ORAL ARGUMENT NOT YET SCHEDULED

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

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

MISO TRANSMISSION OWNERS, *et al.*
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

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

INITIAL BRIEF OF PETITIONERS ON 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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Rule 28(a)(1) of the Circuit Rules of this Court, the undersigned hereby certify as follows:

A. Parties and *Amici*

1. Parties Before the Federal Energy Regulatory Commission

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

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

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

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

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

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

Petitioners:[1]

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

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

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

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

Case Nos. 20-1251 and 20-1513:

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

Case No. 20-1240:

Transource Energy, LLC

Case No. 20-1241:
Ameren Services Company
Union Electric Company d/b/a Ameren Missouri
Ameren Illinois Company d/b/a Ameren Illinois
Ameren Transmission Company of Illinois
International Transmission Company d/b/a ITC Transmission
ITC Midwest LLC
Michigan Electric Transmission Company, LLC

Case No. 1248:
Resale Power Group of Iowa

Case No. 20-1267:
DTE Electric Company
Consumers Energy Company
Alliant Energy Corporate Services, Inc.

Respondent: Federal Energy Regulatory Commission

Intervenors for Petitioner:

Case No. 16-1325:
Midcontinent Independent System Operator, Inc.
PPL Electric Utilities Corporation

Case No. 16-1326:
Midcontinent Independent System Operator, Inc.

Case No. 20-1182:
PPL Electric Utilities Corporation

Case No. 20-1241:
Alliant Entergy Corporate Services, Inc.

Intervenors for Respondent:

Case No. 16-1325:
American Municipal Power, Inc.
Citizens' Utility Board of Wisconsin
Hoosier Energy Rural Electric Cooperative, Inc.

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

Case No. 16-1326:

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

Resale Power Group of Iowa
Cooperative Energy f/k/a South Mississippi Electric Power Association
Southwestern Electric Cooperative, Inc.
Wisconsin Industrial Energy Group

Case No. 20-1182:
Association of Businesses Advocating Tariff Equity
Coalition of MISO Transmission Customers
Consumers Energy Company
Hoosier Energy Rural Electric Cooperative, Inc.
Illinois Industrial Energy Consumers
Indiana Industrial Energy Consumers, Inc.
Louisiana Public Service Commission
Minnesota Large Industrial Group
Missouri Public Service Commission
Organization of MISO States, Inc.
Resale Power Group of Iowa
Wisconsin Industrial Energy Group

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

B. Rulings Under Review

1. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Opinion No. 551, Order on Initial Decision, Docket No. EL14-12-002, 156 FERC ¶ 61,234 (Sept. 28, 2016) (R.466);

2. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.*, Opinion No. 569, Order on Briefs, Rehearing, and Initial Decision, Docket Nos. EL14-12-003 and EL15-45-000, 169 FERC ¶ 61,129 (Nov. 21, 2019) (R.560);

3. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.,* Opinion No. 569-A, Order on Rehearing, Docket Nos. EL14-12-004 and EL15-45-013, 171 FERC ¶ 61,154 (May 21, 2020) (R.611); and

4. *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.,* Opinion No. 569-B, Order on Rehearing, Docket Nos. EL14-12-015 and EL15-45-014, 173 FERC ¶ 61,159 (November 19, 2020) (R.651).

C. Related Cases

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

Dated: March 10, 2021

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENTS

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

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

approximately $1.2 billion per year. Association of Businesses Advocating Tariff Equity has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Association of Businesses Advocating Tariff Equity.

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

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

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, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with nine members that is headquartered in Smyrna, Delaware. American Municipal Power, Inc. provides wholesale energy supply and related services to its members. American Municipal Power, Inc. issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Cooperative Energy is an incorporated, non-profit cooperative electric power association, organized and operating under and pursuant to Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, *et seq.*, Vol. 4A Recompiled, Mississippi Code of 1942; and is a public utility under the laws of the State of Mississippi. Cooperative Energy is owned and controlled by its members, which are distribution

rural electric power associations, serving rural areas in Mississippi at retail. Cooperative Energy is a transmission-owning member of Midcontinent Operator and its operations are integrated into Midcontinent Operator. Cooperative Energy has no parent corporation, and no publicly held corporation has any ownership interest in Cooperative Energy.

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

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

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

Missouri Joint Municipal Electric Utility Commission is a joint action agency and a political subdivision of the State of Missouri authorized by legislation to

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

The Organization of MISO States, Inc. is a Non-Profit Domestic Corporation (under the Indiana Nonprofit Corporation Act of 1991), and is a self-governed, member-based organization comprised of representatives from entities with regulatory jurisdiction over utilities participating in the Midcontinent Operator region. The purpose of the Organization of MISO States, Inc. is to promote the public interest and social welfare by providing means for its members to act in concert when deemed to be in the common interest of their affected publics. 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.

Wabash Valley Power Association, Inc. ("Wabash Valley") is a not-for-profit generation and transmission cooperative formed in 1963 under Indiana law to enable its member cooperatives to obtain reliable long-term all-requirements power at least-cost, stable cost-based rates as part of a not-for-profit enterprise that the Members owned and controlled. Wabash Valley's twenty-five Members are both owners and customers of Wabash Valley. Twenty-three Members are not-for-profit distribution electric cooperatives that provide electric energy to their members at retail across the States of Indiana, Illinois, and Missouri.[1] The other two Members are a Wabash Valley subsidiary, Wabash Valley Energy Marketing, Inc., and J. Aron & Company,

[1] Wabash Valley's 23 not-for-profit distribution cooperatives are: Boone REMC, Carroll White REMC, Citizens Electric Corporation, Corn Belt Energy, EnerStar Electric Cooperative, Fulton County REMC, Heartland REMC, Hendricks Power Cooperative, Jasper County REMC, Jay County REMC, Kankakee Valley REMC, Kosciusko REMC, LaGrange County REMC, M.J.M. Electric Cooperative, Marshall county REMC, Miami-Cass REMC, Newton County REMC, Ninestar Connect, Noble REMC, Parke county REMC, Steuben County REMC, Tipmont REMC, and Warren County REMC.

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

Resale Power Group of Iowa ("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.[2]

---

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

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

GLOSSARY

Briefing Order	*Ass'n of Businesses Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc.*, Order Directing Briefs, 165 FERC ¶ 61,118 (2018)
Capital model	Capital Asset Pricing Model (referred to as "CAPM" in proceedings below)
ConEd	Consolidated Edison, Inc., the publicly-traded parent company of the public utilities operating in New York and New Jersey
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 at n.634: Roger G. Ibbotson & James P. Harrington, *Using a Non-Beta-Adjusted Size*
IBES	I/B/E/S, the trademarked single-word name for a database formerly known as the "Institutional Brokers' Estimate System." We omit the slashes for legibility and to conform to usage in the proceedings below.
Midcontinent Operator	Midcontinent Independent System Operator, Inc. (referred to as "MISO" in proceedings below)
Owners	MISO Transmission Owners (referred to as "MISO TOs" in proceedings below)

point	One-hundredth of a percent (*i.e.*, one ten-thousandth). Referred to in the proceedings below as “bp,” for “basis point.”
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
Tr.	Hearing transcript
Value Line	The Value Line Investment Survey

STATEMENT OF JURISDICTION

Petitioners seek review of Federal Energy Regulatory Commission ("FERC") Opinions 551, 569, 569-A, and 569-B (respectively, R.466, R.560, R.611, and R.651).

Petitioners timely sought rehearing[1] of FERC's aggrieving Opinions, and later timely petitioned for review. Federal Power Act ("FPA") § 313(b), 16 U.S.C. § 825*l*(b), therefore confers jurisdiction.

STATEMENT OF ISSUES

1. Whether FERC violated standards of reasoned administrative decision in adopting its new Return-determination methodology, under which it set the allowed Return in the First Complaint proceeding at 10.02%.

2. Whether FERC violated standards of reasoned administrative decision in adopting a new "Presumption," under which it dismissed the Second Complaint.

STATUTORY PROVISIONS

Pertinent statutes appear in the Addendum.

[1] R.565, R.567, R.579, R.580 (each concerning Opinion 569); R.623 (concerning Opinion 569-A).

STATEMENT OF THE CASE

This case concerns the Return on Equity ("Return") FERC allows on electric transmission investment in the nation's center—the Midcontinent Operator region. Under FPA sections 205-206,[2] FERC must keep this Return "just and reasonable." Based on its estimate of investors' required Return circa 2001, FERC previously allowed a 12.38% Return.[3] In November 2013 ("First Complaint")[4] and February 2015 ("Second Complaint"),[5] various transmission customers alleged that investors no longer required so much profit, and sought both prospective Return reduction and refunds.[6]

When the First Complaint was filed, FERC equity cost estimates, under longstanding precedent (including FERC's 12.38% prior determination), had relied only on the Discounted Cash Flow ("Discount") model. That model reasons that a

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[2] 16 U.S.C. §§ 824d(a), 824e(a).

[3] *See* Opinion 569, n.12 (citing prior case). One Midcontinent sub-region had a 12.2% Return. *Id*.

[4] R.1.

[5] R.125.

[6] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Op., Inc.*, Opinion 569, P 3 & n.11, 169 FERC ¶ 61,129 (2019) ("Opinion 569") (noting one Owner's Return was 12.20%), *reh'g*, *Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.,* Opinion 569-A, 171 FERC ¶ 61,154 (2020) ("Opinion 569-A"), *reh'g, Ass'n of Bus. Advocating Tariff Equity, et al., v. Midcontinent Indep. Sys. Operator, Inc., et al.,* Opinion 569-B, 173 FERC ¶ 61,159 (2020) ("Opinion 569-B).

stock's market price is "the current value of all expected future cashflows, discounted at the rate of return."[7] It infers investors' expected cashflow, solves for the discount rate that aligns investor expectations with known stock prices, and identifies that discount rate as equity's cost. The expected cashflow consists of expected dividends, inferred by a formula that combines recent dividend yields with earnings growth expectations.[8]

In October 2014, while the First Complaint proceeded, FERC applied a changed version of the Discount model to New England utilities.[9] In September 2016, FERC issued Opinion 551, R.466, a then-final order on the First Complaint, applying a similar method to determine the Owners' Return, which it reduced to 10.32%. Both sides requested rehearing.

In April 2017, while those rehearing requests percolated, this Court vacated FERC's New England determination, finding its equity cost estimation method arbitrary.[10] In October 2018, FERC opened a paper hearing to re-consider the Return methodology for New England, proposing further Return methodology

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[7] *Tenn. Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1210 (D.C. Cir. 1991).

[8] *See* R.525 at 36; *Ill. Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1259 (D.C. Cir. 1993).

[9] *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.,* Opinion 531, 147 FERC ¶ 61,234 (2014) ("Opinion 531"), *paper h'g*, Opinion 531-A, 149 FERC ¶ 61,032 (2014), *reh'g*, Opinion 531-B, 150 FERC ¶ 61,165 (2015

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

changes.[11] Weeks later, FERC issued a parallel order for the Midcontinent Operator.[12]

Petitioners (and others) timely submitted extensive paper hearing presentations. In November 2019, FERC issued Opinion 569, addressing both the paper hearing and Opinion 551 rehearing.[13]

Opinion 569 changed FERC's Return methodology, first by factoring in a Capital Asset Pricing Model ("Capital") model. This method centers on investors' expected long-term "market return" on diversified equities and its "market risk premium" above a risk-free Return. That difference is multiplied by representative "betas" that measure the relative price volatility of representative proxy and market-wide stocks, and summed with the risk-free Return.[14] FERC's particular version adds a further "size adjustment."[15]

FERC's second main change adopted a Return-shielding evidentiary rule. FERC's Discount and Capital models both generate distributions of proxy-company results. Opinion 569 averaged the point 5/8 of the way up the range of

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[11] *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018).

[12] R.525, *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Op., Inc.*, 165 FERC ¶ 61,118 (2018) ("Briefing Order").

[13] *See generally* Opinion 569 (R.560).

[14] *See* R.525:36-37.

[15] *See infra,* Part B.

each method's results to establish what it called the top of a "presumption" "quartile," and treated the proxy results distributions as providing no evidence that a Return below the quartile-top was unreasonable.[16] Thus, the study results were not considered evidence that an existing Return within that quartile is excessive under FPA "prong one."[17]

For the First Complaint, Opinion 569 found such excess and proceeded, under FPA "prong two," to set a reduced Return, effective on the September 28, 2016 issuance date of Opinion 551. The reduced Return, 9.88%, averaged the midpoints of FERC's Discount and Capital model proxy results ranges. FERC also applied that Return in ordering refunds for service provided November 12, 2013–February 11, 2015.[18] For the Second Complaint, FERC applied its quartile-based "prong one" analysis through a comparison to the 9.88% that it simultaneously made effective for a later period, rather than to the 12.38% that was charged throughout the Second Complaint's fifteen-month refund effective period and until

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[16] Opinion 569, PP 18, 57, 85, 425.

[17] *Id.*, P 85.

[18] *Id.*, P 574.

September 2016. Consequently, FERC dismissed that Complaint.[19] Commissioner Glick dissented.[20]

Petitioners and others timely filed multiple rehearing requests. In Opinion 569-A, FERC changed its Return methodology again, in four main ways:

- Within the Discount model, FERC replaced its longstanding 2:1 weighting of near-term and long-term growth rates practice with 4:1 weighting.[21]
- Alongside that revised model and a largely unchanged Capital model, FERC added a Risk Premium ("Risk") model. It inferred a relationship between certain past FERC-allowed Returns and contemporaneous utility bond yields, which it extrapolated using updated utility bond yields.
- FERC broadened its Return-shielding evidentiary rule. As noted above, Opinion 569 deemed its Discount and Capital model study results to not evidence excess Return under FPA "prong one" unless the existing Return exceeded the point 5/8 of the way up their composite range. Opinion 569-A raised that shield level to the point 2/3 of the way up the composite range.
- FERC further broadened its Return-shielding evidentiary rule by bringing the new Risk model into that analysis. To do so, FERC "impute[d]"[22] a range surrounding the Risk model's single point estimate.

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[19] *See* Opinion 569, P 575; Dissent of Commissioner Glick, P 2 (refund period ended May 2016) (R.560).

[20] *Id.*

[21] Opinion 569-A, P 57.

On these bases, FERC raised its First Complaint replacement Return to 10.02%, while re-affirming its Second Complaint dismissal.[23] Two groups of customer-side parties sought rehearing;[24] Owners petitioned for judicial review.

On November 19, 2020, FERC issued Opinion 569-B, on rehearing of Opinion 569-A.[25] While correcting certain Risk model inputs, FERC affirmed Opinion 569-A's outcomes.[26] Customers timely petitioned for review.

SUMMARY OF ARGUMENT

The subject orders' unreasoned and unsupported departures from FERC's prior Return methodology are costing customers dearly.

This "Return Brief" shows, first, that FERC violated reasoned decision-making, in quantifying Owners' equity cost and reasonable Return for the First Complaint. FERC's three quantification models, and FERC's distillation thereof, all embody reversible error. FERC's new Capital model embodies market-wide return assumptions and a "size adjustment" that contradict other FERC rulings and the record. FERC's Discount model late revision is similarly arbitrary in underweighting long-term growth. FERC's late reversal to use Risk modeling, with

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[22] Opinion 569-A, P 107.

[23] *Id.*, P 3.

[24] *See* Opinion 569-B, P 25.

[25] R.651. FERC had denied all rehearing requests by inaction, R.643.

[26] Opinion 569-B, P 3.

an "imputed" component, is likewise inadequately explained. FERC expanded its "midpoint" method to these three new methods without adequately explaining its departure from judicially-affirmed statistical principles.

Second, in assessing for the Second Complaint whether Owners' "existing rate" was reasonable, FERC erroneously adopted a new "Presumption" that bifurcates a unitary statutory standard, excludes evidence, deems above-cost Returns reasonable, and is effectively irrebuttable.

Third, the accompanying Refund Brief will show further reversible error in FERC's denial of Second Complaint refunds.

STANDING

Petitioners (or their associational or governmental constituents) paid and continue to pay transmission rates determined by the FERC Return methodology and level under consideration. FERC's decisions produced an excessive Return, causing Petitioners concrete and particularized injury that is ongoing, traceable to FERC's actions, and redressable through this case.[27] All Petitioners actively participated in the FERC proceedings in which the orders under review were issued and timely sought rehearing.[28] Thus, Petitioners have standing.

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

[28] 16 U.S.C. § 824e.

STANDARD OF REVIEW

This Court reverses any FERC action "that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[29]

FERC "must be able to demonstrate that it has 'made a reasoned decision based upon substantial evidence in the record,'" and "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[30] FERC's decision-making must be "reasoned, principled, and based upon the record."[31] Substantial evidence is "relevant evidence" that "a reasonable mind might accept as adequate to support a conclusion."[32] Finally, "an agency changing its course…is obligated to supply a reasoned analysis for the change beyond that which may be required [for entirely new policies]."[33]

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[29] *Wis. Valley Improvement v. FERC*, 236 F.3d 738, 742 (D.C. Cir. 2001) (quoting 5 U.S.C. 706(2)(A)).

[30] *See, e.g., Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (quoting *N. States Power v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)).

[31] *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 60 (D.C. Cir. 1999) (quoting *Penn. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 285 (D.C. Cir. 1997); *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018); *W. Deptford Energy, LLC*, 766 F.3d 10, 20 (D.C. Cir. 2014).

[32] *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3d Cir. 2014) (quoting *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011)).

[33] *Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 503 (2009) (agency changing position must acknowledge and explain that change); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006) (in changing course, FERC must supply a reasoned analysis indicating that prior

ARGUMENT

FERC's First Complaint Return determination and Second Complaint dismissal violated the foregoing standards of reasoned decision, in multiple respects.

I. FERC's new Capital model is arbitrary.

Although FERC could reasonably employ *a* Capital model, the specific model FERC adopted arbitrarily contradicts itself and other aspects of FERC's method.

A. FERC's market-wide return assumptions contradict established long-term realities.

FERC traditionally relied on regulated-sector "proxy" stocks' Discount model Returns, with each stock's expected Return modeled by adding its current dividend yield to expected growth estimated by blending near-term (three-to-five-year) company-specific forecasts with long-term Gross Domestic Product ("GDP") forecasts. FERC applied that approach here, giving GDP growth substantial (albeit reduced[34]) weight. But FERC also broke ground to adopt a Capital model pinned to investors' expected long-term "market return" on diversified equities. To estimate

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policies and standards are being deliberately changed, not casually ignored); *Pub. Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 451 (D.C. Cir. 1987) (FERC must explain departures from long-standing practices, with all underlying facts supported by substantial evidence).

[34] *See infra,* Part II.

that market Return, FERC used Discount model Returns on a 370-company portfolio.[35] But FERC's portfolio Discount model contradicts its proxy Discount model—a fatal "internal[] inconsisten[cy]."[36]

For proxies, FERC's Discount model, like investors,[37] factors in "long-term growth projections,"[38] because "over the long-term, companies cannot maintain their short-term growth rates and must…converge on the growth rate of the overall economy."[39] For the portfolio, however, FERC assumes near-term projections *will* be sustained for the long term. FERC rationalizes this assumption by asserting that the evolving roster of Standard & Poor's ("S&P") 500 companies allows the S&P 500 index to perpetually "grow at a short-term growth rate," and that "S&P 500 companies include [mature] stocks that…have a moderating effect."[40] As Petitioners showed previously,[41] both rationales fail.

Index roster substitution cannot affect, and thus cannot perpetuate, near-term growth of the 370 static-portfolio stocks FERC actually used. FERC's

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[35] *See* R.535:92, 145-151.

[36] *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

[37] Opinion 569, P 153.

[38] Opinion 569-A, P 59.

[39] Opinion 569, P 159; *see also Generic Determination of Rate of Return*, 50 Fed. Reg. 21,802, 21,807 (May 29, 1985) ("analysts' short-term forecasts overstate[] investors' long term growth expectations").

[40] Opinion 569-A, P 85.

[41] R.539:44-45, 275-78; R.548:35-37, 106-120; R.580:64-81.

observation that "companies cannot maintain indefinitely the high growth rates of their early years"[42] applies to each of those 370. Nor can substitution perpetuate growth in the "overall market"[43] they proxy: that market includes all stocks, rostered or not, and "the long-term dividend growth of a [portfolio]… representative of the capital market will have a long-term (terminal) growth rate similar to the expected growth rate for the U.S. economy."[44] Index roster substitutions do not actually make the index grow faster than the overall market.[45] But even if roster changes in the "overall market" *subset* the index represents somehow could grow that subset faster than the overall market, relying on that differential growth would mean relying on a difference that makes the subset return unrepresentative of the quantum being estimated: the overall market return.

As FERC and investors expect *each* company's long-term growth to "converge on the growth rate of the overall economy,"[46] and the whole grows by

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[42] Opinion 569, P 265.

[43] Opinion 569-A, P 264; *see also* Roger J. Grabowski, COST OF CAPITAL 117 (2010) (model references "the expected return on a fully diversified portfolio of equity securities"); R.183 at 96 (same, per Owners' witness).

[44] R.329:43.

[45] *Compare* Opinion 569-A, P 264, *with* R.548:30 (before and after substitutions, the index has the same value, and commensurately stable aggregate growth expectations).

[46] *See supra,* n.39.

its summed parts,[47] a broad portfolio's expected growth must likewise converge on the broad economy's expected growth. FERC's unsourced claim that "a portfolio of companies behaves differently than an individual company"[48] posits that portfolios grow faster than their constituent stocks, and faster than the economy those portfolios inhabit. No logic or substantial evidence supports that claim.

Index inclusion of mature companies likewise cannot perpetuate the indexed companies' short-term growth. Logically, a representative snapshot cannot ensure representativeness over time: a peloton's downhill average speed overstates its full-course average, despite including laggards.[49] Here, even if the near-term expected growth of the index's mature subset sustainably resembles the economy's long-term trajectory, the near-term expected growth of the index's other, emerging companies does not; their growth and that of the indexed portfolio and overall market must therefore moderate over time.[50] The index's mature companies cannot "perform[] the same role as…the long-term GDP growth rate in the DCF analysis of a single utility."[51] The former does not moderate the long-term growth attributed

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[47] *See* R.331:33.

[48] Opinion 569, P 266.

[49] As discussed below, FERC overstates further by excluding all "braking cyclists" (negative-growth companies). R.580:78, 110-114.

[50] R.330:75-76; R.331:31.

[51] Opinion 569, P 265.

to emerging index companies. And the latter serves to ensure that even mature utilities' modeled growth reflects their expected convergence on economy-wide growth.

Moreover, many of the 370 portfolio stocks are pipeline or utility stocks,[52] to which FERC applies a long-term growth factor regardless of maturity—but only when used as proxies.[53] For pipeline stocks, FERC found that short-term growth averaging 5.92%, 170 points above 4.22% GDP growth, required 1/3 weighting of the latter.[54] For utility stocks, FERC found that short-term growth averaging 5.03%, 64 points above GDP's 4.39%, required 1/5 weighting of the latter.[55] Yet for all 370 portfolio stocks (including pipelines and utilities), where short-term growth averaged 9.46%, much *further* above GDP,[56] FERC applied *zero* GDP weight.

FERC compounded this error by excluding, from the portfolio through which it sought to represent the "overall market," 27 S&P-500-member dividend-paying stocks—including Owner parent Entergy[57]—because it deemed their

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[52] *See* R.535:145-151; R.194:105; R.302:140.

[53] *See* Opinion 569, n.332.

[54] Opinion 569-B, P 83.

[55] *Id.*

[56] R.535:92.

[57] R.535:145.

negative short-term growth "highly unsustainable and non-representative of the growth rates of … electric utilities."[58] Any long-held, market-wide portfolio will include stocks that differ from utilities, including stocks in terminal decline. For example, the 27 excluded stocks hail mainly from the dwindling fossil fuel sector. Excluding declining stocks inflated FERC's estimate of the "overall market"[59] Returns. Moreover, FERC's utilized growth rates of, *e.g*., 18.5% for Starbuck's,[60] are at least equally "unsustainable and non-representative of the growth rates of … electric utilities."[61] (If Starbucks' earnings and market capitalization actually grew that fast, that long, by FERC's 2069 Discount model horizon the latter would more than triple US GDP.[62]) By excluding declining stocks, FERC belied its claim that the mature S&P 500 companies "perform[] the same role as…the long-term GDP growth rate in the DCF analysis of a single utility."[63]

Because FERC excluded declining stocks and disregarded long-term constraints on its selected 370 portfolio stocks' growth, it projected an 11.81%

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[58] Opinion 569, P 267.

[59] Opinion 569-A, P 264.

[60] R.535:151.

[61] *Cf*. Opinion 531, P 115 (FERC's prior models excluded, for illogical unsustainability, any utility stock with growth exceeding 13.3% or estimated return exceeding 17.7%).

[62] *See* R.535 151 ($75.891 billion Starbucks 2015 "Market Cap"); R.224:8($202 trillion 2069 GDP); $75.891B*((1+18.5%)^(2069-2015))>3*(202T).

[63] Opinion 569, P 265.

long-term market Return.[64] That projection entailed a "risk premium" (above thirty-year treasury yields) of 9.12%.[65] The record, and academic, investor, and governmental consensus, fatally undermine these foundations of FERC's Capital model.

Academics consistently look to historical and/or GDP-constrained market Returns and risk premiums,[66] none of which approach FERC's corresponding estimates. After surveying all reputable approaches, a leading finance textbook discredits any equity market risk premium exceeding 6.5%.[67] The long-term historical average S&P 500 Return premium is lower still.[68] The record's contemporaneous financial-advisory projections, including those by sources on which FERC otherwise relied, point far below FERC's 9.12% premium and 11.81% Return,[69] as do other federal agencies' Return models[70] (which FERC cited

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[64] R.535:92.

[65] *Id.*; Opinion 569, P 269.

[66] *See* R.580:67, n.185 & 79, n.222 (citing articles by Damodaran, Malkiel, and Brigham *et al.*). Articles by Harris *et al.*, which FERC cited for the contrary proposition, are in accord. *See* R.580:78-81.

[67] *See* R.580:68 (quoting Michael C. Ehrhardt and Eugene F. Brigham, *Corporate Finance: A Focused Approach* at 351 (4th ed. 2011)—the same authors on which FERC relied, Opinion 569, n.501).

[68] *See* R.263:37 (historical market risk premium, for S&P 500 returns above long-term Treasury bonds during 1926–2014, was 6.0%).

[69] *See* R.580:66-67 (collecting record projections by, *e.g.*, the Value Line and Duff & Phelps sources on which FERC otherwise relied).

selectively[71]) and regulators globally.[72] FERC's high projections suppose that diversified portfolios will grow much faster over the coming decades than they did during the 1900s, even though population, productivity, and economic growth projections are much slower.[73]

FERC's GDP-factor self-contradiction distorted its Capital model and should be remanded.

B. FERC's upwards "size adjustment" contradicts itself and the record.

FERC' Capital model includes a "size adjustment," which FERC found "necessary…to fully account for the impact of firm size."[74] But as FERC applied it, the adjustment embodies self-contradictory, reversible error, and fails entirely to address a witness's incisive counter-evidence.

FERC concedes that its utilized adjustment embodies "imperfect correspondence,"[75] but declares that it "improve[s] the accuracy of the CAPM results and cause [them] to better correspond to the costs of capital estimates

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[70] *See* R.580:69-70 (equity market returns of 10.1% (Federal Reserve), 8.71% (FCC), 9.45% (Surface Transportation Board)).

[71] R.525:23 (*Briefing Order,* n.73).

[72] *See* R.580:70, n.203.

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

[74] Opinion 569-B, P 95.

[75] Opinion 569, P 297.

employed by investors."[76] As Petitioners told FERC,[77] no record or logical basis supports that fiat rationalization.

Size adjustment calibrates "Ibbotson" model results for small, typically high-beta stocks to such stocks' historical performance.[78] But the model thereby calibrated uses Ibbotson's historical, realistic risk premium (a margin smaller than 7%, above income on long-term Treasury bonds) rather than FERC's idiosyncratic, inflated risk premium.[79] FERC combined an upward adjustment, meant to align small companies' Ibbotson-model premium with their historical norm, with FERC-model premiums already exceeding the historical norm. FERC cites no basis to conclude that this mismatched adjustment makes *FERC's* model more accurate.

That self-contradiction has company:

- FERC's base proxy results (before "size" adjustment) combine "Blume adjusted" betas with an equity risk premium based on short-term forecasts for 370 S&P 500 companies.[80] Blume adjustment forces all betas toward the market average (1.0), to reflect "the long-term tendency of betas to converge" on that market average.[81] The

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[76] *Id.*

[77] R.580:81-87.

[78] *See* Opinion 569, n.634, *Ibbotson 2019* article cited therein, and accompanying text.

[79] *See* R.539:319; *compare supra*, n.69.

[80] *See* Opinion 569-B, P 100; Opinion 569, P 231; R.539:281-82.

[81] R.539:281.

proxies' betas are below-average, so Blume adjustment increases their betas and Capital model results.[82] But the size adjustments FERC engrafted to those increased results use "raw" betas. A model that consistently used actual betas, for both base Returns and size adjustment, would point lower.[83] The long-term, upwards "Blume" adjustment also clashes with FERC's short-term approach to the market Return.[84]

- FERC's base proxy results reflect each proxy's volatility relative to an Exchange-wide portfolio. Those betas exceed betas based on only S&P 500 members, because the larger index's greater diversity makes it less volatile, and increases the relative volatility of the proxies.[85] A model using the same index for the proxies' betas and size adjustments would, again, point lower.[86] In mixing two different indices, FERC ignored its favored treatise.[87]

- The Ibbotson model's upward size adjustment is designed for generic small stocks' above-average risk and volatility,[88] as to which FERC found "differences in risk and required returns between small and

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[82] R.539:283-286.

[83] *See* R.539:283-286, 321.

[84] *See supra*, Part A.

[85] R.534:42, 179.

[86] *See id*.

[87] *See* Roger A. Morin, *New Regulatory Finance*, 159-60 (2006) ("New Regulatory Finance").

[88] *See* R.539:319.

large companies that are not captured in the betas”[89] Yet FERC applies it to small *utility* stocks with below-average risk and volatility, without addressing evidence directly contradicting such application.

- FERC reasoned that a size adjustment is warranted because the model’s “betas” fail to capture other size-related risk differentials. Yet it ignored evidence that explicitly examined those other risk measures, and reached the opposite conclusion. An expert and his sponsor showed that for utility-sector stocks, size does not correlate with risk.[90] FERC failed to address that showing.[91] Nor did FERC address the adjustment’s source economists’ recommendation to combine size adjustment with “industry premium adjustment,” which they estimate as a 4.24% *reduction* for regulated utilities,[92] such that consistently applying this “build-up” method would, again, produce proxy Returns well below FERC’s.[93] FERC’s non-responses necessitate remand.[94]

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[89] Opinion 569, P 301.

[90] R.533:56-57; R.538:60-61; R.579:31-33.

[91] *Compare* Opinion 569-A, P 68 (reciting Resale Group testimony and rehearing) *with id.,* PP 75-76 (omitting any response thereto).

[92] R.539:287-288.

[93] R.539:288, 322.

[94] *See ANR,* 904 F.3d at 1025; *Canadian Assoc. Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (“*Canadian*”).

The size adjustment's source economists warn against cherry-picking their work.[95] In all these respects, FERC cherry-picked without justification, producing an unjustified upward size adjustment.

II. FERC's Discount model arbitrarily under-weighted long-term growth.

FERC's longstanding, judicially-affirmed Discount model—as supported by FERC's favored textbook,[96] and as FERC continues to apply to pipelines[97]—utilizes a 2:1 weighted average of short-term and long-term growth projections.[98] FERC extended that policy to electric utilities in Opinion 531 (the *Emera* proceeding). After applying[99] and "reaffirm[ing]"[100] that weighting here, FERC changed it to 4:1[101] and denied rehearing.[102] This change is inadequately explained and lacks a substantial evidentiary basis, making it arbitrary and capricious.[103]

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[95] R.539:312-313.

[96] *See* Opinion 569, P 152, citing New Regulatory Finance, 308.

[97] *Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines*, 171 FERC ¶ 61,155, P 29 (2020) ("*Pipeline Policy*").

[98] *See Canadian*, 254 F.3d at 297.

[99] *See* Opinion 551, P 18.

[100] Opinion 569, PP 134, 151-159.

[101] Opinion 569-A, P 57 (giving "the short-term growth rate 80% weighting and the long-term growth rate 20% weighting"; 80%:20% is 4:1, whereas 2/3:1/3 is 2:1).

[102] Opinion 569-B, PP 80-87 (denying R.623:7-17 request).

[103] *See supra*, nn.30 & 33.

FERC attempted to rationalize it by citing two trends in electric utilities' projected short-term growth rates, but erred mathematically while providing no explanation of why those trends would matter if they existed.

First, FERC asserted that since it established its 2:1 weighting policy in the 1990s, electric utilities' short-term growth rates "have declined and are now closer to the current GDP growth projection ['4.39%'] than [to] those from the 1990s ['5.08%']."[104] But this math erred: By FERC's own account, the First Complaint proxy electric utilities' short-term growth rates averaged "5.03%."[105]—very close to FERC's cited 1990s GDP growth projection (5.08%), and considerably further from the current GDP growth projection (4.39%). Moreover, FERC nowhere explained why the relationship of current short-term electric growth projections to decades-past GDP growth projections should matter in weighting current short-term and current GDP growth projections.

Second, FERC seemed to perceive a trend narrowing the spread between electric utilities' short-term growth projections and contemporaneous GDP growth projections, based on three snapshots: a 158-point spread in 2002, a 19-point spread in 2012-13, and a 64-point spread in early 2015.[106] That is hardly a

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[104] Opinion 569-A, P 57 & n.129.

[105] *Id.*, P 57 & n.132.

[106] *See id.*, P 57 & nn.131-34.

consistent or well-supported trend. FERC's arbitrariness in relying thereon is highlighted by considering a readily available data point that FERC (even while reaching deep to find a 2002 data point[107]) ignored—the same spread as of late 2015 (as shown elsewhere in Opinion 569-A): 74 points.[108] Thus, by FERC's own measure, the trend in electric utility proxies' short-term growth projections, since Opinion 531 when FERC extended 2:1 weighting to electric utilities, has been *away* from GDP growth projections, not the direction on which FERC relied in changing its weighting.

FERC's reliance on spurious trends also clashes with FERC's simultaneous decision to retain 2:1 weighting for pipelines.[109] In *Pipeline Policy*, FERC found that a 170-point spread (as of February 2020) between pipelines' short-term growth projections and long-term GDP growth projections supported continued 2:1 weighting,[110] whereas in the First Complaint, FERC found that a 64-point spread (as of early 2015) supported 4:1 weighting.[111] By the same tokens, however, the 170-point February 2020 spread for pipelines represented a 418-point narrowing (from 588 points) of the spread that FERC associated with its adopting of 2:1

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[107] *See id.*, n.134

[108] *See* R.611:127 (Opinion 569-A, Appendix, "MISO II DCF Results").

[109] *Pipeline Policy*, P 29.

[110] *Id.*, P 33 & n.78.

[111] Opinion 569-A, P 57.

weighting in 1998. FERC failed to explain why a 94-point narrowing for electric utilities (comparing 2015 to 2002) indicates 4:1 weighting, whereas a 418-point narrowing for pipelines indicates continued 2:1 weighting.[112]

FERC's focus on the spread between GDP growth and the broader proxy group's average short-term growth is also unexplained. In Opinion 569, FERC found no impediment to 2:1 weighting in the fact that the "IBES growth projections of a number of public utilities are less than or about equal to projected growth in GDP."[113] Rather, FERC's weighting decision focused on the fact that short-term growth projections for the proxies found atop the Discount model distribution "are substantially above projected growth in GDP,"[114] finding that spread supported 2:1 weighting. Without explanation, however, Opinion 569-A changed FERC's focus to the spread between GDP growth and the broader proxy group's average short-term growth.

More generally, FERC's selected weighting is arbitrarily unsupported by the record. Neither *Pipeline Policy* nor Opinion 569-A explained how the trend or average in either industry's short-term growth projections correlates to FERC's industry-specific weightings. Nor did FERC cite any record basis specifically

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[112] *Pipeline Policy*, P 33, n.78.

[113] Opinion 569, P 158.

[114] *Id.*

supporting 4:1 weighting. None exists. Although Owners sought to *eliminate* the long-term growth rate, no party or expert witness advocated or presented evidence for 4:1 weighting. Since First Complaint hearing procedures commenced in October 2014 with guidance that called for 2:1 weighting,[115] through Opinion 569's issuance five years later, FERC steadfastly applied 2:1 weighting. When Opinion 569-A switched to 4:1, drastically reducing the long-term weighting, it failed to ground its revised weighting in any record evidence.

Instead, citing *Canadian*, FERC rested on its "broad discretion in its weighting choice."[116] The exercise of discretion must, nonetheless, comport with FERC's duty to engage in reasoned decision-making.[117] FERC's failure to rationally connect its weighting policy change to substantial evidence abused FERC's discretion.

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[115] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Op., Inc.*, 149 FERC ¶ 61,049, P 186 (2014) ("we expect the participants' evidence and DCF analyses to be guided by" Opinion 531, which used 2:1 weighting).

[116] Opinion 569-A, P 57.

[117] *Laclede Gas Co. v. FERC*, 997 F.2d 936, 945 (D.C. Cir. 1993) ("even the Commission's broad discretion is bounded by the limits of its authority and the necessity for rational decision making").

III. FERC's addition of Risk modeling was arbitrary.

Opinion 569 detailed the Risk model's flaws,[118] and "[b]ased on full consideration of the record," rejected its use.[119] Opinion 569-A reversed course,[120] but failed to adequately explain this about-face and ground it in the record.[121]

Prior to Opinion 569-A, FERC's Return determinations had consistently rejected direct reliance on Risk models.[122] Here, FERC likewise had rejected the Risk model, citing "the disadvantages of its deficiencies."[123] These deficiencies, as catalogued in Opinion 569, and FERC's decision to exclude the Risk model from the Return methodology, were anchored in the record. FERC's later adoption of the Risk model was not.

Opinion 569's Return approach turned on ranges indicated by the Discount and Capital models' multiple proxy-company results.[124] The Risk model fell outside this framework, as it "produces a single numerical point" rather than "a

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[118] Opinion 569, PP 340-352.

[119] *Id.*, P 340.

[120] Opinion 569-A, PP 104-114; *see also* Opinion 569-B, P 113.

[121] Opinion 569-A, Glick Dissent, P 3 ("[I]t appears that the Commission again has chosen a path directed by the results…rather than the law and the facts."). *See also* R.623:22-33, 46-49.

[122] R.623:22-24.

[123] Opinion 569, P 340.

[124] *Id.*, P 516.

range."[125] Thus, the Risk model's potential use was limited to the second prong of the Return analysis.[126] FERC characterized this "asymmetry" as disadvantageous and decided to "use the same models" for both prongs.[127]

While the Risk model's single point estimate and asymmetry were unchanged and remained a "serious concern," Opinion 569-A "impute[d]"[128] a range to pound the Risk model's square peg into the Return framework's round hole.[129] The imputation was fictitious: FERC's Risk model produces only a single point estimate, not a range, and "imputing" a range width from other measures does not change this fact. Because the imputed range disregards Risk model data and comes entirely from Discount and Capital model data, it clashes with FERC's purported goal of viewing equity cost through multiple independent lenses.[130] No party proposed such a strained development of the Risk model's range.

Although FERC may change its methodology, such changes must be explained and justified.[131] Here, FERC reversed its prior decision and past practice

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[125] *Id.*, P 16.

[126] Opinion 569-A, P 107.

[127] Opinion 569, P 351.

[128] Opinion 569-A, P 107; Opinion 569-B, P 116.

[129] Opinion 569-A, Glick Dissent, P 17.

[130] *See* Opinion 569-A, P 141 (seeking to "fully capture the model diversity that each brings").

[131] *Vehicle Mfrs Ass'n,* 463 U.S. at 42.

of rejecting Risk models, without adequately explaining that reversal. FERC also failed to ground in the record its decision to "impute" a Risk model range—a concoction that no expert witness, in the many years of litigation below, had proposed. FERC's belated about-face left the parties no evidentiary opportunity to critique that concoction.

FERC acted arbitrarily and capriciously in other respects.

First, after Opinion 569 found no basis "to conclude that investors rely on risk premium analyses utilizing historic Commission ROE determinations or settlement approvals to determine the cost of capital and make investment decisions,"[132] Opinion 569-A switched to noting that investors "observe regulatory ROEs" and that "changes in authorized ROE levels could affect utility earnings."[133] But FERC still identified no evidence that utility investors apply a Risk model.

Second, after Opinion 569 found the Risk model's direct reliance on past FERC Returns makes its circularity "particularly direct and acute,"[134] Opinion 569-A switched to asserting that combining it with other methods remedied its

[132] Opinion 569, P 345.

[133] Opinion 569-A, P 112; Opinion 569-B, P 122.

[134] Opinion 569, P 343

circularity.[135] But the Risk model is no less circular when combined with other methods, and was no less circular when revisited. Accordingly, FERC's changed view of the Risk model's circularity was not "reasoned, principled and based upon the record."[136]

Finally, after Opinion 569 determined that using the "analytically redundant"[137] Risk model and Capital model conjunctively would weight the Return methodology too heavily toward analyses that add an equity Risk model to bond yields,[138] Opinion 569-A did just that. FERC rationalized that these approaches' use of some differing inputs makes them "sufficiently distinct,"[139] but nowhere explained how much difference spares models from being deemed "analytically redundant."

In adopting a Risk model after Opinion 569's thorough and well-reasoned rejection, FERC changed course without a reasoned, record-grounded explanation.

IV. FERC expanded the "midpoint" method without explanation.

FERC's Discount and Capital models produce distributions consisting of one indicated equity cost per retained proxy company. To identify the specific

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[135] Opinion 569-A, P 106; Opinion 569-B, P 115.

[136] *Willliston Basin* at 60, *supra* n.31.

[137] Opinion 569-A, Glick Dissent, P 13.

[138] Opinion 569, P 341.

[139] Opinion 569-A, P 105; Opinion 569-B, P 114.

cost-reflective Return charged through rates, FERC must distill these distributions to a single representative number. *How* to distill is the "central tendency"[140] issue FERC faced here, framed by two prior judicial affirmances.

Midwest Remand[141] distilled retained proxy results using their "midpoint," *i.e.*, the average of the single lowest and single highest result. In that case, however, the region's Owners themselves comprised the proxy group: "the proxy group used to define the range of reasonableness…consist[ed] of a subset of the Mid[continent] [Owners]… to which the Return will actually apply,"[142] and "encompasse[d] only publicly traded Mid[continent] [Owners]."[143] For that context, the midpoint was found to reasonably emphasize the most disparate equity costs among the region's diverse utilities.[144]

Edison[145] concerned a Return specific to one utility. It applied a nation-wide proxy group, whose retained proxy results it distilled using their median. FERC grounded that approach in universal "laws of statistics," finding that medians

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[140] Opinion 569-A, P 171.

[141] *Midwest Indep. Transmission Sys. Op.,* 106 FERC ¶ 61,302 (2004) ("*Midwest Remand*"), *aff'd sub nom. Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1010 (D.C. Cir. 2005) ("*Kentucky*").

[142] *Midwest Remand*, P 9.

[143] *Id.*, P 10.

[144] *Id.*

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

appropriately "represent the typical observation," whereas midpoints are "clearly subject to distortion by extremely high or low values."[146]

Neither precedent squarely governs here. FERC here set a region-wide Return but did so using "national" proxies.[147] Consequently, the present proxy group range was *not* confined to entities "to which the ROE will actually apply;"[148] Black Hills, not a Midcontinental entity, topped FERC's utilized Capital model range.[149] Moreover, FERC had never previously determined the central tendency to use with the Capital model. And *Edison*'s key finding, that medians reflect universal "statistical facts," demands new explanation for disregarding that universality—especially given Petitioners' strong case for medians.[150] Accordingly, before relying on *national* Discount and Capital model midpoints here, FERC needed to explain how doing so would fairly reflect the Owners' lowest and highest equity costs.

Opinion 569 attempted that explanation, stating that "the high and low ends of the DCF and CAPM zones…produced by those proxy groups…

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[146] *Id.*, 183 (approvingly quoting *S. Cal. Edison Co.*, 131 FERC ¶ 61,020, P 86 (2010)).

[147] Opinion 569, P 412.

[148] *See supra*, n.142.

[149] Opinion 569, P 412; R.535:92.

[150] R.539:67-74, 111-114; R.548:51-53, 453-58; R.580:88-90.

[]represent[]…the highest and lowest risk profiles among the [Owners]."[151] But FERC's approach to assessing representativeness was arbitrary. Moreover, Opinion 569 relied on observations inapplicable to the revised results of Opinion 569-A. These errors compel remand.

Opinion 569 argued for midpoints by observing "that the companies that set the high and low ends of the [Discount model] and [Capital model] zones of reasonableness…have similar risk profiles to the [Owners]."[152] By "similar," however, FERC meant only that those range-setting proxies' credit ratings were "within the ranges of" Owners' credit ratings. FERC never weighed whether those range-setting proxies' equity costs were *representative* of Owner equity costs. FERC did not assess those range-setting proxies' representativeness of the Owners collectively. Nor did FERC assess those proxies' representativeness of any individual Owner, including those with the most dispersed ratings, risks, or equity costs. FERC merely purported to describe "the general correspondence between the credit rating of proxy group companies and those at the high and low end of the

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[151] Opinion 569, P 412 (stating converse as double negative).

[152] *Id.*

zone,"[153] while admitting that "this examination was not specific to the [Owners]."[154]

FERC's stated "general correspondence" between "proxy group companies" and those proxies "at the high and low end" is a tautology—range-setting proxies *are* proxies—and elides the necessary, specific comparison between the range-setting proxies and Owners. It cannot support deeming range-setting proxies' results representative of Owners.

Instead of undertaking that comparison, FERC reasoned circularly, holding that *because* it uses the midpoint for Owners, Owners must be an average-risk regional group for which the midpoint is appropriate. *See* Opinion 569-B n.160 (finding Owners "are of average risk…*because* Commission policy is to set an RTO-wide ROE at the midpoint," and citing Opinion 569 P 521 ("[g]iven that Commission policy is to set an RTO-wide ROE at the midpoint…we conclude that MISO TOs must be treated as of average risk")).

Furthermore, FERC found that the Discount and Capital models, taken separately, produce no meaningful equity cost "estimate for each proxy group company."[155] FERC's finding that those models' separate extremes do not estimate

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[153] Opinion 569-A, P 171 (characterizing Opinion 569, P 412).

[154] *Id.*

[155] Opinion 569, P 439.

any individual company's equity cost leaves no basis to infer that those extremes stand in for the Owners' equity cost range.

FERC thus failed to adequately explain how the Discount and Capital model midpoints produce a Return apt for the diverse Owners. To the contrary, medians better reflect the equity cost distributions associated with proxies' diverse risk profiles.[156]

Insofar as FERC compared the range-setting proxies to Owners, moreover, it did so only by reference to Opinion 569 results, which FERC later abandoned. FERC thus relied on the middling Moody's ratings (Baa1–Baa3) of the proxies that *might have* set the bottom of two Discount model ranges,[157] and the fact that one of them was Midcontinental[158]—even though the proxy that *actually* set both ranges had a high Moody's rating (A3), and was not Midcontinental.[159]

FERC exacerbated its unjustified reliance on midpoints by raising the low and high range-ends they average. As applied, *e.g.*, to the First Complaint Discount model in Opinion 569-A, FERC substantially raised its tests for retaining low results and discarding high results:

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

[157] *See* Opinion 569, P 412.

[158] *See id.*

[159] *See* Opinion 569-A, PP 209, 223 & Appendix A (ConEd set both bottoms); R.198:118 (ConEd rating); R.339:21 (same).

Test	Low[160]	High[161]
Prior	Utility Bond Yield+100 points=5.65%	150% of all-proxies median=13.02%
New	Utility Bond Yield+(Capital model risk premium/5)=6.47%	200% of all-proxies median=17.67%

FERC failed to consider how these changed tests affect the representativeness of the range ends and range-setting proxies they determine.

Perhaps sensing its rationales' weaknesses, ultimately FERC retreated to a claim that using the median would "revers[e]"[162] *Kentucky*. But, as shown above, applying the median here—in the first-impression context of a region-wide Return using multiple models and national proxies—would have extended *Edison* and distinguished *Kentucky*, without reversing either. FERC inadequately explained its contrary decision.

V. FERC erred in adopting a new "Presumption" that deems above-cost Returns nonetheless reasonable.

FERC adopted a new framework for determining whether an existing Return, challenged under FPA section 206, remains just and reasonable. As applied here to a regional group deemed "average-risk," the framework identifies the "Middle Third"[163] of the collective range of FERC's three financial models

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[160] *See* Opinion 569, P 511 & Appendix (R.560:236, 266).

[161] *See* Opinion 569-A, P 154 & Appendix (R.611:63, 129).

[162] Opinion 569-A, P 171.

[163] *Id*., Appendix III (R.611:129).

(Discount, Capital, and Risk). FERC then deems those models insufficient to establish the excessiveness of an existing Return, unless it exceeds a "Presumption" point located atop that Middle Third.[164] Customers challenging an existing Return within that Middle Third must submit "other evidence"[165] of its excessiveness—evidence somehow more compelling than FERC's specified financial models.

FERC compounded this conundrum by (as further discussed in the accompanying "Refund Brief") treating a rate determined later as the "existing rate" to which that Presumption point was compared, requiring complainants to rebut an unknown. Having moved the target, FERC found that complainants missed it.[166]

But FERC's rationale for the Presumption is fatally flawed. It misinterprets and misapplies *Emera*; establishes a heightened proof burden that improperly

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[164] *Id.*, P 194.

[165] Opinion 569, P 65.

[166] Opinion 569, PP 62, 558; Opinion 569-A, PP 3, 268. FERC rested its dismissal on the Presumption, as its adopted methods' central Return was, in Opinion 569, Appendix C, lower for the Second Complaint than the First Complaint (9.72% vs. 9.88%). FERC's methodological changes on rehearing inverted this relationship. *See* Opinion 569-A, Appendix III (10.05% vs. 10.02%). But FERC did not rest its dismissal on that inversion, and its decision stands or falls on its stated reasons. Moreover, repairing the methodological flaws raised in Parts I-IV *supra* would make the centrally-indicated Return again decline from the First to Second Complaint.

bifurcates a single statutory standard; and, as applied here, is effectively irrebuttable.

A. This Court did not require FERC to establish the Presumption.

FERC disclaimed responsibility for its Presumption, portraying it as dictated by this Court's *Emera* decision.[167] *Emera,* however, requires only that FERC provide a separate explanation for finding that an existing Return is no longer just and reasonable under FPA section 206's first prong, rather than "skipp[ing] to Section 206's second step and reason[ing] backward from there, claiming that its analysis 'generating a new just and reasonable [rate] necessarily proved that Transmission Owners' existing [rate] was unjust and unreasonable.'"[168] *Emera* did not hold, or even imply, that FERC's first-prong analysis must presume that a range of Returns is reasonable. Indeed, such a demand ignores *Emera's* holding that the zone of reasonableness is *not* "coextensive" with the statutory just and reasonable standard.[169]

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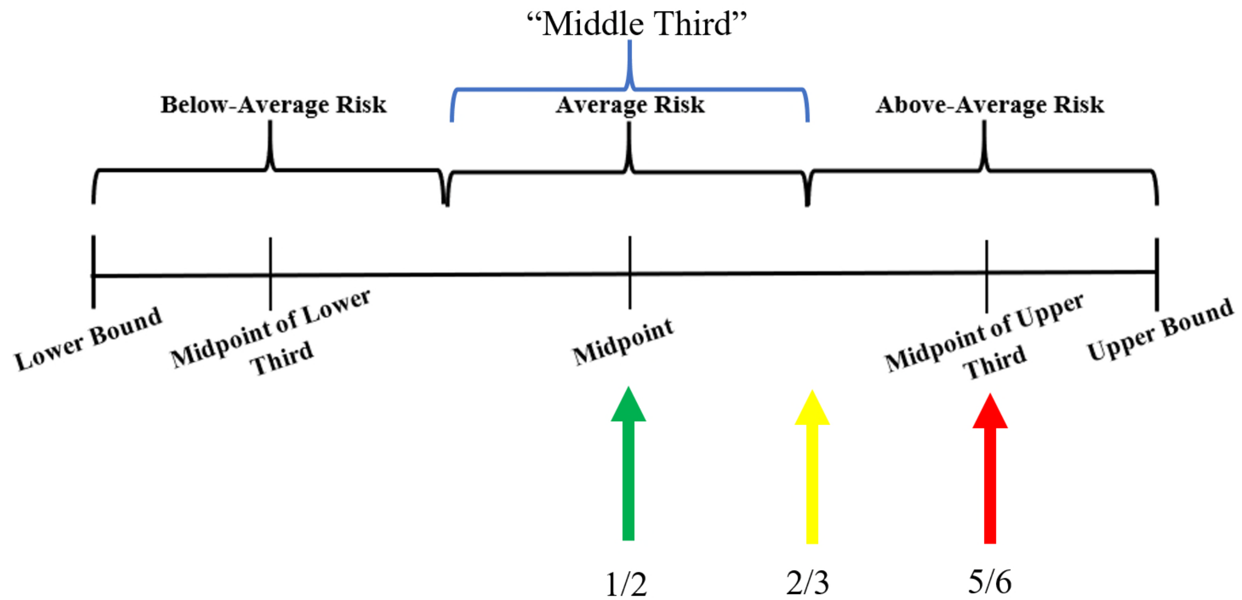
[167] Opinion 569, P 59.

[168] *Int'l Trans. Co. v. FERC*, Case No. 19-1190, slip op. at 27 (D.C. Cir. Feb. 19, 2021) ("*International*"), slip op. at 27 (explaining *Emera*, 854 F.3d at 26); *see also* Opinion 569-B, Glick Dissent, P 21 (anticipating *International*'s clarification of *Emera*).

[169] *Emera* at 23.

FERC based its Presumption on an illogical syllogism, illustrated below by Opinion 569-A, P 194, "Figure 2," with our clarifying annotations.



FERC stated that if, for average-risk utilities, the proxy results' green (1/2) point was fitting while the red (5/6) point was unreasonably high, then a Return up to the yellow (2/3) point, being closer to the 1/2 than the 5/6 point, must be presumptively fitting.[170] Thus, FERC erroneously presumed reasonableness based on relative proximity to one "starting point" that FERC never found reasonable, and relative distance from a second "starting point" that it found unreasonable. But the fact that a Return is *less* unreasonable if it is closer to the green (1/2) point and further from the even higher red (5/6) point does not make it affirmatively reasonable. Any presumption must rest on a rational connection between the facts

[170] Opinion 569-A, P 194.

it infers and facts proved by competent evidence.[171] FERC established no such rational connection here.

The "starting point for determining whether [Owners'] existing ROE has become unjust and unreasonable must be a consideration of … the[ir] current market cost of equity"[172]—meaning the central indication of FERC's approved cost-estimation methods, not the cost FERC might find for a group that, unlike Owners,[173] has above-average risk. Moreover, FERC's characterization of the 5/6 point as a "modif[ied]…traditional starting point[] for…above-average risk utilities"[174] is falsely revisionist. No such "tradition[]" existed before Opinion 569-A invented it. And FERC's underlying assumption that utilities' risks and associated Return decisions must be divided into exactly three categories—below-average, average, and above-average—replicates the error vacated in *Emera*.[175]

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[171] *U.S. v. Gainey*, 380 U.S. 63, 78 (1965) (Justice Black dissent); R.623:60-62.

[172] Opinion 569-A, P 207.

[173] *See id.*, P 216.

[174] *Id.*, P 194.

[175] *See Emera*, 854 F.3d at 29-30 (FERC erred in assuming that the upper midpoint was the only potentially apt distillation of a proxy distribution).

Accordingly, that an existing Return is closer to the 1/2 point than it is to the 5/6 point, while still exceeding the equity cost "starting point,"[176] provides no rational basis to presume its reasonableness.

B. The single-step analysis rejected in *Emera* was not an issue here.

In *Emera*, FERC's reasoning that "a new just and reasonable ROE *necessarily* proved that Transmission Owners' existing ROE was unjust and unreasonable"[177] led it to skip the required explanation of "how the existing Return was unjust and unreasonable."[178] Here, the Presiding Judge filled that gap, explaining that "[t]he COE [Cost of Equity] is the return necessary to attract capital,"[179] meaning any higher Return "would exploit consumers and, therefore, would be unjust and unreasonable."[180] Moreover, the Presiding Judge found explicitly that the existing Return was completely outside the newly calculated zone of reasonableness, and no party took exception to these determinations.[181] FERC, in Opinion 551, adopted the Presiding Judge's findings, thereby avoiding

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[176] Opinion 569-A, P 207.

[177] *Emera*, 854 F.3d at 26 (emphasis added).

[178] *Id.*; *see also International*, slip op. at 27 (explaining *Emera*).

[179] R.404:9 (P 21).

[180] R.404:41 (P 135, n.135).

[181] R.404:8,18 (PP 19, 58-59).

its *Emera* error.[182] But in Opinion 569, based on its erroneous reading of *Emera*, FERC declined to adopt the Presiding Judge's parallel findings for the Second Complaint. FERC thus recognized that prior findings standing on non-Presumption grounds satisfied section 206's first prong,[183] but failed to explain why parallel findings were insufficient for the Second Complaint.

C. The "Presumption" establishes an unlawful heightened burden of proof.

FERC's description of its new rule as a "rebuttable presumption" is a misnomer. A *rebuttable* presumption can be rebutted by the preponderance of any record evidence.[184] But FERC's "Presumption" functions as a rule of evidence exclusion. By FERC's own standards, the best evidence of a utility's equity cost consists of FERC's approved financial models, distilled using FERC's applicable central tendency metric. FERC would use that evidence to establish a replacement Return under section 206's second prong, and has used, and presumably would continue to use, that evidence to review utilities' section 205 filings. For example, the section 205 filing underlying the Midcontinent's prior Return sought 13%, which FERC reduced to the 12.38% financial model's midpoint even though 13%

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[182] R.466:7 (P10).

[183] R.560:253-54 (P 558).

[184] *See e.g., Tafoya v. Sears Roebuck and Co.*, 884 F.2d 1330, 1337 (10th Cir. 1989) ("Rebuttable presumptions in the civil law are normally overcome by a preponderance of the evidence.").

fell within the Middle Third.[185] Under the "Presumption," however, in addressing section 206's first prong, FERC sets that evidence aside and demands "other evidence."[186] FERC thereby immunizes existing Returns against customer challenge even if FERC's approved financial models indicate that they exceed the cost of equity. By requiring customers to provide "other evidence," the Presumption establishes a heightened burden of proof.

D. The Presumption bifurcates the single "just and reasonable" standard of FPA sections 205 and 206.

The just and reasonable standard of FPA sections 205 and 206 is meant to "protect consumer interests"[187] by erecting "a complete, permanent and effective bond of protection from excessive rates and charges;"[188] it permits "not even a little unlawfulness."[189] The statutory (un)just and (un)reasonable standard is the same under both sections.[190] As explained in foundational Supreme Court decisions,[191] a

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[185] *See Midwest Remand*, PP 2-3 (utilities sought 13% and FERC-determined model range was 8.79% to 15.96%—implying a middle third extending to 13.57%). *See also infra,* Part D.

[186] Opinion 569, P 65.

[187] *New Eng. Power Generators Ass'n v. ISO New Eng.,* 146 FERC ¶ 61,038, P 26 & n.33 (2014); *see also City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955) (FERC must always "relate its action to the primary aim of the Act to guard the consumer against excessive rates").

[188] *Atl. Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959).

[189] *Consumers Fed'n of Am. v. FPC,* 515 F.2d 347, 358 n.64 (D.C. Cir. 1975) (quoting *FPC v. Texaco*, 417 U.S. 380, 399 (1974)).

[190] *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014).

rate increase suspended under section 205 and a rate decrease sought under section 206 are both subject to the same "character" and "scope" of review.[192]

The Presumption violates this precedent. It treats the results of FERC-approved financial models differently when submitted to support section 205 rate increases than when submitted to support section 206 rate decreases. It thereby enables utilities to continue obtaining increases pursuant to section 205 by relying on the same financial models that FERC deems insufficient to support decreases under section 206. Consequently, it retains under section 206 Returns that would be found unlawful under section 205(e)—even though FERC's authority to act under section 205(e) springs from a statutory cross-reference to section 206.

Compare three hypothetical scenarios, wherein the referenced models constitute the entire record and apply FERC's approved methods. Each illuminates the "Middle Third" adopted in Opinion 569-A (*see id.,* P 194, Figure 2 and Appendix III), which centered at 10.02% and extended to 10.89%.

1. Customers file under section 206 to reduce a 10.88% existing Return to 10.02%, with model results precisely duplicating those FERC adopted in the First Complaint.

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[191] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.,* 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pac. Power Co*., 350 U.S. 348 (1956).

[192] *Mobile,* at 341-342.

2. On the same record but with the existing Return standing at 10.02%, Owners file under section 205 for an increase to 10.88%.
3. Owners seek the same increase as in scenario two, but with an inverted record: although the models show 10.02% as within the applicable "Middle Third," they support 10.88% as their applicable central tendency.

In scenario one, FERC would consider its approved models insufficient evidence that 10.88% is unreasonable, and would dismiss the complaint. In scenario two, FERC (assuming it adhered to longstanding practice that FERC indicated will continue, *see* Opinion 569-A, P 198) would find the proposed 10.88% Return unreasonable, much as it found the proposed 13% Return unreasonable in *Kentucky*.[193] That is, because FERC applies the Presumption only under section 206, FERC would (rightly) consider the model results sufficient evidence that a higher requested Return is unreasonable, even though a "Middle Third" Presumption range, if applied, would encompass it. In scenario three (because, again, FERC applies the Presumption only under section 206), FERC would deem the models' central result sufficient evidence to carry the Owners' burden of proving 10.88% to be reasonable. FERC would not treat the fact that the "Middle

[193] *See supra*, n.139.

Third" extends lower as signifying that Owners' proof is merely an "imprecise…general estimate"[194] and therefore insufficient.

Both of the treatment disparities illustrated above violate the precedent under which sections 205 and 206 embody the same "just and reasonable" substantive standard. In Scenarios 1 and 2, the same evidence produces different findings as to whether 10.88% is currently reasonable. In Scenarios 1 and 3, only customers are burdened with proving, through some "other evidence," that model results represent the cost of equity and reasonable Return. In both respects, customers seeking to show that an existing Return has become unreasonable now face a high bar not faced by utilities seeking rate increases.

As Justice Stevens reasoned, "[t]here is no significant difference between requiring a heightened showing to overcome an otherwise conclusive presumption and imposing a heightened standard of review."[195] The heightened showing required by FERC's Presumption alters section 206 review so as to impose a heightened, non-statutory standard. It is not salvaged, as FERC contends,[196] by the fact that only section 206 requires a "prong one" showing of the prior rate's unreasonableness. Section 205 requires a showing, mirroring section 206 prong

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[194] Opinion 569, P 61.

[195] *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1*, 554 U.S. 527, 557 (2008) (Stevens, J. dissenting, Souter J. joining).

[196] *See* Opinion 569-A, P 198.

two, that an increased rate is reasonable. FERC will now apply asymmetrical standards to those symmetrical issues.

E. FERC's decisional course made its Presumption effectively irrebuttable.

An irrebuttable presumption is often contrary to fact and may violate due process.[197] Here, due process concerns are prominent.

FERC maintains that its Presumption confers due process because the "parties already know the *existing* ROE with which to compare to the zone of reasonableness."[198] But FERC precluded such knowledge here. By applying its new Presumption to the Second Complaint, FERC demanded that customers rebut the 10.02% FERC adopted in Opinion 569-A (after years of litigation marked by repeated methodology changes), not the "existing ROE" actually charged. As explained in the accompanying Refund Brief, FERC's fiction that its subsequent 10.02% constituted the "existing" rate contradicts FPA section 206. FERC's fiction also rendered the Presumption effectively unrebuttable, because customers could not rebut a Return they could not know.

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[197] *See, e.g., Heiner v. Donnan*, 285 U.S. 312, 329 (1932) (condemning "a presumption which operates to deny a fair opportunity to rebut it"); *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (same); *U.S. Dep't of Agriculture v. Murry*, 413 U.S. 508, 518 (1973) (Marshall, J., concurring) (general propositions may "serv[e] only as rebuttable presumptions or other burden-shifting devices."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (condemning irrebuttable presumption).

[198] Opinion 569-B, P 66.

At the Second Complaint's initiation, and while its trial record was compiled, the existing Return was 12.38%. When a further, final opportunity to present evidence closed, FERC's most recent determination of Owners' Return was 10.32%, under Opinion 551, and FERC's determination method was in flux; the 10.02% Return that FERC treated as "existing" and compared to its Second Complaint models remained inchoate. Customers cannot fairly be expected to demonstrate that the Return deemed fictively applicable during the Second Complaint refund period was unreasonable before FERC, in Opinion 569-A, actually adopted that fiction and identified its Return.[199]

Indeed, Complainants could not even know the sequence in which FERC would resolve the two complaints. FERC has, and claimed here, "broad discretion to structure its proceedings."[200] Thus, customers could not even know *whether* a different Return would be set for later application, much less its level.

Complaints filed under FPA section 206(a) must "state the change or changes to be made in the … charge … then in force."[201] The statute thus focuses on what customers actually pay, not a fiction depicting them as paying less. Here,

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[199] *Cf. City of Redding v. FERC*, 693 F.3d 828, 837 (9th Cir. 2012) ("If FERC could not keep straight in its own orders what it was doing, other parties cannot be expected to do any better.").

[200] Opinion 569-A, P 263 & n.424 (citing cases).

[201] 16 U.S.C. § 824e(a).

notwithstanding FERC's later orders, the 12.38% Return charged at the Second Complaint's initiation kept being charged throughout the ensuing refund period. By dismissing the Second Complaint for not demonstrating the unreasonableness of a rate that existed neither when that complaint was filed nor during its refund period, FERC withheld due process and abdicated its section 206 responsibilities.

CONCLUSION

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

Respectfully submitted,

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STATUTORY ADDENDUM

5 U.S.C. § 706(2)(A) ADD-01

16 U.S.C. § 824d(a) ADD-02

16 U.S.C. § 824e ADD-06

16. U.S.C. § 824e(a) ADD-06

16 U.S.C. § 825*l*(b) ADD-10

5 U.S.C.A. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C.A. § 824d

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein

provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine--

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric

energy), and

(B) whether any such clause reflects any costs other than costs which are--

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to--

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum--

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title

16 U.S.C.A. § 824e

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(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.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or

transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to--

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or

power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

16 U.S.C.A. § 825*l*

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The

finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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 9,390 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 March 10, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. All participants in this case registered with CM/ECF will be served by the CM/ECF system.

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