

156 FERC ¶ 61,060  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Tony Clark.

Association of Businesses Advocating Tariff Equity                      Docket No. EL14-12-001  
Coalition of MISO Transmission Customers  
Illinois Industrial Energy Consumers  
Indiana Industrial Energy Consumers, Inc.  
Minnesota Large Industrial Group  
Wisconsin Industrial Energy Group

v.

Midcontinent Independent System Operator, Inc.  
ALLETE, Inc.  
Ameren Illinois Company  
Ameren Missouri  
Ameren Transmission Company of Illinois  
American Transmission Company LLC  
Cleco Power LLC  
Duke Energy Business Services, LLC  
Entergy Arkansas, Inc.  
Entergy Gulf States Louisiana, LLC  
Entergy Louisiana, LLC  
Entergy Mississippi, Inc.  
Entergy New Orleans, Inc.  
Entergy Texas, Inc.  
Indianapolis Power & Light Company  
International Transmission Company  
ITC Midwest LLC  
Michigan Electric Transmission Company, LLC  
MidAmerican Energy Company  
Montana-Dakota Utilities Co.  
Northern Indiana Public Service Company  
Northern States Power Company-Minnesota  
Northern States Power Company-Wisconsin  
Otter Tail Power Company  
Southern Indiana Gas & Electric Company

## ORDER ON REHEARING

(Issued July 21, 2016)

1. On October 16, 2014, the Commission granted in part, denied in part, and dismissed in part a November 12, 2013 complaint (Complaint) filed by Complainants<sup>1</sup> against Midcontinent Independent System Operator, Inc. (MISO) and certain of its transmission-owning members (MISO TOs).<sup>2</sup> The Commission granted the Complaint with respect to the return on equity (ROE) element, established hearing and settlement judge procedures and set a refund effective date of November 12, 2013.<sup>3</sup> The Commission also denied the Complaint with respect to the capital structure and transmission incentive issues, and dismissed the Complaint as it relates to MISO.
2. In this order, we deny in part and grant in part requests for rehearing and clarification filed between November 14, 2014 and November 26, 2014.

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<sup>1</sup> Complainants, a group of large industrial customers, consist of: Association of Businesses Advocating Tariff Equity (ABATE); Coalition of MISO Transmission Customers; Illinois Industrial Energy Consumers; Indiana Industrial Energy Consumers, Inc.; Minnesota Large Industrial Group; and Wisconsin Industrial Energy Group.

<sup>2</sup> MISO TOs named in the Complaint are: ALLETE, Inc. (for its operating division Minnesota Power, Inc. and its wholly-owned subsidiary Superior Water Light, & Power Company; Ameren Illinois Company; Union Electric Company; Ameren Transmission Company of Illinois; American Transmission Company LLC (ATC); Cleco Power LLC; Duke Energy Business Services, LLC d/b/a Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, LLC; 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 Transmission), ITC Midwest LLC, and Michigan Electric Transmission Company, LLC (METC) (collectively, the ITC Subsidiaries); MidAmerican Energy Company (MidAmerican); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company-Minnesota; Northern States Power Company-Wisconsin; Otter Tail Power Company; and Southern Indiana Gas & Electric Company d/b/a Vectran Energy Delivery of Indiana, Inc..

<sup>3</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. System. Operator, Inc.* 149 FERC ¶ 61,049, at P 188 (2014) (Hearing Order).

## I. Background

3. The Complaint alleged that the current 12.38 percent base ROE earned by MISO TOs<sup>4</sup> through the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) is unjust and unreasonable. Additionally, Complainants argued that the capital structures of certain MISO TOs feature unreasonably high amounts of common equity and that MISO TOs' capital structures should be capped at 50 percent common equity. Finally, Complainants contended that the ROE incentive adders received by ITC Transmission for being a member of a regional transmission organization (RTO) and by both ITC Transmission and METC for being independent transmission owners were unjust and unreasonable and should be eliminated.

4. Multiple intervenors responded to the Complaint. MISO TOs filed a motion asking the Commission to dismiss the Complaint because Complainants failed to establish that they satisfied the procedural requirements of Rule 206 of the Commission's Rules of Practice and Procedure by "demonstrating the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant."<sup>5</sup> The Commission found that, pursuant to 18 C.F.R. § 385.206, Complainants, as industrial customers within MISO, had standing to dispute MISO TOs' base ROE, capital structures, and ROE incentive adders.<sup>6</sup>

5. MISO TOs' motion to dismiss also argued that Complainants failed to make a *prima facie* case that the base ROE is unjust and unreasonable. In response, the Commission stated that the Complaint's analysis constituted substantial evidence that the challenged rates may be unjust and unreasonable. It also noted that, after the Complaint was filed, the Commission changed its policy on determining the ROE for public utilities by adopting a two-step discounted cash flow (DCF) methodology.<sup>7</sup>

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<sup>4</sup> ATC, which has a base ROE of 12.2 percent, is an exception.

<sup>5</sup> *Id.* P 26 (citing 18 C.F.R. § 385.206(b)(3) (2015)).

<sup>6</sup> *Id.* P 82.

<sup>7</sup> *Id.* P 184 (citing *Martha Coakley, Mass. Attorney Gen., v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on rehearing*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015) (Opinion No. 531)).

6. The Commission set for hearing the issue of whether MISO TOs' base ROE is unjust and unreasonable and set the refund effective date at November 12, 2013. The Commission denied the Complaint with respect to the capital structure, finding that Complainants had neither demonstrated that such existing capital structures are not just and reasonable nor cited any precedent for capping, for ratemaking purposes, the level of common equity in such capital structures for individual utilities, much less groups of utilities.<sup>8</sup>

7. The Commission also denied the Complaint with respect to ROE incentive adders. Regarding ITC Transmission's RTO participation adder, the Commission stated that the Commission's decision to grant ITC Transmission an incentive adder for participation in MISO is consistent with the stated purpose of Federal Power Act (FPA) section 219 and is intended to encourage ITC Transmission's continued involvement in MISO. The Commission similarly found that, just as ongoing participation in an RTO justifies provision of the RTO participation incentive, ongoing operation as an independent transmission company justifies continued provision of the independence incentive.

8. On February 12, 2015, in Docket No. EL15-45-000, a different set of complainants filed a second complaint challenging the public utility MISO TOs' base ROE (Second Complaint). By order dated June 18, 2015, the Commission set this matter for hearing and prescribed a refund effective date of February 12, 2015, the day after the expiration of the refund period established by the Hearing Order. That refund period expired May 11, 2016.<sup>9</sup>

9. On December 22, 2015, the Administrative Law Judge in this proceeding issued an initial decision finding that MISO TOs' existing 12.38 percent base ROE is unjust and unreasonable and should be reduced to 10.32 percent. The Administrative Law Judge also prescribed refunds, with interest, for the period from November 12, 2013 through February 11, 2015.<sup>10</sup> In the Initial Decision, the Administrative Law Judge explained that the 10.32 percent base ROE represents the upper midpoint of the zone of reasonableness

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<sup>8</sup> *Id.* P 190.

<sup>9</sup> *Arkansas Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, at P 1 (2015) (Second Complaint Hearing Order).

<sup>10</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 (2015) (Initial Decision).

of 7.23 percent to 11.35 percent.<sup>11</sup> The Commission will address the Initial Decision in a further order.

## **II. Procedural Matters and Responsive Pleadings**

10. Timely requests for rehearing were filed by MISO TOs, Joint Consumer Advocates, Ameren Service Company, on behalf of Ameren Illinois Company, Union Electric Company d/b/a Ameren Missouri, and Ameren Transmission Company of Illinois (the Ameren Companies) and Northern Indiana Public Service Company (collectively, the Ameren Companies and NIPSCO), and the Organization of MISO States. Xcel Energy Services, Inc. (Xcel) and Missouri River Energy Services (Missouri River) filed requests for clarification. Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier) filed an answer to Xcel's request for clarification.

## **III. Substantive Matters**

### **A. Standing**

#### **1. Rehearing Request**

11. MISO TOs argue that the Commission erred by finding that Complainants sufficiently demonstrated standing. To this end, MISO TOs assert, Rule 206 of the Commission's regulations provides that a complainant must "establish standing by specifically setting forth 'the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant.'"<sup>12</sup> According to MISO TOs, Complainants fail to explain how MISO TOs' base ROE "purportedly affects Complainants on any business, economic, or other level" and that any complainant that is not a customer of the respondent "must demonstrate that it is adversely affected by the action it challenges."<sup>13</sup> Here, according to MISO TOs, Complainants make insufficient allegations regarding their relationship to MISO's, or MISO TOs' rates, either individually or collectively. Additionally, MISO TOs argue that the Complaint does not allege that any individual complainant is a MISO transmission customer.<sup>14</sup> MISO TOs

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<sup>11</sup> *Id.* P 110.

<sup>12</sup> MISO TOs Nov. 17, 2014 Request for Rehearing at 11 (citing 18 C.F.R. § 385.206(b)(3) (2015)) (MISO TOs Request).

<sup>13</sup> *Id.* at 12 (citing, *inter alia*, *Cont'l Res., Inc. v. Bridger Pipeline, LLC*, 113 FERC ¶ 61,178, at P 8 (2005)).

<sup>14</sup> *Id.* at 13.

state that the Hearing Order finds that Complainants “either directly pay wholesale transmission rates or pay for transmission through bundled retail rates, such that they are affected by MISO [Transmission Owners’] base ROE, capital structures, and ROE incentive adders.”<sup>15</sup> MISO TOs argue that the Complaint provides no basis for these inferences and that the Commission should therefore have dismissed the Complaint.<sup>16</sup>

## 2. Commission Determination

12. We deny MISO TOs’ rehearing request in this regard. As the Commission noted in the Hearing Order, pursuant to Rule 206(a) of the Commission’s regulations any “person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.”<sup>17</sup> Additionally, Rule 206(b)(3) requires that a complaint “set forth the business, commercial, economic, or other issues presented by the action or inaction as such relate to or affect the complainant.”<sup>18</sup> Complainants include ABATE, Coalition of MISO Transmission Customers, and Illinois Industrial Energy Consumers, all of which are non-transmission owning members of MISO.<sup>19</sup> Each of these organizations represents industrial customers within MISO that either pay wholesale transmission rates or pay for transmission through bundled retail rates, such that they are affected by MISO TOs’ base ROE, capital structures, and ROE incentive adders. For example, ABATE’s membership includes a number of large industrial corporations within Michigan, including Dow Chemical Co., General Motors Company, and U.S. Steel Corporation.<sup>20</sup> A cursory examination of the membership of individual

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<sup>15</sup> *Id.* at 14 (citing Hearing Order, 149 FERC ¶ 61,049 at P 181).

<sup>16</sup> *Id.* at 14.

<sup>17</sup> 18 C.F.R. § 385.206(a) (2015).

<sup>18</sup> 18 C.F.R. § 385.206(b)(3) (2015).

<sup>19</sup> Complaint at 4; Midcontinent Independent System Operator, Inc., Membership List, <https://www.misoenergy.org/StakeholderCenter/Members/Pages/MembershipList.aspx>

<sup>20</sup> Complaint at 4; Association of Businesses Advocating Tariff Equity, Member Companies, <http://abate-energy.org/our-members/>

Complainants would be sufficient to demonstrate that Complainants have standing to bring the Complaint.<sup>21</sup> We therefore deny MISO TOs' rehearing request in this regard.

**B. ROE within Zone of Reasonableness**

**1. Request for Rehearing**

13. MISO TOs contend that the Commission should have denied the Complaint because their existing ROE remains within the zone of reasonableness. They argue that the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has stated that the court "may only set aside a rate that is outside a zone of reasonableness," which, according to MISO TOs, suggests that any point within this zone should withstand an FPA section 206 challenge.<sup>22</sup> MISO TOs further state that the Commission claims "broad discretion to establish returns on equity anywhere within the zone of reasonableness" and that such flexibility "could not exist" unless all points within the zone satisfy the statutory standard.<sup>23</sup> They further state that the Commission recently reaffirmed this point in *Southern California Edison Company*.<sup>24</sup>

14. For this reason, MISO TOs ask the Commission to deny the Complaint and disregard its decision in *Bangor Hydro-Electric Co.*, where the Commission held that an ROE within the zone of reasonableness can still be unjust and unreasonable.<sup>25</sup> MISO TOs ask the Commission to disregard *Bangor Hydro* because no court has ruled on it and

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<sup>21</sup> See *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229, PP 102-107 (2012).

<sup>22</sup> MISO TOs Request at 6-7 (citing *Montana-Dakota Utils. Co. v. Northwestern Public Servs. Co.*, 341 U.S. 246, 251 (1951) (*Montana-Dakota*), *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Circ. 2002) (*PG&E*), and *San Diego Gas and Elec. Co. v. Sellers of Energy and Ancillary Services*, 97 FERC ¶ 61,275, at 62,218 (2001) (*San Diego Elec.*)).

<sup>23</sup> *Id.* at 7 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, at P 67 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007)).

<sup>24</sup> *Id.* at 7 (citing *S. Cal. Edison Co.*, 139 FERC ¶ 61,042, at PP 47, 65 (2012) (*SoCal Edison*)).

<sup>25</sup> *Id.* at 8 (citing *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,038, at PP 10-11 (2008) (*Bangor Hydro*)).

because this decision is inconsistent with prior Commission and court decisions.<sup>26</sup> Furthermore, MISO TOs consider *Bangor Hydro* inapplicable in the FPA section 206 context because the time for setting a rate at a point in the applicable zone of reasonableness is not until and unless the Commission first finds the challenged rate unjust and unreasonable. MISO TOs contend that, in an FPA section 206 context, “the zone of reasonableness is determinative” in finding the rate unjust and unreasonable.<sup>27</sup>

15. MISO TOs concede that Opinion No. 531 conflicts with their position. Still, they take issue with the Commission’s citation of *Southern California Edison Co. v. FERC* to “bolster its decision,” arguing that, reliance on this decision is unpersuasive because “of the very nature of the difference between section 205 and 206.”<sup>28</sup> To support this contention, MISO TOs argue that in an FPA section 206 proceeding, the Commission cannot reach the question of establishing an ROE until the existing ROE is found unjust and unreasonable, which it cannot do if the existing rate remains within the applicable zone of reasonableness.

## **2. Commission Determination**

16. We deny MISO TOs’ request for rehearing with respect to the issue of whether a public utility’s ROE may be found unjust and unreasonable under FPA section 206, even though it remains within the zone of reasonableness produced by a DCF analysis of the proxy group. We continue to find, consistent with *Bangor Hydro* and Opinion No. 531, that an ROE may be both within the DCF zone of reasonableness and be unjust and unreasonable.

17. We disagree with MISO TOs’ assertion that, in determining whether an existing ROE is unjust and unreasonable under FPA section 206, the Commission must treat “all points within the zone of reasonableness” as satisfying the just and reasonable standard. MISO TOs rely on precedent setting forth the general ratemaking principle under the FPA that there can be more than one just and reasonable rate. For example, MISO TOs point out that the Supreme Court has stated that “[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too

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<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 10 (citing *So. Cal. Edison v. FERC*, 717 F.3d 177 (D. C. Cir. 2013) (*SoCal Edison v. FERC*)).

high.”<sup>29</sup> MISO TOs equate references to “an area” of “statutory reasonableness” or to a “zone of reasonableness” in these cases to the “zone of reasonableness” produced by the DCF analysis we use to determine the ROE to include in a public utility’s cost of service. On that basis, MISO TOs contend that the Commission must show that their existing ROE is outside the DCF zone of reasonableness in order to satisfy its FPA section 206 burden to show that their ROE is unjust and unreasonable.

18. However, as explained in Opinion No. 531-B,<sup>30</sup> when the Commission determines the ROE component of a public utility’s cost of service pursuant to a DCF analysis, the term “zone of reasonableness” has a particular, more technical meaning that differs from its meaning when used in general descriptions of what constitutes a just and reasonable rate charged by a public utility for jurisdictional service, such as in *Montana-Dakota, PG&E*,<sup>31</sup> and *San Diego Elec.* The Commission uses a three-step process to determine the just and reasonable ROE component of the cost of service of a public utility or a group of public utilities. First, the Commission establishes a proxy group of companies of comparable risk. Second, the Commission performs a DCF analysis of each member of the proxy group in order to determine a “zone of reasonableness,” within which to set a just and reasonable ROE. That DCF zone of reasonableness is the range from the lowest proxy member ROE to the highest proxy member ROE. Finally, the Commission establishes a just and reasonable ROE at a single point within the DCF zone of reasonableness.

19. Thus, in the context of determining an ROE, the establishment of the DCF zone of reasonableness is simply one step in the process of determining a just and reasonable ROE for inclusion in the cost of service of the subject public utility or utilities. Typically, the DCF zone of reasonableness is relatively broad. For example, in Opinion No. 531, the DCF zone of reasonableness was from 7.03 percent to 11.74 percent, or

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<sup>29</sup> *Montana-Dakota*, 341 U.S. at 251. MISO TOs also cite the D.C. Circuit’s statement in *PG&E*, 306 F.3d at 1116, that a “court may only set aside a rate that is outside a zone of reasonableness, bounded on one end by investor interest and the other by the public interest against excessive rates,” and the Commission’s statement in 97 FERC ¶ 61,275 at 62,218, that “whether prices are just and reasonable depends on whether those prices fall within a ‘zone of reasonableness.’”

<sup>30</sup> 150 FERC ¶ 61,165 at PP 22-25.

<sup>31</sup> *PG&E* is distinguishable on the further ground that the passage cited by MISO TOs relates entirely to the level of deference that the court applies to a rate determination made by the Commission because “of the highly technical and policy-based nature of rate design.” *PG&E*, 306 F.3d at 1116.

nearly 500 basis points. As the Commission held in Opinion No. 531-B, not every ROE within such a relatively broad DCF “zone of reasonableness” is a just and reasonable ROE for the particular public utility or utilities at issue.

20. This conclusion is supported by the decision of the D.C. Circuit in *So. Cal. Edison v. FERC*.<sup>32</sup> In that case, the utility filed to modify its rates under FPA section 205. The court stated that section 205 required the Commission to approve the utility’s rate proposal “as long as the new rates are just and reasonable.”<sup>33</sup> Nevertheless, the court also held that the Commission had authority to require the utility’s ROE to be set at the median of the zone of reasonableness, even though the midpoint of the zone, proposed by the utility, was also within the DCF zone of reasonableness. In short, the court recognized that the Commission need not treat every ROE within the zone of reasonableness as a just and reasonable ROE. If the Commission were required to find any and every ROE within the zone of reasonableness to be just and reasonable, the requirement that the Commission approve any section 205 rate proposal “as long as the new rates are just and reasonable”<sup>34</sup> would require the Commission to accept any ROE proposed by a utility in a section 205 rate case, as long as that ROE did not exceed the top of the range of reasonableness. However, the FPA has never been understood to require such a result, which would be contrary to the consumer protection purpose of the FPA.

21. MISO TOs argue that *SoCal Edison v. FERC* is distinguishable because of the “very nature of the difference between [FPA] section 205 and section 206” and that the Commission cannot reach the question of establishing a just and reasonable ROE under the second prong of FPA section 206 unless and until it finds the existing rate unjust and unreasonable under the first prong of FPA section 206.<sup>35</sup> MISO TOs thus contend that, while the Commission can find that a utility’s proposed ROE is not just and reasonable in a FPA section 205 case, even though it is within the zone of reasonableness, the Commission cannot find that same ROE to be unjust and unreasonable in a FPA section 206 case.

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<sup>32</sup> *So. Cal. Edison v. FERC*, 717 F.3d at 181-82.

<sup>33</sup> *Id.* at 181.

<sup>34</sup> *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007).

<sup>35</sup> MISO TOs Request at 11.

22. In making these arguments, MISO TOs confuse the differences in who bears the burden of persuasion as between FPA sections 205 and 206 with the substantive “just and reasonable” standard contained in both those sections. The two sections of course differ as to who bears the burden of persuasion, because under FPA section 206 the Commission or complainant must show that the utility’s existing rate is unjust and unreasonable and the Commission must show that its replacement rate is just and reasonable, whereas under FPA section 205 the utility need only show that its proposed rate is just and reasonable. However, as the Supreme Court has stated, sections 205 and 206 are “parts of a single statutory scheme under which . . . all rates are subject to being modified by the Commission upon a finding that they are unlawful.”<sup>36</sup> While the party bearing the burden of persuasion is different under FPA section 205 and FPA section 206, “the scope and purpose of the Commission’s review remains the same – to determine whether the rate fixed by the [utility] is lawful.”<sup>37</sup> The effect of MISO TOs’ argument, if that argument were to be accepted, would turn the statute on its head. FPA section 206 would no longer be a tool to challenge an ROE that was no longer reasonable, but rather would serve to insulate that ROE from challenge as long as it fell somewhere—anywhere—within the zone of reasonableness produced by a DCF analysis. Under that reading, a statute that was intended to protect ratepayers from exploitation,<sup>38</sup> would instead protect and preserve just such exploitation.

23. The Commission has long required the use of a DCF methodology to determine a zone of reasonableness, with the lawful just and reasonable ROE set at a single numerical point within that range based on the circumstances and record of that case.<sup>39</sup> Therefore, when the Commission finds a utility’s base ROE to be just and reasonable in a particular case, it finds *only* that single point to be just and reasonable given the facts and circumstances of that case.<sup>40</sup> It does *not* find any other base ROE within the DCF zone of

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<sup>36</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 341 (1956). While this case involved the Natural Gas Act, the Supreme Court held in a companion case that the provisions of the FPA relevant to this question are substantially identical to the equivalent sections under the Natural Gas Act. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

<sup>37</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. at 341.

<sup>38</sup> *See, e.g., Pub. Sys. v. FERC*, 606 F.2d 973 n.27 (D.C. Cir. 1979).

<sup>39</sup> *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 57 (D.C. Cir. 1999).

<sup>40</sup> *Cf. Montana-Dakota*, 341 U.S. at 251 (explaining that while statutory reasonableness is an abstract concept represented by an area rather than a pinpoint the

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reasonableness, let alone *all* other base ROEs either above or below the approved ROE, to be a just and reasonable base ROE for that utility or group of utilities. Thus, the DCF zone of reasonableness does not establish a continuum of just and reasonable base ROEs, any one of which the utility would equally be free to charge to ratepayers; rather, only the single point approved by the Commission within the DCF zone of reasonableness is the just and reasonable base ROE.<sup>41</sup> It follows that showing the existing base ROE established in the prior case is unjust and unreasonable merely requires showing that the Commission's ROE methodology now produces a numerical value below the existing numerical value. Contrary to MISO TOs' assertion, the fact that both of the burdens of proof under FPA section 206 can be satisfied using a single ROE analysis—one that generates an ROE that both is below the existing ROE (thus demonstrating that the existing ROE is excessive) and that also is a just and reasonable ROE (thus demonstrating what numerical point the new ROE should be)—does not alter those two burdens. In short, the statute does not require that the Commission treat all ROEs within the DCF zone of reasonableness as just and reasonable. Rather, the statute requires that, under section 206, before we may change an ROE we must find it unjust and unreasonable.

24. For the reasons discussed above, we further disagree with MISO TOs' assertion that *Bangor Hydro* conflicts with court and Commission precedent. In that decision, the Commission stated that “assuming that every rate within the zone of reasonableness is equally just and reasonable . . . would leave no room for the Commission to exercise its judgment in determining the just and reasonable rate.”<sup>42</sup> The Commission went on to explain that the term, zone of reasonableness, “must be understood as a shorthand way of expressing the concept that ratemaking is not an exact science and that the Commission ‘must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.’”<sup>43</sup> As described above, in Opinion Nos. 531 and 531-B, the

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Commission must translate that concept into a concrete rate, and it is the rate—not the abstract concept—that governs the rights of the buyer and seller).

<sup>41</sup> As discussed below in P 28, the addition of an incentive adder for a project can justify a higher overall just and reasonable ROE (i.e., the base ROE plus the incentive adder) for that project.

<sup>42</sup> *Bangor Hydro*, 122 FERC ¶ 61,038 at P 14 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968)).

<sup>43</sup> *Bangor Hydro*, 122 FERC ¶ 61,038 at P 14 (citing *Permian Basin Area Rate Cases*, 390 U.S. at 797).

Commission reaffirmed and further explained the holdings in *Bangor Hydro* and we do not depart from them here.

25. As MISO TOs state, in the context of incentive ROE adders authorized for projects pursuant to Order No. 679, the Commission has capped the overall ROE for a particular project (i.e., the sum of the utility's base ROE and the incentive ROE adder for that project) at the top of the DCF zone of reasonableness.<sup>44</sup> However, it does not follow from this fact that all ROEs within the DCF zone of reasonableness must be treated as just and reasonable for purposes of the first prong of FPA section 206. The Commission awards an incentive adder based on a separate, independent showing that a particular project is of a type that qualifies for such an adder, and—as directed by Congress—the Commission allows the adder to be added to the base ROE and charged to ratepayers so long as the sum of the adder and base ROE for that project is just and reasonable under FPA section 205.<sup>45</sup> The Commission makes that determination by looking at whether the utility's base ROE plus the incentive ROE adder(s) for that project remain within the zone of reasonableness. That is, the Commission looks to whether the sum of the base ROE and the adder(s) for that project falls within the DCF-determined zone of reasonableness, or does that sum instead fall outside the zone of reasonableness, for that project. This use of the DCF-determined zone of reasonableness to place an outer limit on the overall ROE that a utility may earn on a particular project does not in any way suggest that any base ROE up to the top of the DCF-determined zone of reasonableness must be treated as just and reasonable for purposes of FPA section 206. To the contrary, it is only the separate, independent finding that the project qualifies for an incentive adder that justifies increasing the overall ROE for that project to a point within the DCF-determined zone of reasonableness above the utility's base ROE.

26. Consistent with this discussion, MISO TOs' reliance upon the Commission's 2012 *SoCal Edison* order finding that a utility's overall ROEs, including incentive adders, to be just and reasonable misinterprets the basis of that decision. In that case, after a paper hearing, the Commission determined the base ROE for three of Southern California Edison Company's transmission projects. To do so, the Commission applied a DCF

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<sup>44</sup> See, e.g., *Northeast Utils. Serv. Co.*, 124 FERC ¶ 61,044, at P 71 (2008); *Central Maine Power Co.*, 125 FERC ¶ 61,079, at P 74 (2008); *Desert Southwest Power, LLC*, 135 FERC ¶ 61,143, at P 96 (2011). The Commission uses the DCF zone of reasonableness in the same manner to ensure that the sum of a utility's base ROE plus an incentive adder for joining an RTO is just and reasonable.

<sup>45</sup> See 16 U.S.C. § 824s(d) (2012) (“All rates approved under the rules adopted pursuant to [FPA section 219] . . . are subject to the requirements of sections [205 and 206] of this title that all rates . . . be just and reasonable.”).

analysis to a national proxy group of companies with comparable risks, determined an ROE zone of reasonableness, and then established the base ROE at the median point within that zone. Then, the Commission updated the base ROE by adjusting for the change in average yields on ten-year Treasury bonds. Finally, the Commission added previously approved incentive adders for the projects and, only at that point, concluded that, “pursuant to Order No. 679,” the ROEs determined for the transmission projects were consistent with FPA section 205 because the “overall ROEs are set within the zone of reasonableness.”<sup>46</sup>

27. MISO TOs’ analysis misapprehends this decision in several respects. First, a base ROE, such as the one discussed in *SoCal Edison* and the base ROE at issue here, does not include incentive ROE adders. Second, in *SoCal Edison*, the Commission only reached the question regarding the upper bound of the zone of reasonableness after calculating the base ROE. At that point, because the projects at issue qualified for ROE incentive adders, the Commission followed the policy laid out in Order No. 679. In that rulemaking, which implemented the congressional directives regarding transmission incentives laid out in FPA section 219, the Commission stated that it “will provide ROEs at the upper end of the zone of reasonableness for transmission investments that meet the requirements of [FPA] section 219.”<sup>47</sup> It was only the separate, independent finding that the projects qualified for an incentive adder that justified increasing the utility’s overall ROE to a point within the DCF-determined zone of reasonableness above the utility’s base ROE. Thus, MISO TOs’ reliance on *SoCal Edison* is misplaced because that decision does not stand for the principle that any ROE that falls within the zone of reasonableness must be just and reasonable.

28. In any event, the Complainants provided evidence, in the form of a DCF study that produced a zone of reasonableness of 7.97 percent to 10.33 percent,<sup>48</sup> that the existing 12.38 percent ROE received by MISO TOs falls *outside* of the zone of reasonableness. The Commission found such evidence substantive enough to merit examination through hearing and settlement procedures.

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<sup>46</sup> *SoCal. Edison*, 139 FERC ¶ 61,042 at P 47.

<sup>47</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 93, *order on reh’g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007) (Order No. 679).

<sup>48</sup> Complaint at 16.

### C. Capital Structure

29. In the Hearing Order, the Commission denied the Complaint with respect to certain MISO TOs' use in ratemaking of actual or Commission-approved hypothetical capital structures that include more than 50 percent common equity. The Commission stated that, in approving the capital structure to be used for ratemaking purposes, the Commission uses an operating company's actual capital structure if the operating company: (1) issues its own debt without guarantees; (2) has its own bond rating; and (3) has a capital structure within the range of capital structures approved by the Commission.<sup>49</sup> If the operating company meets these requirements, then the Commission will find that the operating company has demonstrated a separation of financial risks between the operating and parent company.

30. The Commission found that the Complainants had not demonstrated that MISO TOs, individually or collectively, do not meet the requirements of this three-part test. The Commission stated that it had never capped the capital structures used for ratemaking at a particular numerical value, either for individual transmission owners or for groups of transmission owners. The Commission also found that the 50 percent cap requested by Complainants appeared both arbitrary and unduly restrictive and ignored the numerous capital structures, including those of the ITC Subsidiaries, with more than 50 percent common equity that the Commission has approved.<sup>50</sup>

31. Finally, the Commission stated that, to the extent that parties contend that some of MISO TOs' capital structures cause unjust and unreasonable costs to ratepayers because they compound what they argue is an unjust and unreasonable base ROE for MISO TOs, then such concerns are best addressed with respect to that ROE, which the Commission was setting for hearing.

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<sup>49</sup> Hearing Order, 149 FERC ¶ 61,049 at P 190 (citing *ITC Holdings Corp. v. Interstate Power and Light*, 121 FERC ¶ 61,229, at P 49 (2007), and *Transcon. Gas Pipe Line Corp.*, Opinion No. 414, 80 FERC ¶ 61,157 (1997) (*Transcon. I*), *granting reh'g in part*, Opinion No. 414-A, 84 FERC ¶ 61,084, at 61,413-61,415 (*Transcon. II*), *reh'g denied*, Opinion No. 414-B, 85 FERC ¶ 61,323 (1998), *petition for review denied*, *N.C. Utils. Comm'n v. FERC*, 203 F.3d 53 (D.C. Cir. 2000) (*per curiam*)).

<sup>50</sup> *Id.* P 195 (citing *ITC Holdings Corp.*, 143 FERC ¶ 61,257, at P 78 (2013); *Mo. Pub. Serv. Co. v. FERC*, 215 F.3d 1, at 4 (2000); *DATC Midwest Holdings, LLC*, 139 FERC ¶ 61,224, at P 76 (2012) (55 percent), *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,121, at P 51 (2012) (56 percent); *WPPI Energy*, 141 FERC ¶ 61,004, at P 32 (2012)).

## 1. Rehearing Requests

32. Joint Consumer Advocates assert that the Commission's three-part capital structure test fails to consider current circumstances and appropriately balance consumer interests. Specifically, they state that the Commission cannot confine its inquiries to the computation of costs of service or to conjectures about the capital market. For this reason, they argue that, just as ROEs must meet the just and reasonable standard, so too must the capital structures used in setting regulated rates.<sup>51</sup> They reason that, because the weighted cost of capital directly affects the return provided in rates, the Commission should consider the ROE and the ratemaking capital structure together.<sup>52</sup> The Organization of MISO States also argues that it is important that equity ratios and the cost of capital in rates be evaluated together to ensure a reasonable outcome.<sup>53</sup>

33. Joint Consumer Advocates further state that MISO TOs have below average risk and that the Commission erred by not considering whether this lower risk business profile warrants a lower maximum common equity component for MISO TOs' regulated capital structure.<sup>54</sup> They state that the Commission-regulated ITC Subsidiaries, for example, could be capitalized with much lower and less expensive common equity ratios and still maintain investment grade ratings.<sup>55</sup>

34. Joint Consumer Advocates assert that MISO TOs have ratemaking capital structures with "significantly more common equity than the companies that comprise the integrated electric utility industry."<sup>56</sup> Joint Consumer Advocates thus reason that MISO TOs' capital structures are excessively weighted with common equity and that "an appropriate capital structure" must consider the firm's business risks and the current cost of debt and equity.<sup>57</sup> Based upon these assertions, Joint Consumer Advocates state that,

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<sup>51</sup> Joint Consumer Advocates Nov. 17, 2014 Request for Rehearing at 6 (Joint Consumer Advocates Request).

<sup>52</sup> *Id.* at 7; Organization of MISO States Nov. 17, 2014 Request for Rehearing at 3-4 (Organization of MISO States Request).

<sup>53</sup> Organization of MISO States Request at 4.

<sup>54</sup> Joint Consumer Advocates Request at 7.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Id.* at 9.

in light of financial market changes and MISO TOs' relatively low business risk, the Commission should set for hearing MISO TOs' appropriate capital structure or adopt a 50 percent maximum common equity.<sup>58</sup>

35. Joint Consumer Advocates further contend that the Commission should reconsider its rejection of Complainants' recommended maximum common equity ratio for setting capital structure.<sup>59</sup> In support, they argue that allowing a low risk transmission owner to be capitalized with a common equity ratio substantially higher than that utilized by integrated utilities violates the principle of return commensurate with comparable risk opportunity established in *Federal Power Comm'n v. Hope Natural Gas Co.*<sup>60</sup> Additionally, Joint Consumer Advocates state that, currently, a 50 percent maximum capital equity ratio is conservative compared to vertically integrated capital structures under current market conditions. Further, they argue that a rate of return that exceeds the cost of capital is an "unreasonable transfer of wealth from ratepayers to stockholders."<sup>61</sup> The Organization of MISO States similarly argues that Complainants presented evidence that suggests that higher-than-average equity ratios result in higher costs to customers without evidence of offsetting benefits.<sup>62</sup>

## 2. Commission Determination

36. We deny Joint Consumer Advocates' and the Organization of MISO States' requests for rehearing. Despite the arguments raised here, neither Joint Consumer Advocates nor the Organization of MISO States has demonstrated that MISO TOs, individually or collectively, fail to meet the Commission's longstanding three-part test for using an operating company's actual capital structure for ratemaking purposes. Rather, they contend that the Commission should modify its existing policy of deciding capital structure issues on a case-by-case basis and instead impose an across-the-board prohibition on public utilities' use of capital structures with equity ratios in excess of 50 percent. The arguments that they raise on rehearing in support of this policy change rely on the same evidence presented in the Complaint and in their comments, and neither

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<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 11 (citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*)).

<sup>61</sup> *Id.* at 11.

<sup>62</sup> Organization of MISO States Request at 4.

Joint Consumer Advocates nor the Organization of MISO States has presented substantive evidence that would suggest that the Commission should wholly reevaluate its current policy for examining capital structures.

37. As the Commission noted in the Hearing Order, the Commission has not capped the capital structures used for ratemaking at a particular numerical value and “has never dictated a utility’s capital structure based on how much common equity it *needs* to attract capital and maintain good credit ratings.”<sup>63</sup> In Opinion No. 414, the Commission announced a revised capital structure policy for natural gas pipelines under which it would only use a natural gas pipeline’s actual capital structure if its equity ratio fell within the range of equity ratios of the proxy group used in the DCF analysis.<sup>64</sup> However, in Opinion No. 414-A, the Commission granted rehearing, finding that such an absolute limit on the equity component of a pipeline’s capital structure “would limit the Commission in its consideration of all the relevant factors in a particular case and would constrain the Commission in balancing its consumer protection obligation with its obligation to ensure that a pipeline had a reasonable opportunity to attract capital and earn a fair return on its investment.”<sup>65</sup> We continue to find that the issue of a reasonable capital structure for ratemaking purposes should be addressed on a case-by-case basis, taking into account all the relevant factors concerning the particular public utility at issue, rather than imposing an arbitrary across-the-board cap on the equity ratios of public utilities. To the extent Joint Consumer Advocates or the Organization of MISO States believe that the capital structure reflected in the formula rate of a particular MISO TO is unjust and unreasonable, they may file a complaint against that transmission owner’s formula rate and explain why the relevant factors concerning that particular utility do not justify its equity ratio.

38. Furthermore, we again find no support for the argument that certain MISO TOs have higher amounts of equity than is necessary to maintain good credit ratings and attract capital. The Commission has previously found that capital structures comprised of more than 50 percent common equity yield may reasonably “contribute to achieving and maintaining credit ratings and accessing capital markets.”<sup>66</sup> As the Commission stated in the Hearing Order, a utility may consider a range of factors beyond simple capital cost

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<sup>63</sup> Hearing Order, 149 FERC ¶ 61,049 at P 193 (emphasis in original).

<sup>64</sup> Opinion No. 414, 80 FERC at 61,664-61,667.

<sup>65</sup> Opinion No. 414-A, 84 FERC at 61,414.

<sup>66</sup> *ITC Holdings Corp.*, 143 FERC ¶ 61,257 at P 78 (finding ITC Midwest’s 60 percent target equity ratio just and reasonable).

minimization in developing their capital structures. Such considerations include, but are not limited to, managing risk and cash flow. Except in unusual circumstances not shown here, we are reluctant to substitute our judgement for that of the public utility's management concerning the appropriate capital structure for its circumstances.

39. With respect to Joint Consumer Advocates' argument that MISO TOs are subject to lower risk than typical utilities and thus should have lower common equity percentages, Joint Consumer Advocates have not provided evidence of lower risk, and as noted earlier, the amount of risk faced relates to the base ROE determination, where the capital structure is based on the actual amounts of debt and equity employed by the utility. While Joint Consumer Advocates are correct that the weighted cost of capital directly affects the rates paid by customers, they have provided no evidence to suggest that the Commission's current policies with regard to capital structure result in unjust and unreasonable rates. Further, the Commission evaluates the justness and reasonableness of the ROE, while the rate of return is the mathematical result of the product of the ROE and the capital structure. Accordingly, we find that Joint Consumer Advocates failed to raise any factual issue concerning the consistency of MISO TOs' capital structures with current policy that would justify setting the issue for hearing.

#### **D. Incentives**

##### **1. Rehearing Request**

40. The Organization of MISO States also requests rehearing with regard to the Commission's continued use of incentive transmission adders for operation as an independent transmission company and RTO participation. With regard to the RTO participation adder, the Organization of MISO States argues that only one transmission owner has received this adder after more than a decade of MISO's existence, and that this fact suggests that MISO TOs do not require an incentive to be RTO members.<sup>67</sup> With regard to the independence adder, the Organization of MISO States claims that significant transmission investment in MISO by companies not deemed independent suggests that there is no need for this adder to encourage infrastructure investment.<sup>68</sup> Furthermore, the Organization of MISO States maintains that the Commission failed to address its suggestion that adders may misallocate capital from (or raise cost of capital for) other public service utility obligations. Finally, because the Commission "rejected the evidence" it provided, the Organization of MISO States asks the Commission to

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<sup>67</sup> Organization of MISO States Request at 5.

<sup>68</sup> *Id.* at 6.

explain what type of evidence would be persuasive and what circumstances indicate that an incentive adder has outlived its purpose.<sup>69</sup>

## 2. Commission Determination

41. We deny the Organization of MISO States' request for rehearing with regard to independence and RTO participation incentive adders. As the Commission noted in the Hearing Order, the Commission issued Order No. 679 providing for these incentive adders in response to the congressional directives of FPA section 219. The Organization of MISO States argues that few transmission owners have taken advantage of these incentives, but individual transmission owners' decisions about whether to pursue incentive adders do not impact or negate their eligibility to do so. Nevertheless, we find that the Organization of MISO States has failed to substantiate its claims that these incentives are no longer necessary and that they do not benefit those customers that pay them. We also confirm the findings in the Hearing Order that entities that join and remain members of an RTO are eligible to receive RTO participation incentive. Additionally, we reiterate that ongoing operation as an independent transmission company justifies continued provision of the independence incentive. While the Commission, in the Hearing Order, noted that "nothing in the Commission's transmission incentive policy requires periodic reexamination of whether incentives are necessary," the Commission has, when appropriate, taken steps to provide clarity and guidance on its transmission incentives policy.<sup>70</sup>

42. With respect to the Organization of MISO States' observation that only one MISO transmission owner receives the RTO participation adder, we note that the Commission has accepted a request for this adder by the MISO TOs, subject to it being applied to a base ROE that has been shown to be just and reasonable based on an updated discounted cash-flow analysis and subject to the resulting ROE being within the zone of reasonableness determined by the updated DCF analysis, which will be determined in the Complaint proceeding.<sup>71</sup> In this regard, ITC is no longer atypical.

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<sup>69</sup> *Id.*

<sup>70</sup> Hearing Order, 149 FERC ¶ 61,049 at P 204; *see Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012).

<sup>71</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,004 (2015).

## **E. Non-Public Utility Transmission Owners**

### **1. Requests for Clarification**

43. The Complaint in this proceeding only challenged the base ROE of the jurisdictional MISO TOs. In the Hearing Order, the Commission did not address the issue of whether and how the base ROEs of non-jurisdictional MISO transmission owners might be affected by the outcome of the hearing, generally on the “base ROE element of this Complaint” as established by ordering paragraph (A) of the Hearing Order.

44. No party requested rehearing of the Hearing Order’s silence with respect to the issue of the non-jurisdictional MISO TOs’ base ROE. However, Xcel filed a request for clarification that the intent of ordering paragraph (A) is that non-jurisdictional transmission owners’ use of the existing 12.38 percent base ROE will be subject to the outcome of the proceedings in this case. Xcel states that non-jurisdictional transmission owners only use the 12.38 percent base ROE because the jurisdictional transmission owners use the same ROE. It therefore reasons that, if the 12.38 percent base ROE is unjust and unreasonable for the jurisdictional transmission owners, the Commission must reach the same conclusion for non-jurisdictional transmission owners. Thus, if the Commission establishes an ROE lower than 12.38 percent, Xcel asks the Commission to clarify that ordering paragraph (A) of the Hearing Order “will require that non-jurisdictional MISO [transmission owners] amend their Attachment Os to incorporate the base ROE determined to be just and reasonable according to the same compliance timeline as the jurisdictional [transmission owners].”<sup>72</sup> Xcel further states that if non-jurisdictional transmission owners are not subject to the outcome of the Hearing Order, the result could make a separate FPA section 206 proceeding necessary, which, it argues, would be a “waste of Commission resources.”<sup>73</sup>

45. Missouri River argues that Xcel’s request is outside the scope of issues raised in the docket because the complaint was limited to named respondent transmission owners, all of whom are public utilities. Missouri River further states that, while the Commission can require the non-jurisdictional transmission owners to prospectively change their rates, the Commission’s authority does not extend to seeking refunds from non-jurisdictional utilities.<sup>74</sup> For this reason, should the proceeding result in a reduced ROE for public utility MISO transmission owners, Missouri River argues that any such adjustment would

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<sup>72</sup> Xcel Nov. 17, 2014 Request for Clarification at 5-6.

<sup>73</sup> *Id.* at 6.

<sup>74</sup> Missouri River Request Nov. 26, 2015 Request for Clarification at 5.

only apply to non-public utility MISO transmission owners on a forward looking basis “from the date of a decision, ‘flowed through’ via a change in MISO’s formula rate for all MISO [transmission owners].”<sup>75</sup> Missouri River further requests that the Commission specify clearly that, should the hearing result in refund obligations, non-jurisdictional transmission owners will be exempt from any such obligation. Finally, Missouri River requests that the Commission clarify that this proceeding will not generate obligations for non-public utility MISO transmission owners unless and until a final order is issued requiring all MISO transmission owners to incorporate an altered ROE into their formula rates on a prospective basis.

46. Hoosier contends that the reasonableness of the ROEs of the non-jurisdictional transmission owners is not at issue in this proceeding, and therefore the Commission should deny Xcel’s request for clarification. Hoosier argues that, if Xcel believes the rates charged by MISO have become unjust and unreasonable because of the ROEs of non-jurisdictional transmission owners embedded in those rates, then Xcel’s remedy is to file a complaint against MISO. Hoosier also argues that, while the rates charged by an RTO must be just and reasonable, the components of a non-jurisdictional transmission owner’s rates need not be identical to those of investor-owned transmission owners.<sup>76</sup>

## 2. Commission Determination

47. We grant Xcel’s request for clarification. As the Commission has previously noted, non-public utility transmission owners are subject to the outcome of this proceeding.<sup>77</sup> Moreover, after filing its answer to Xcel’s request for clarification in this proceeding, Hoosier agreed to revise its ROE consistent with the outcome of this proceeding in connection with the approval of its RTO Adder.<sup>78</sup> Therefore, if, upon review of the Initial Decision and record of the hearing in this proceeding, should the Commission find that the existing base ROE is unjust and unreasonable and requires MISO TOs to amend their Attachment Os accordingly, the Commission will also require those non-public utility transmission owners that incorporate the existing base ROE in

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<sup>75</sup> *Id.* at 5.

<sup>76</sup> Hoosier Dec. 3, 2014 Answer at 2-3.

<sup>77</sup> See *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,282, at P 60 (2014) (finding that a non-public utility transmission owner should be subject to the outcome of the Complaint proceeding).

<sup>78</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,104, at PP 7, 27 (2015).

their rates to amend their Attachment Os to incorporate the just and reasonable base ROE on a prospective basis. Non-public utility transmission owners would have to comply by the same deadline established for the public utility transmission owners.

48. However, we note that the Commission does not “have refund authority over . . . governmental entities and non-public utilities.”<sup>79</sup> Thus, the MISO non-public utility transmission owners will only be subject to any refund obligations imposed in this proceeding to the extent they have voluntarily committed to make such refunds in prior FPA section 205 proceedings relating to the inclusion of the transmission revenue requirement in MISO’s jurisdictional rates.<sup>80</sup>

49. We note that in a contemporaneous order we are instituting a proceeding under FPA section 206 to examine the MISO Tariff.<sup>81</sup> The Commission identified concerns regarding lack of ROE-specific refund commitment by all non-public utilities receiving Commission-jurisdictional rates and lack of refund commitment for the full range of situations in which they may receive revenues associated with service provided due to their status as transmission-owning RTO members. The Commission found that such concerns might be addressed by revising the MISO Tariff to require a prospective refund commitment from non-public utility transmission owners for all manner of refunds that may be ordered in FPA section 205 and 206 proceedings related to revenues that they may receive associated with service provided due to their status as transmission-owning RTO members. Under such a tariff provision, if a non-public utility transmission owner chooses not to make such a refund commitment, then MISO would remove its transmission revenue requirement(s) from the MISO Tariff as of a prospective date to be determined by the Commission. Under the refund commitment, non-public utility transmission owners would be subject to the same refund obligations as public utility transmission owners on all matters involving the justness and reasonableness of revenues that they may receive associated with service provided due to their status as transmission-owning RTO members based on RTO rates, including, but not limited to, refunds (1) to

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<sup>79</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005); *see also Transmission Agency of N. Cal.*, 495 F.3d 663, 673 (D.C. Cir. 2007).

<sup>80</sup> *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,053, at P 11 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,240, at P 16 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,166, at P 12 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,137, at P 13 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,104 at P 27.

<sup>81</sup> *Arkansas Electric Cooperative Corp. v. ALLETE, Inc.*, 156 FERC ¶ 61,061 (2016).

correct any errors in the application of their formula rates, (2) to remedy any other elements of, or costs passed through, their formula rates that are found to be unjust and unreasonable, or (3) to remedy any rules governing allocation of MISO Tariff revenues among transmission owners that are found to be unjust and unreasonable. As a result, the refund commitment would not be limited to the ROE component of their transmission revenue requirement(s). Additionally, MISO would revise the MISO Tariff such that any new non-public utility transmission owners must also commit to providing refunds consistent with the terms of this commitment, before they may recover their transmission revenue requirement(s) through MISO Tariff rates. However, as explained in that order, the Commission is not proposing to require non-public utility transmission owners to agree to any additional retroactive refund requirement beyond those they have already agreed to in FPA section 205 proceedings concerning the inclusion of their revenue requirements in MISO's jurisdictional rates.

## **F. Other Rehearing Issues**

### **1. Rehearing Request**

50. The Ameren Companies and NIPSCO argue that, unless the Commission clarifies that the issues they raised on the Complaint can be pursued at hearing, it failed to consider the end result before finding that Complainants had established a *prima facie* case that a hearing was warranted.<sup>82</sup> Additionally, the Ameren Companies and NIPSCO state that, unless the Commission clarifies that its Hearing Order was interlocutory, it erred in ignoring arguments and evidence on issues that should have been considered, including benefits accruing to customers at the existing rate level. Finally, they argue that the Commission erred by refusing to address or set for hearing requests that the Commission clarify that the RTO participation adder should not be limited by a DCF range of equity returns.<sup>83</sup>

### **2. Commission Determination**

51. We deny the Ameren Companies and NIPSCO's request for rehearing. We note that, in the Hearing Order, the Commission simply determined that there were material

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<sup>82</sup> The Ameren Companies and NIPSCO Nov. 17, 2014 Request for Rehearing at 9 (Ameren/NIPSCO Request). Ameren Companies and NIPSCO had requested that the Commission clarify that any new DCF range established in this proceeding will not cap the availability of the full RTO participation adder. Hearing Order, 149 FERC ¶ 61,049 at P 171.

<sup>83</sup> Ameren/NIPSCO Request at 9-10.

facts at issue that warranted the establishment of hearing procedures. With regard to the existing base ROE, we note that the Ameren Companies and NIPSCO and the other MISO TOs involved in this proceeding had a full opportunity to support their positions at hearing.

52. Additionally, we deny the Ameren Companies and NIPSCO's request for clarification that the RTO participation adder should not be limited by a DCF range of equity returns.<sup>84</sup> In Order No. 679, in response to similar arguments that incentive adders "need not be cost-based and therefore can justifiably be above the upper-end of the zone of reasonableness," the Commission determined that "a return within the zone will be adequate to attract new investment and consistent with the intent of Congress in section 219."<sup>85</sup> The Ameren Companies and NIPSCO have offered no evidence to convince us to depart from this policy here. The Commission has held that it will only accept ROE incentives if the total resulting ROE is within the zone of reasonableness.<sup>86</sup> The Commission reaffirmed that policy in Opinion No. 531-B.<sup>87</sup>

The Commission orders:

- (A) The requests for rehearing of the Hearing Order are denied, as discussed in the body of this order.
- (B) The requests for clarification of the Hearing Order are granted in part, and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>84</sup> See also Hearing Order, 149 FERC ¶ 61,049 at PP 171,173; Ameren/NIPSCO Request at 21-23.

<sup>85</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 93.

<sup>86</sup> *ITC Holdings Corp.* 121 FERC ¶ 61,229.

<sup>87</sup> 150 FERC ¶ 61,165 at PP 139-146.