11-13 (collecting cases).

[21] FERC Br. at 82.

[22] *See* Refund Br. at 12; R.611 (Op. 569-A), Glick Dissent, P 26.

[23] *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 816-17 (D.C. Cir. 2008).

[24] Owner Br. at 8.

explicitly hinged on FERC's interpretation of the phrase 'orders to be thereafter observed and in force,' not the phrase 'any proceeding.'"[25]

But that argument fails for two reasons. First, as discussed above, FERC did not exercise its discretion; the Court, therefore, cannot affirm the agency on that ground. Second, agencies and courts cannot simply read out key language in interpreting statutes, as "[t]he precise words of the statutory text matter."[26] Here, the phrase "any proceeding" "is an integral part of th[e] statute, one that this court cannot ignore while considering [FERC's and Owners'] arguments."[27]

Ultimately, neither FERC nor Owners address the points that (a) Congress included the expansive phrase "any proceeding" to clarify that FERC can order refunds whether or not it denies the underlying complaint, and (b) the Second Complaint proceeding is "any proceeding." The Court should give the phrase its unambiguous, undisputed meaning.

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[25] *Id.* at 8-9 (emphasis added); *see* Refund Br. at 13.

[26] *City of Anaheim, Cal. v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009).

[27] *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981); *see also Boumediene v. Bush*, 553 U.S. 723, 787 (2008) (explaining that, even under the canon of constitutional avoidance, courts "cannot ignore the text and purpose of a statute in order to save it").

"[A]mounts paid." FERC acknowledges (as it must) that "12.38 percent [is what] Customers actually paid[.]"[28] But FERC urges the Court to ignore that the "amounts [customers] paid" were unjust and unreasonable because "having not ordered a new just and reasonable rate to be thereafter observed, there are *no* 'amounts paid … in excess of' that rate that [FERC] can order to be refunded."[29] FERC thus maintains that it did not disclaim its refund authority based on the fiction that customers paid a just and reasonable rate, but rather that "[i]t was the absence of a new just and reasonable rate that precluded awarding refunds."[30] As set forth previously and below, however, the FPA does not require FERC to order that a "new rate" be "thereafter observed and in force" before it can order refunds of excessive amounts paid during the refund effective period. And, of course, compared to the amounts that were actually paid, a new rate was thereafter observed and in force.

FERC changes tack to argue that "the new return established in the 2013 Complaint proceeding was not a fiction but was actually charged" because "the 2013 return was 'demanded, observed, charged or collected' for the 2013 Com-

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[28] FERC Br. at 75.

[29] *Id.* (quoting R.560 (Op. 569), P 568).

[30] *Id.*

plaint refund period."[31] But that assertion ignores (as FERC elsewhere acknowledges) that the rate *actually* paid during the Second Complaint refund period was based on a 12.38% Return, not the 10.02% Return subsequently ordered in the 2013 Complaint.[32] Issuing refunds does not "reset rates" even within a refund period. FERC's assertion that "the new return … was actually charged" thus only confirms that FERC's denial of refunds hinged on applying the 10.02% Return in a manner that constitutes statutorily prohibited retroactive ratemaking.[33]

"[T]hereafter observed and in force." FERC contends that "it did not order a *new* just and reasonable rate to be 'thereafter observed' in the [Second Complaint] proceeding, and therefore there are no 'amounts paid … in excess of' that rate that [FERC] can order to be refunded."[34] But FERC continues to ignore that "section 206(b) does *not* say … 'where FERC *sets a new rate* to be thereafter observed and in force.'"[35] FERC is "ask[ing] [the Court] to add words to the law to produce what is thought to be a desirable result."[36]

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[31] *Id.* at 74-75.

[32] *See* Refund Br. at 6 (Chronology).

[33] *See id.* at 15-16.

[34] FERC Br. at 72 (emphasis added).

[35] Refund Br. at 16-17.

[36] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015).

Nor does FERC dispute that it plainly ordered a just and reasonable rate to be thereafter observed and in force (albeit not a *new* rate compared to the result of the First Complaint).[37] Indeed, the Opinions "order[ed]" that the "base [Return] is set at 10.02%,"[38] and FERC's Brief acknowledges that, in the Second Complaint, it "*found* the return determined in the [First] Complaint proceeding remained just and reasonable[.]"[39] That finding—which squarely rebuts Owners' contention that Petitioners are "attempt[ing] to import the First Complaint's findings into the Second Complaint"[40]—is all the plain language of section 206(b) requires.

It is also logical that FERC found a rate to be "thereafter observed and in force" following a proceeding wherein it (in this case, erroneously) dismissed a complaint, as there must necessarily be *some* rate "thereafter observed and in force," even when FERC denies a complaint. Otherwise, there would be no applicable rate at all. Owners' assertion that "FERC did not order a rate to be thereafter observed and in force" is therefore belied by both the record and common sense.[41]

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[37] FERC Br. at 70-71 (describing, but not disputing, Refund Petitioners' argument).

[38] Refund Br. at 16 (quoting R.611 (Op. 569-A), P 268, Ordering Paragraph (B); R.651 (Op. 569-B), P 183, Ordering Paragraph (B)).

[39] FERC Br. at 68 (emphasis added); *id.* at 17 (same).

[40] Owner Br. at 6.

[41] *Id.*; *see Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) ("[S]tatutes should be interpreted to avoid … 'absurd consequences.'" (citation omitted)).

FERC's entire argument appears to rest on a single sentence of analysis: that FERC "reasonably interpreted the reference in section 206(b) of the Act to the rate 'which [FERC] orders to be thereafter observed and in force' to be the same rate referenced in section 206(a)[.]"[42] *Prill* aside, FERC does not address the text and context of each section (or the important differences between the two). Nor does FERC grapple with the underlying point made by Refund Petitioners and Commissioner Glick in arguing that the "thereafter observed and in force" language of section 206(b) "mirror[s]" section 206(a): using the same phrase 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.[43] Nothing about the use of the phrase "thereafter observed and in force" in section 206(b) requires FERC to impose a "new rate" in a proceeding before refunds can be granted in that proceeding, nor does it import the other text and context of section 206(a) into section 206(b).

Lastly, FERC points to three decisions that did "not address[] pancaked [*i.e.*, successive] rate complaints," but linked the finding of an unjust and unreasonable

[42] FERC Br. at 71.

[43] Refund Br. at 17; R.611, (Op. 569-A), Glick Dissent, P 29; FERC Br. at 71.

rate to FERC's refund authority.[44] These cases stand for the unremarkable proposition that FERC *may* issue refunds where it grants a complaint. As FERC acknowledges, these decisions did not involve successive complaints. They did not address whether FERC can order refunds when it denies a complaint under section 206(a) yet still orders a just and reasonable rate to be thereafter observed and in force that is lower than the unjust and unreasonable rate charged during the refund period. They say nothing that would preclude FERC from issuing refunds here.

Critically, and contrary to Owners' suggestion, the Court need not disturb FERC's section 206(a) analysis or its dismissal of the Second Complaint (although both were improper) to hold that section 206(b) authorizes refunds on the Second Complaint.[45] That said, Refund and Return Petitioners did not waive the argument, discussed at length in the Return Brief, that FERC's section 206(a) analysis and resulting dismissal of the Second Complaint were erroneous.[46]

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[44] FERC Br. at 72-73 (citing *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992), *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211-12 (D.C. Cir. 2009), *City of Redding v. FERC*, 693 F.3d 828, 838-39 (9th Cir. 2012)).

[45] *See* Owner Br. at 5.

[46] *See id.* at 5-6; Return Br. at 10 ("FERC's First Complaint Return determination *and Second Complaint dismissal* violated the foregoing standards of reasoned decision, in multiple respects." (emphasis added)).

In sum, section 206(b) unambiguously authorizes FERC to order refunds of excessive charges collected during the Second Complaint refund period despite not ordering a new rate under section 206(a) in the Second Complaint proceeding. After all, the rate FERC ordered to be "thereafter observed and in force" at the end of the Second Complaint proceeding was significantly less than the rate charged during the Second Complaint refund period. That FERC can order refunds here is logical (particularly given Congress's understanding of successive complaints), and, most importantly, the result is compelled by the statute's plain language.[47]

III. Granting refunds would not unlawfully extend the refund period beyond the fifteen-month period allowed under the FPA.

FERC and Owners assert that the statutory refund period was "*effectively* extend[ed]" because "[a]ny refunds ordered in the 2015 Complaint proceeding would be based on the 2013 return determination, allowing that determination to serve as a predicate for two consecutive 15-month refund periods, *essentially* creating one longer 30-month refund period[.]"[48] That argument fails for several reasons.

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[47] It is also consistent with FERC decisions granting refunds despite no action under section 206(a). *See Bangor Hydro-Elec. Co.*, 120 FERC ¶ 61,093 (2007); *Blue Ridge Power Agency v. Appalachian Power Co.*, 57 FERC ¶ 61,100 (1991). While FERC points out that *Bangor* and *Blue Ridge* involved both sections 205 and 206, FERC does not explain how its theory can be reconciled with the grant of refunds under section 206(b) despite no corresponding action under section 206(a). *See* FERC Br. at 80.

[48] *Id.* at 76-77 (emphasis added); Owner Br. at 10.

First, FERC's position clashes with the plain text of section 206(b), which refers to "the period subsequent to the refund effective date through a date fifteen months after such refund effective date[.]"[49] The Second Complaint's refund period started on February 12, 2015, and ended fifteen months later.[50] That period is entirely separate from the refund period for the First Complaint, which started on November 12, 2013 and ended fifteen months later.[51] Only underscoring the unambiguous distinction between the two refund periods, section 206(b) repeatedly uses the term "proceeding" in singular form.[52]

FERC and Owners tellingly argue that granting refunds on the Second Complaint would "*effectively* extend the 15-month limitation"—*i.e.*, not actually extend it.[53] FERC's use of the "modifier 'effective' is doing quite a lot of work,"[54] and underscores that granting refunds on the Second Complaint would not *actually* ex-

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[49] 16 U.S.C. § 824e(b).

[50] R.199 at 1; R.415; *see* Refund Br. at 6 (Chronology).

[51] R.93 at 188; R.414; *see* Refund Br. at 6 (Chronology).

[52] *See* Brief of Intervenors for Respondent Aligned with Remaining Petitioners, at 9-10.

[53] FERC Br. at 19 (emphasis added); *see also id.* at 69, 76 (same); R.560 (Op. 569), P 531 (same); Owner Br. at 10 (same).

[54] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 283-84 (2016), *as revised* (Jan. 28, 2016) (rejecting argument that FERC had "effectively" set retail rates, and stressing that the word "effective" was doing "more work than any conventional understanding of rate-setting allows").

tend the statutory fifteen-month refund period. And absent an actual extension, there can be no statutory violation.

Second, FERC's position contradicts its own finding that "different groups of complainants have filed two separate complaints, based on different facts, thereby commencing two separate proceedings."[55] Nor can it be reconciled with FERC's rejection of Owners' argument, in moving to dismiss the Second Complaint, that allowing it to proceed "would unlawfully extend the 15-month refund period."[56] There, FERC stressed that it "permits successive complaints where the later complaint is based on a new analysis, and the 2015 Complaint requested a rate decrease based on later cost data."[57] That is because, "[w]here the subsequent complaint is based on new cost data, it is not a duplicative proceeding seeking to expand refund protection beyond 15 months, but rather is a new proceeding based on a new record, that may reach a different result than the earlier complaint proceeding."[58] As FERC points out, "[l]imiting refunds to 15 months was not intended to shield a utility's rates from a later complaint[.]"[59] Consistent with FERC's own

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[55] *See* R.415, P 32.

[56] FERC Br. at 8. FERC's related (and erroneous) contention that it cannot grant refunds where it dismisses a complaint is addressed in Part II.

[57] *Id.*

[58] *Id.* at 83.

[59] *Id.*

findings and analysis, granting refunds on the separate Second Complaint does not unlawfully expand the refund period beyond fifteen months.

Similarly, FERC's attempt to distinguish *Golden Spread* on the basis that it did not address whether to order refunds is misguided. FERC improperly differentiates (1) allowing a successive complaint to proceed without running afoul of the fifteen-month refund period (which happened both here and in *Golden Spread*), from (2) impermissibly extending the refund period by ordering refunds without granting the underlying complaint.[60] But, again, FERC fails to ground that purported distinction in the statutory text or precedents. It is illogical to suggest that although *establishing* a separate refund period for a second complaint respects the fifteen-month refund period limitation, *applying* refunds for that same separate period does not.

Third, the assertion by FERC and Owners that granting refunds would unlawfully extend the refund period because the applicable rate in the Second Complaint proceeding is based on the First Complaint proceeding is irreconcilable with the Opinions. In asserting that Refund Petitioners are "attempt[ting] to import the First Complaint's findings into the Second Complaint,"[61] FERC and Owners ig-

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[60] *Id.* at 77-79.

[61] Owner Br. at 6.

nore that, *in the Second Complaint proceeding*, FERC (1) acknowledged that customers actually paid 12.38%, and (2) ordered that 10.02% was the rate to be thereafter observed and in force.

* * * *

Ultimately, the FPA is clear, and FERC and the courts must apply the statute's plain language. To the extent that FERC and Owners may believe the language is "mistaken as a matter of policy, it is for Congress to change [it]."[62]

CONCLUSION

FERC's interpretation of section 206(b) "comports neither with the statutory text nor with the [FPA's] 'primary purpose' of protecting consumers."[63] The Opinions should be vacated and remanded for FERC to determine whether to issue refunds on the Second Complaint given its unambiguous authority to do so.

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[62] *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 427 (1985); *see Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1098 (D.C. Cir. 2017) ("[T]hose policy arguments are best addressed to Congress, not the courts. … [U]nless and until Congress acts, our hands are tied.").

[63] *Cal. ex rel. Lockyer*, 383 F.3d at 1017.

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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 4,740 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 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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