173 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Association of Businesses Advocating Tariff Equity Docket No. EL14-12-015
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

Arkansas Electric Cooperative Corporation Docket No. EL15-45-014
Mississippi Delta Energy Agency
Clarksdale Public Utilities Commission
Public Service Commission of Yazoo City
Hoosier Energy Rural Electric Cooperative, Inc.

v.

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

OPINION NO. 569-B

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING, AND SETTING ASIDE PRIOR ORDER, IN PART

(Issued November 19, 2020)

1. On November 21, 2019, the Commission issued Opinion No. 569.[1] In that order, the Commission acted on the then-pending requests for rehearing of Opinion No. 551,[2] an Initial Decision,[3] as well as the Order Directing Briefs,[4] in the above-captioned proceedings. In brief, Opinion No. 569 applied a revised methodology for analyzing the base return on equity (ROE) component of public utility rates under section 206 of the Federal Power Act (FPA)[5] that used the discounted cash flow (DCF) model and capital-asset pricing model (CAPM), instead of only the DCF model, and established ranges of presumptively just and reasonable ROEs based on the quartiles of the zone of reasonableness centered on the central tendency of the overall composite zone of reasonableness, and the central tendencies of the lower and upper halves of the zone of reasonableness.

2. On May 21, 2020, in Opinion No. 569-A,[6] the Commission modified and set aside, in part, Opinion No. 569 to use the risk premium (Risk Premium) model under both prongs of the analysis of a challenged base ROE under section 206 of the FPA, to give the short-term growth rate 80% weighting and the long-term growth rate 20% weighting in the two-step DCF model, to modify the high-end outlier test to treat any proxy company as a high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median result of all of the potential proxy group members in that model[7] before any high or low-end outlier test is applied, subject to a

---

[1] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019).

[2] *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016) (affirming *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 2015 (Initial Decision (I)).

[3] *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 (2016) (Initial Decision (II)).

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

[5] 16 U.S.C. § 824e.

[6] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020).

[7] As noted below, the high-end outlier test only applies to the DCF model and CAPM because they utilize results of the relevant analysis applied to a proxy group, while the Risk Premium model is derived from actual ROEs.

"natural break" analysis, to consider the use of *Value Line* short-term earnings growth estimates in the CAPM in future proceedings, and to calculate the ranges of presumptively just and reasonable base ROEs by dividing the overall composite zone of reasonableness into thirds. The Commission determined that the resulting base ROE for the November 12, 2013 section 206 complaint, filed in Docket No. EL14-12-000, (First Complaint) was 10.02%, dismissed the second section 206 complaint, filed in Docket No. EL15-45-000, (Second Complaint) and found that no refunds should be issued as a result of that complaint.

3. Certain parties request rehearing of Opinion No. 569-A.[8] Pursuant to *Allegheny Defense Project v. FERC*,[9] the rehearing requests filed in these proceedings may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,[10] we are modifying the discussion in Opinion No. 569-A and setting aside the order, in part, as discussed below.[11] Specifically, as discussed below, with the exception of correcting certain inputs to the Risk Premium model, we continue to reach the same result that the Commission reached in Opinion No. 569-A.

I. <u>Background</u>

A. <u>Opinion No. 531, *et seq.*</u>

4. In Opinion No. 531, the Commission adopted certain changes to its use of the DCF methodology for evaluating and setting the Commission-allowed ROE for the New England transmission owners (New England TOs). In particular, the Commission elected to replace the "one-step" DCF model, which considers only short-term growth projections for a public utility, with a "two-step" model that considers both short- and long-term growth projections.[12] The Commission also departed from its typical practice

---

[8] *See infra* P 25.

[9] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[10] 16 U.S.C. § 825*l*(a) ("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.").

[11] *Allegheny Def. Project*, 964 F.3d at 16-17.

[12] *See generally Coakley Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at PP 8, 32-41, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC

of setting the just and reasonable ROE of a group of utilities at the midpoint of the zone of reasonableness. The Commission explained that evidence of "anomalous" capital market conditions, including "bond yields [that were] at historic lows," made the Commission "less confiden[t] that the midpoint of the zone of reasonableness . . . accurately reflects the [ROE] necessary to meet the *Hope* and *Bluefield* capital attraction standards."[13] The Commission therefore looked to four alternative benchmark models: three financial models—the Risk Premium model, CAPM, and expected earnings (Expected Earnings) model[14]—as well as a comparison with the ROEs approved by state public utility commissions.[15] In considering those models, the Commission emphasized that it was not departing from its long-standing reliance on the DCF model, but rather relying on those models only to "inform the just and reasonable placement of the ROE within the zone of reasonableness established . . . by the DCF methodology."[16] Based on these alternative models, the Commission determined that an ROE of 10.57%, the midpoint of the upper half of the zone of reasonableness produced by the two-step DCF model, would be just and reasonable. Because that figure differed from New England TOs' existing 11.14% ROE, the Commission concluded that the existing base ROE had become unjust and unreasonable and it therefore set New England TOs' base ROE at 10.57%, pending a paper hearing concerning the long-term growth projection to use in the DCF analysis. Following that hearing, in Opinion No. 531-A the Commission sustained its conclusion that New England TOs' existing ROE was unjust and

---

¶ 61,165 (2015), *rev'd, Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (*Emera Maine*).

[13] Opinion No. 531, 147 FERC ¶ 61,234 at PP 144-145 & n.285. *Hope* and *Bluefield* refer to a pair of U.S. Supreme Court cases that require the Commission "to set a rate of return commensurate with other enterprises of comparable risk and sufficient to assure that enough capital is attracted to the utility to enable it to meet the public's needs." *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967 (D.C. Cir. 1984) (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*) and *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W.V.*, 262 U.S. 679 (1923) (*Bluefield*)).

[14] As discussed further below, the Risk Premium model estimates cost of equity using the implied premium that provided over Baa-rated utility bonds by regulatory decisions and settlements. The CAPM derives the ROE through the risk premium observed from the risk premium of a DCF analysis of S&P 500 dividend-paying companies. The Expected Earnings model is a method of calculating the earnings that an investor expects to receive on the book value of a particular stock.

[15] Opinion No. 531, 147 FERC ¶ 61,234 at PP 147-49.

[16] *Id.* P 146.

unreasonable and that 10.57% was the just and reasonable ROE. The Commission required New England TOs to submit a compliance filing to implement their new ROEs effective October 16, 2014—the date of issuance of Opinion No. 531-A.

B. Opinion No. 551, *et seq.*

5. On November 12, 2013, multiple complainants[17] filed the First Complaint pursuant to section 206 of the FPA, alleging, among other things, that the Midcontinent Independent System Operator, Inc.'s (MISO) transmission-owning members' (MISO TOs) base ROE reflected in MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff was unjust and unreasonable.[18] At the time of the First Complaint, MISO TOs had a base ROE of 12.38% (except for the ATCLLC zone which had a 12.20% ROE),[19] and their total ROE (i.e., the base ROE plus any ROE adders

[17] The complainants consist of a group of large industrial customers: Association of Businesses Advocating Tariff Equity (ABATE); Coalition of MISO Transmission Customers (Coalition of MISO Customers); Illinois Industrial Energy Consumers (IIEC); Indiana Industrial Energy Consumers, Inc. (INDIEC); Minnesota Large Industrial Group (MLIG); and Wisconsin Industrial Energy Group.

[18] The following MISO transmission owners were named in the First Complaint: ALLETE, Inc. for its operating division Minnesota Power (and its subsidiary Superior Water, L&P); Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company, and Ameren Transmission Company of Illinois; American Transmission Company LLC (ATC); Cleco Power LLC; Duke Energy Corporation for Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Gulf States Louisiana, L.L.C.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; METC; MidAmerican Energy Company; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Indiana Gas & Electric Company; and Wolverine Power Supply Cooperative, Inc. Intervenor Xcel Energy Services Inc. did not join certain of the MISO TOs' pleadings in this proceeding, but generally supported the brief on behalf of respondents Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation.

[19] For ease of reference, we refer to the MISO TOs' base ROE at the time of the First Complaint as 12.38% in this order, without separately identifying that the ATCLLC zone had a 12.20% ROE. Our discussion and decisions with respect to the MISO TOs' 12.38% ROE also apply to the 12.20% ATCLLC ROE.

approved by the Commission) was not permitted to exceed 15.96%. The Commission established MISO TOs' preexisting 12.38% ROE in a 2002 decision.[20] That ROE was based on a DCF analysis using financial data for the six-month period ending February 2002.[21] On October 16, 2014, the same date that the Commission issued Opinion No. 531-A, it set the First Complaint for hearing before an Administrative Law Judge and established a refund effective date of November 12, 2013.[22]

6. Following the hearing, the Presiding Judge issued an Initial Decision,[23] and the Commission subsequently issued Opinion No. 551.[24] In Opinion No. 551, the Commission calculated the just and reasonable ROE using the two-step DCF methodology from Opinion No. 531 and financial data for the period January 1 through June 30, 2015. The Commission affirmed the conclusions of Initial Decision (I), finding that the Presiding Judge correctly applied the two-step DCF analysis required by Opinion No. 531.[25] The Commission also affirmed the Presiding Judge's determination that, as in Opinion No. 531, there were anomalous capital market conditions such that the Commission had less confidence that the midpoint of the zone of reasonableness produced by a mechanical application of the DCF methodology satisfied the capital

[20] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 99 FERC ¶ 63,011, *initial decision affirmed as to base ROE*, 100 FERC ¶ 61,292 (2002), *reh'g denied*, 102 FERC ¶ 61,143 (2003), *order on remand*, 106 FERC ¶ 61,302 (2004). The ATCLLC zone base ROE of 12.20% was established as part of a settlement agreement that was filed with the Commission on March 26, 2004. In Docket No. ER04-108-000, the Commission approved the uncontested settlement. *Am. Transmission Co. LLC*, 107 FERC ¶ 61,117 (2004).

[21] *Midwest Indep. Transmission Sys. Operator, Inc.*, 99 FERC ¶ 63,011 at App. A.

[22] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 188 (2014) (First Complaint Hearing Order), *order on reh'g*, 156 FERC ¶ 61,060 (2016) (First Complaint Rehearing Order). In the First Complaint Rehearing Order, the Commission denied requests for rehearing and clarification of the First Complaint Hearing Order and clarified that non-public utility transmission owners are subject to the outcome of that proceeding. First Complaint Rehearing Order, 156 FERC ¶ 61,060 at PP 47-48.

[23] Initial Decision (I), 153 FERC ¶ 63,027 (2015).

[24] Opinion No. 551, 156 FERC ¶ 61,234.

[25] *See generally* Opinion No. 551, 156 FERC ¶ 61,234 at P 9.

attraction standards of *Hope* and *Bluefield*.[26] The Commission found that the Presiding Judge reasonably considered evidence of alternative methodologies for determining the ROE and the ROEs approved by state regulatory commissions, for purposes of deciding to set the ROE at the central tendency of the upper half of the zone of reasonableness, setting the base ROE for MISO TOs at 10.32%.[27] The Commission required MISO TOs to submit a compliance filing to implement their new ROEs effective September 28, 2016, the date of Opinion No. 551, and to provide refunds for the November 12, 2013-February 11, 2015 refund period. Following the issuance of Opinion No. 551, numerous parties submitted requests for rehearing.

C. Second Complaint Against MISO TOs' ROE

7. On February 12, 2015, a new set of complainants[28] filed the Second Complaint in Docket No. EL15-45-000 also alleging that MISO TOs' base ROE of 12.38% was unjust and unreasonable.[29] Relying on an updated two-step DCF analysis, the Second

[26] *Id.*

[27] *Id.*

[28] Complainants for the Second Complaint consist of: Arkansas Electric Cooperative Corporation (Arkansas Electric Cooperative); Mississippi Delta Energy Agency and its two members, Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi and Public Service Commission of Yazoo City of the City of Yazoo City, Mississippi; and Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier Cooperative).

[29] The following MISO transmission owners were named in the Second Complaint: 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 (identified as Ameren Missouri); Ameren Transmission Company of Illinois; ATC; 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, and 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; and Southern Indiana Gas & Electric Company.

Complaint complainants argued that the base ROE should be no higher than 8.67%.[30] On June 18, 2015, the Commission established hearing procedures and set a refund effective date of February 12, 2015.[31]

8. Parties filed requests for rehearing of the Second Complaint Hearing Order, and on July 21, 2016, the Commission generally sustained the Second Complaint Hearing Order.[32] Following the Second Complaint Hearing Order, the Presiding Judge issued an Initial Decision on June 30, 2016.[33] The Presiding Judge adopted a zone of reasonableness of 6.75% to 10.68% based on financial data for the period July 1, 2015 through December 31, 2015. The Presiding Judge also determined that the anomalous capital market conditions identified in Opinion No. 531 persisted and, after considering the alternative benchmark methodologies, that the just and reasonable ROE was 9.70%—halfway between the midpoint and the upper bound of the zone of reasonableness. The participants filed briefs on and opposing exception.

D. *Emera Maine*

9. On April 14, 2017, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its *Emera Maine* decision, vacating and remanding Opinion No. 531, *et seq*. As an initial matter, the D.C. Circuit was not persuaded by New England TOs' argument that an ROE within the DCF-produced zone of reasonableness could not be deemed unjust and unreasonable. The D.C. Circuit explained that the zone of reasonableness established by the DCF is not "coextensive" with the "statutory" zone of reasonableness envisioned by the FPA.[34] Accordingly, the D.C. Circuit concluded that the fact that New England TOs' existing ROE fell within the zone of reasonableness produced by the DCF did not necessarily indicate that it was just and reasonable for the purposes of the FPA.[35]

---

[30] *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, at P 1 (2015) (Second Complaint Hearing Order), *order on reh'g*, 156 FERC ¶ 61,061 (2016) (Second Complaint Rehearing Order).

[31] Second Complaint Hearing Order, 151 FERC ¶ 61,219 at P 1.

[32] *See* Second Complaint Rehearing Order, 156 FERC ¶ 61,061.

[33] Initial Decision (II), 155 FERC ¶ 63,030.

[34] *Emera Maine*, 854 F.3d at 22-23.

[35] *Id.* at 23.

10. Nevertheless, the D.C. Circuit found that the Commission had not adequately shown that New England TOs' existing ROE was unjust and unreasonable. The D.C. Circuit explained that the FPA's statutory "zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE" and that whether a particular ROE is unjust and unreasonable depends on the "particular circumstances of the case."[36] Thus, the fact that New England TOs' existing ROE did not equal the just and reasonable ROE that the Commission would have set using the current DCF inputs did not necessarily indicate that New England TOs' existing ROE fell outside the statutory zone of reasonableness.[37] As such, the D.C. Circuit concluded that Opinion No. 531 "failed to include an actual finding as to the lawfulness of [New England TOs'] existing base ROE" and that its conclusion that their existing ROE was unjust and unreasonable was itself arbitrary and capricious.[38]

11. The D.C. Circuit also found that the Commission had not adequately shown that the 10.57% ROE that it set was just and reasonable. Although recognizing that the Commission has the authority "to make 'pragmatic adjustments' to a utility's ROE based on the 'particular circumstances' of a case," the D.C. Circuit nevertheless concluded that the Commission had not explained why setting the ROE at the upper midpoint was just and reasonable.[39] The D.C. Circuit noted, in particular, that the Commission relied on the alternative models and state-regulated ROEs to support a base ROE above the midpoint, but that it did not rely on that evidence to support an ROE at the upper midpoint.[40] Similarly, the D.C. Circuit noted that the Commission had concluded that a base ROE of 9.39%—the midpoint of the zone of reasonableness—might not be sufficient to satisfy *Hope* and *Bluefield* or to allow the utility to attract capital, but that the Commission had not similarly explained how a 10.57% base ROE was sufficient to meet either of those conditions. Because the D.C. Circuit found that the Commission had not pointed to

[36] *Id.* at 23, 26.

[37] *Id.* at 27 ("To satisfy its dual burden under section 206, FERC was required to do more than show that its single ROE analysis generated a new just and reasonable ROE and conclusively declare that, consequently, the existing ROE was per se unjust and unreasonable.").

[38] *Id.*

[39] *Id.* (quoting *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942)).

[40] *Id.* at 29 ("FERC's reasoning is unclear. On the one hand, it argued that the alternative analyses supported its decision to place the base ROE above the midpoint, but on the other hand, it stressed that none of these analyses were used to select the 10.57% base ROE.").

record evidence supporting the specific point at which it set New England TOs' ROE, the D.C. Circuit held that the Commission had not articulated the "rational connection" between the evidence and the rate that the FPA demands.[41]

12. Based on the D.C. Circuit's conclusion that the Commission had not met its burden either under the first or the second prong of section 206 of the FPA, it vacated and remanded Opinion No. 531 *et seq.*,[42] meaning that Opinion No. 531 is no longer precedential,[43] even though the Commission remained free to re-adopt those determinations on remand as long as it provided a reasoned basis for doing so.[44] The Commission relied extensively on its determinations in Opinion No. 531 in its order on the First Complaint (i.e., Opinion No. 551).

E. **Briefing Orders**

13. On October 16, 2018, the Commission issued an order proposing a methodology for addressing the issues that were remanded to the Commission in *Emera Maine* and established a paper hearing on whether and how this methodology should apply to the four complaint proceedings concerning New England TOs' ROE.[45] In the *Coakley* Briefing Order, the Commission proposed to change its approach to determining base ROE by giving equal weight to four financial models, instead of primarily relying on the DCF methodology. The Commission stated that evidence indicates that investors do not rely on any one model to the exclusion of others. Therefore, relying on multiple financial models made it more likely that the Commission's ROE determination would accurately reflect how investors make their investment decisions.

14. Specifically, the Commission proposed to rely on three financial models that are used to produce a zone of reasonableness—the DCF model, CAPM, and Expected Earnings model—to establish a composite zone of reasonableness. The zone of

---

[41] *Id.* at 28-30.

[42] *Id.* at 30.

[43] *Id.*

[44] *Id.*

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

reasonableness produced by each model would be averaged to determine the composite zone of reasonableness.[46]

15. The Commission also proposed a framework for using the composite zone of reasonableness in evaluating whether a utility's existing base ROE remains just and reasonable. The Commission proposed that, in order to find a utility's existing ROE unjust and unreasonable under the first prong of section 206 of the FPA, its ROE must be outside a range of presumptively just and reasonable ROEs for a utility of its risk profile, absent additional evidence to the contrary. In other words, the Commission would dismiss an ROE complaint if the targeted utility's existing ROE falls within the range of presumptively just and reasonable ROEs for a utility of its risk profile unless that presumption is sufficiently rebutted. The Commission explained that, by the same token, a finding that the existing ROE of a utility falls outside that range would support a holding that the ROE has become unjust and unreasonable, absent additional evidence to the contrary.[47]

16. The Commission explained that it would be appropriate to calculate the applicable ranges of presumptively just and reasonable ROEs based on a utility's risk profile because a utility's risk profile remains the "particular circumstance[]" most relevant to determining whether a point within a zone of reasonableness is a just and reasonable ROE for that utility.[48] The Commission further concluded that the "principal consideration for determining whether an existing ROE within the overall zone of reasonableness has become unjust and unreasonable is the risk profile of the utility or utilities for which the Commission is setting the ROE."[49]

17. The Commission proposed that the applicable range of presumptively just and reasonable ROEs for a utility should correspond to those points that are closer to the ROE that the Commission should set for that utility than to the ROE for a utility of a different risk profile.[50] For example, the Commission explained that it typically would be unjust and unreasonable for an average risk utility to receive an ROE that is closer to the ROE that would be just and reasonable for a utility of above- or below-average risk.[51] In

---

[46] *See id.* PP 16, 30.

[47] *See id.* PP 16, 28.

[48] *Id.* P 24 (quoting *Emera Maine*, 854 F.3d at 23).

[49] *Id.* P 28.

[50] *Id.* P 27.

[51] *Id.* P 26.

particular, for average risk utilities, the Commission proposed that the presumptively just and reasonable range would be the quartile of the zone of reasonableness centered on the central tendency of the composite zone of reasonableness. For below average risk utilities, the Commission proposed that such range would be the quartile of the zone of reasonableness centered on the central tendency of the lower half of the zone of reasonableness. For above average risk utilities, the Commission proposed that such range would be the quartile of the zone of reasonableness centered on the central tendency of the upper half of the zone of reasonableness.[52]

18. For purposes of establishing a new just and reasonable base ROE when the existing base ROE has been shown to be unjust and unreasonable, the Commission proposed using the above three models, plus the Risk Premium model. The Risk Premium model produces a single numerical point rather than a range; therefore, the Commission did not propose to use it to establish a composite zone of reasonableness. The Commission proposed to determine a new just and reasonable ROE for average risk utilities by determining the midpoint/medians of each zone of reasonableness produced by the DCF, CAPM, and Expected Earnings models and averaging those ROEs with the Risk Premium ROE, giving equal weight to each of the four figures.[53] The Commission proposed to use the midpoint/medians of the lower and upper halves of the zones of

---

[52] *Id.*

[53] *See* Opinion No. 569, 169 FERC ¶ 61,129 at P 344 ("In determining the central tendency of the zone of reasonableness, the Commission has distinguished between cases involving an RTO-wide ROE and cases involving the ROE of a single utility (or pipeline). In cases involving an RTO-wide ROE, the Commission has held that the midpoint is appropriate. The Commission has reasoned that, because an RTO-wide ROE will apply to a diverse set of companies, the range of results becomes as important as the central value, and the midpoint fully considers that range, because it is derived directly from the endpoints of the range . . . By contrast, in cases involving a single utility, the Commission has held that using the median is appropriate, because the median 'is the most accurate measure of central tendency for a single utility of average risk.'") (citing *So. Cal. Edison*, 131 FERC ¶ 61,020, at P 91 (2010), *remanded on other grounds sub nom. S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 183-87 (D.C. Cir. 2013)); Briefing Order, 165 FERC ¶ 61,118 at P 18 n.40 ("The Commission will continue to use the midpoint of the zone of reasonableness as the appropriate measure of central tendency for a diverse group of average risk utilities and the median as the measure of central tendency for a single utility.").

reasonableness to determine ROEs for below average and above average risk utilities, respectively, and average those ROEs with the Risk Premium ROE.[54]

19. On November 15, 2018, the Commission issued the Briefing Order in these proceedings (Briefing Order). In that order, the Commission similarly established a paper hearing on whether and how the methodology proposed in the *Coakley* Briefing Order should apply to the two proceedings pending before the Commission involving MISO TOs' ROE.[55]

F. <u>Opinion No. 569</u>

20. On November 21, 2019, the Commission issued Opinion No. 569 in which it applied a revised methodology for analyzing existing base ROEs under section 206 of the FPA. The revised methodology applied in Opinion No. 569 did not use the Expected Earnings or Risk Premium models as was proposed in the Briefing Order, and instead used only the DCF model and CAPM in the Commission's determinations under the first and second prongs of section 206. The methodology applied in Opinion No. 569 gave equal weight to the DCF model and CAPM by averaging the top and bottom of the DCF and CAPM zones of reasonableness to produce a composite zone of reasonableness.[56] In addition, in Opinion No. 569, the Commission reaffirmed its use of a two-step DCF analysis that gives one-third weight to a long-term growth rate based on projected growth in gross domestic product (GDP).[57] The Commission also held that it would continue to rely exclusively on the Institutional Brokers Estimate System (IBES) as the preferred source for the DCF short-term growth projection, absent compelling reasons otherwise.[58] The Commission further held that only the short-term growth rate should be used to calculate the (1+.5g) adjustment to dividend yield in the DCF analysis for the CAPM.[59]

21. In Opinion No. 569, the Commission also adopted a specific CAPM methodology. First, the Commission adopted the use of the 30-year U.S. Treasury average historical

---

[54] Briefing Order, 165 FERC ¶ 61,118 at P 17.

[55] *See id.* P 1.

[56] *See, e.g.*, Opinion No. 569, 169 FERC ¶ 61,129 at PP 37, 276.

[57] *Id.* PP 151-59.

[58] *Id.* P 133.

[59] *Id.* PP 98-100.

bond yield over a six-month period as the risk free rate.[60] Second, the Commission held that the CAPM expected market return should be estimated using a forward-looking approach based on applying the DCF model to the dividend paying members of the S&P 500.[61] In addition, the Commission approved the use of a one-step DCF model using only short-term three to five-year growth projections for the DCF analysis of the dividend-paying members of the S&P 500. The Commission also held that IBES should be the sole source of the short-term earnings growth estimates used in the DCF analysis that is part of the CAPM analysis[62] and that S&P 500 companies with growth rates that are negative or in excess of 20% should be screened from the DCF analysis.[63] Finally, the Commission held that the CAPM analysis should include a size premium adjustment.[64]

22. In addition to the above holdings concerning the DCF and CAPM models, the Commission also adopted a revised low-end outlier test that eliminates DCF and CAPM proxy group ROE results that are less than the yields of generic corporate Baa bonds plus 20% of the CAPM risk premium.[65] The Commission also adopted the high-end outlier test that was proposed in the Briefing Order, which treats as high-end outliers any proxy company whose cost of equity estimated under the model in question is more than 150% of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a "natural break" analysis.[66] The Commission also reaffirmed its use of the midpoint, rather than the median, as the measure of central tendency for ROEs that applied to groups of utilities.[67]

---

[60] *Id.* P 238.

[61] *Id.* PP 260-73.

[62] *Id.* PP 274-76.

[63] *Id.* PP 267-68.

[64] *Id.* PP 296-303.

[65] *Id.* PP 19, 387-89.

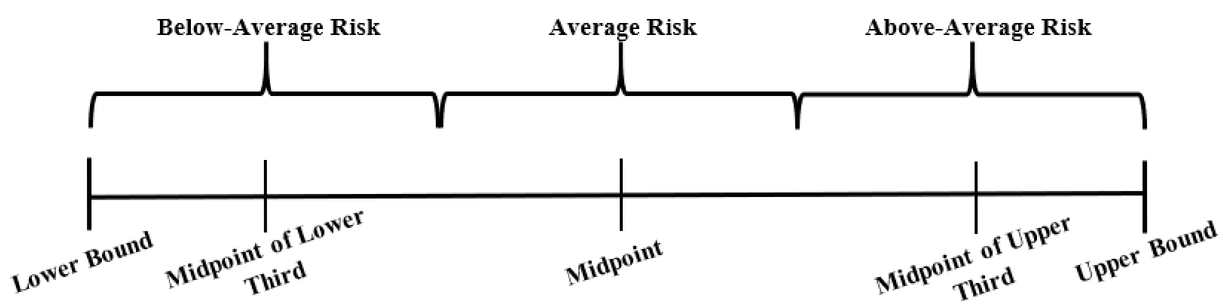
[66] *See id.* PP 367-68, 375.

[67] *Id*. PP 409-13.

G. <u>Opinion No. 569-A</u>

23. On May 21, 2020, the Commission issued Opinion No. 569-A, which sustained in part Opinion No. 569,[68] and modified and set aside in part Opinion No. 569 to make certain revisions to the methodology established in Opinion No. 569. The Commission modified and set aside in part Opinion No. 569 to use the Risk Premium model, DCF model, and CAPM under both prongs of the FPA section 206 analysis instead of relying on only the DCF model and CAPM. The Commission also modified and set aside in part Opinion No. 569 to give the short-term growth rate 80% weighting and the long-term growth rate 20% weighting in the two-step DCF model. The Commission also clarified that it will consider the use of *Value Line* growth rates in future proceedings' CAPM analyses. Additionally, the Commission increased the high-end outlier test threshold from 150% to 200% of the median result of all the potential proxy group members in CAPM and DCF models, subject to a natural break analysis. The Commission also revised its ROE methodology to calculate the ranges of presumptively just and reasonable base ROEs by dividing the overall composite zone of reasonableness into thirds, instead of using the quartile approach adopted in Opinion No. 569.[69] The Commission illustrated how these presumptively just and reasonable ranges would be divided as follows:[70]

Figure 1: Ranges of Presumptively Just and Reasonable Base ROEs



24. In applying that revised methodology, the Commission found that MISO TOs' ROE that was at issue in the First Complaint proceeding was unjust and unreasonable and that a 10.02% ROE was a just and reasonable replacement ROE. The Commission dismissed the Second Complaint regarding MISO TOs' base ROE, finding that the

---

[68] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 1-3.

[69] *See id.*

[70] *See id.* P 194.

10.02% ROE fell within the range of presumptively just and reasonable base ROEs and that no evidence in the proceeding rebutted that presumption.[71]

H. Requests for Rehearing

25. On June 22, 2020, the Complaint-Aligned Parties (CAPs),[72] Louisiana Public Service Commission (LPSC), FirstEnergy Service Company (FirstEnergy), and Edison Electric Institute (EEI) filed requests for rehearing of Opinion No. 569-A. On July 17, 2020, MISO TOs filed an answer to CAPs' and LPSC's requests for rehearing. On August 3, 2020, CAPs filed an answer to MISO TOs' answer.

II. Procedural Matters

26. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.[73] Accordingly, we reject MISO TOs' July 17, 2020 answer to CAPs' and LPSC's requests for rehearing and CAPs' answer to that answer. MISO TOs and CAPs have not shown good cause for us to waive this rule to allow their answers.[74]

A. Late Motions to Intervene in Opinion No. 569-A

27. In Opinion No. 569-A, the Commission denied the motions to intervene out-of-time and the requests for rehearing and other motions included with those motions to intervene out-of-time that were filed by multiple parties, including FirstEnergy and EEI.

---

[71] *See id.* P 3.

[72] For purposes of this request for rehearing, CAPs are: American Municipal Power, Inc.; Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Indiana Industrial Energy Consumers, Inc., Minnesota Large Industrial Group, and Wisconsin Industrial Group; Joint Consumer Advocates, including Indiana Office of Utility Consumer Counselor, Iowa Office of Consumer Advocate, Michigan Citizens Against Rate Excess, Minnesota Department of Commerce, and Citizens Utility Board of Wisconsin; Joint Customers, including Arkansas Electric Cooperative Corporation, Cooperative Energy, and Hoosier Energy Rural Electric Cooperative, Inc.; Organization of MISO States, Inc.; Mississippi Public Service Commission, Missouri Public Service Commission, and Missouri Joint Municipal Electric Utility Commission; Resale Power Group of Iowa; Southwestern Electric Cooperative, Inc.; and Wabash Valley Power Association, Inc.

[73] 18 C.F.R. § 385.713(d)(1) (2020).

[74] 18 C.F.R. § 385.101(e) (2020).

The Commission also denied filings styled as "public comments" as effectively requests for rehearing that were filed by entities that are not parties to these proceedings. The Commission similarly denied motions to lodge because they were essentially components of requests for rehearing of Opinion No. 569, and those entities are not parties to these proceedings.[75]

B. Rehearing Requests

28. EEI and FirstEnergy request rehearing of the Commission's determination in Opinion No. 569-A to deny their late motions to intervene.[76]

29. EEI asserts that it satisfied the Commission's criteria for late intervention because it demonstrated good cause, its late intervention would not disrupt the proceeding, prejudice existing parties or create additional burdens for existing parties, and because it has an interest that cannot be adequately represented by any other existing party.[77] EEI contends that it actively participated in the Commission's Notice of Inquiry proceeding regarding its base ROE policy,[78] but that it was not reasonably foreseeable that the Commission would establish a new methodology for analyzing base ROEs under section 206 of the FPA in these proceedings.[79] EEI further argues that denying its late intervention would in effect require industry groups and trade associations like EEI to intervene in all company-specific rate filings to preserve their right to participate and review Commission orders in the event the Commission's orders unexpectedly implicate the Commission's methodology for determining base ROE for all jurisdictional public utilities. EEI asserts that this outcome is inefficient and unnecessarily burdensome for market participants, stakeholders, and the Commission.[80] EEI argues that its late intervention would not disrupt the proceeding, prejudice existing parties, or create additional burdens for existing parties because EEI moved to intervene to provide additional industry perspective on the implications of the Commission's new base ROE

[75] Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 26-30.

[76] *See* EEI Rehearing Request at 2-3; FirstEnergy Rehearing Request at 1-3.

[77] EEI Rehearing Request at 9-15.

[78] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (Base ROE NOI).

[79] EEI Rehearing Request at 10.

[80] *Id.* at 10-11.

methodology and it accepts the record in these proceedings as it stands.[81] EEI also contends that the Commission has previously accepted late motions to intervene in conjunction with a request for rehearing where the order under review presents issues that have broader implications, and the Commission did not attempt to distinguish these cases. In addition, EEI asserts that its interests are not adequately represented in these proceedings because no other party can address the potential industry-wide impacts of the Commission's orders, which may have implications for transmission owners beyond MISO.[82]

30. EEI argues that, while Opinion No. 569-A explains that parties will have an opportunity to address the methodology applied in Opinion No. 569-A in a proceeding involving that party, trade associations such as EEI will not have an opportunity to litigate specific modifications or applications of the base ROE methodology in their own proceedings. EEI argues that it reasonably expected that the Commission would act in the Base ROE NOI proceeding and, based on this expectation, did not join these proceedings involving the MISO TOs; therefore, EEI states, denying its late intervention would effectively silence EEI's participation on this issue.[83] EEI also notes that the D.C. Circuit has recognized the importance of providing trade associations with broader ability to participate in proceedings involving their members through the doctrine of associational standing and that the Commission should exercise its discretion to allow late interventions by trade associations such as EEI in proceedings where the Commission announces policy changes with potentially broad implications like these proceedings.[84]

31. FirstEnergy argues that the Commission has a right to establish policy in adjudicative proceedings, not just in rulemakings and policy statements, but it is unreasonable for the Commission to deny participation in such proceedings once it becomes clear that the Commission intends to use them as policy vehicles. FirstEnergy asserts that, if the Commission denies late interventions at the rehearing stage in such instances, parties will be compelled to intervene and comment in numerous proceedings at early stages as a precautionary measure in case the Commission later decides to establish new policy, which would be an inefficient use of the resources of participants

[81] *Id.* at 11.

[82] *Id.* at 12-13.

[83] *Id.* at 13-14.

[84] *Id.* at 15-16 (citing *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016); *Warth v. Seldin*, 422 U.S. 490 (1975)).

and the Commission.[85] FirstEnergy also contends that the Commission has previously accepted late motions to intervene where, as here, parties "'had no reason to believe that the Commission would issue an order with wide-ranging precedential affect.'"[86]

32. FirstEnergy argues that the factors enumerated in Rule 214 of the Commission's Rules of Practice and Procedure weigh in favor of granting FirstEnergy's late intervention. FirstEnergy asserts that it demonstrated good cause for granting its late intervention because it had no notice that broad ROE policy would be set in these proceedings, especially in light of the Base ROE NOI proceeding that the Commission established.[87] FirstEnergy also argues that it demonstrated that its interests were not adequately represented by other parties by explaining that these proceedings may adversely impact transmission ROEs in pending or future formula rate filings by FirstEnergy. FirstEnergy contends that the Commission previously accepted such a justification in a proceeding involving "'restructuring of electric transmission service and electric energy markets . . . that no other party can adequately represent.'"[88] In addition, FirstEnergy argues that the Commission's denial of its late intervention was in error because FirstEnergy filed its motion within days, not months or years, of it becoming clear that the Commission intended to use these proceedings as a vehicle to articulate nationwide ROE policy and the Commission did not substantively consider any of the enumerated factors in Rule 214 of its Rules of Practice and Procedure.[89]

C. Commission Determination

33. We are not persuaded by EEI's and FirstEnergy's arguments on rehearing. Consistent with the Commission's explanation in Opinion No. 569-A, when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.[90] In addition, it is generally Commission policy to

---

[85] FirstEnergy Rehearing Request at 2-3.

[86] *Id.* (quoting *Alcon (Puerto Rico), Inc.*, 38 FERC ¶ 61,042, at 61,118 (1987)).

[87] *Id.* at 5-6.

[88] *Id.* at 7-8 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,157, at P 18 (2004)).

[89] *Id.* at 8.

[90] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

deny late intervention at the rehearing stage, including when the petitioner claims that the decision establishes a broad policy of general application.[91] EEI's and FirstEnergy's arguments on rehearing do not persuade us that it was inappropriate for the Commission to conclude that, on balance, EEI and FirstEnergy had not met their burden to justify granting late intervention.

34. We continue to find that granting the late interventions of EEI and FirstEnergy at this stage of the proceedings would disrupt the proceedings,[92] as well as prejudice and place additional burdens on the existing parties to these proceedings.[93] EEI's and FirstEnergy's arguments on rehearing are not sufficient to persuade us that the Commission was incorrect in concluding that EEI and FirstEnergy had not demonstrated good cause for granting late intervention despite these negative consequences. EEI argues that its late intervention would not disrupt the proceeding, prejudice existing parties, or create additional burdens for existing parties because EEI accepts the record in these proceedings as it stands. However, even if EEI accepts the records as it stands, allowing EEI to intervene at the rehearing stage would introduce a new party with its own arguments. Moreover, because Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing, existing parties would have no opportunity to respond to those arguments.[94]

35. Similarly, FirstEnergy contends that its late intervention would not disrupt the proceedings and asserts that the Commission provides no evidence that existing parties would face additional burdens or be prejudiced. FirstEnergy asserts that "[t]he Commission considered other interventions regarding ROE policy to the proceedings from utilities filed on the same date that FirstEnergy filed its late motion to intervene" and argues that "[t]his suggests that it would not have substantially disrupted the proceedings or been a considerable burden to the Commission or existing parties to consider FirstEnergy's motion to intervene."[95] Even if we assume that FirstEnergy had good cause for failing to file its motion to intervene within the time prescribed, we still find that, on balance, a consideration of the factors set forth in Rule 214 requires us to

---

[91] *See, e.g., Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 153 FERC ¶ 61,037, at P 11 & n.14 (2015) (citing *PáTu Wind Farm LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223, at P 39 & n.85 (2015) (citing *Columbia Gas Transmission Co.*, 113 FERC ¶ 61,066, at 61,243 (2005))).

[92] *See* 18 C.F.R. § 385.214(d)(1)(ii) (2020).

[93] *Id.* § 385.214(d)(1)(iv).

[94] 18 C.F.R. § 385.713(d)(1).

[95] FirstEnergy Rehearing Request at 7.

continue to deny FirstEnergy's late intervention. As noted above, granting FirstEnergy's intervention would introduce a new party with new arguments at the rehearing stage and existing parties would have no opportunity to respond to those arguments because Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.[96] Accordingly, we continue to find that granting the late interventions of EEI and First Energy would prejudice and impose additional burdens on the existing parties to these proceedings, and would also significantly disrupt the proceedings.[97]

36. We are not persuaded by FirstEnergy's apparent argument that granting its late intervention would not disrupt the proceedings because the Commission also "considered other interventions regarding ROE policy"[98] that were filed on the same day. The fact that the Commission merely considered other interventions that were filed on the same date is not relevant to the question of whether actually granting an intervention would disrupt the proceedings or prejudice or burden existing parties. The Commission denied the late interventions that it considered concurrent with FirstEnergy's motion, finding that none of the entities had met their burden to justify granting late intervention.[99]

37. Neither are we persuaded by EEI's and FirstEnergy's arguments regarding the implications of this proceeding on ROE policy. EEI argues that denying its late intervention would in effect require industry groups and trade associations like EEI "to intervene in *all* company-specific rate filings"[100] to preserve their right to participate in proceedings that might implicate the Commission's methodology for determining base ROE for all jurisdictional public utilities. Similarly, FirstEnergy argues that it is unreasonable to deny entities' participation in proceedings once it becomes clear that the Commission intends to use those proceedings as policy vehicles and that, if the Commission denies late interventions at the rehearing stage in such instances, parties will be compelled to intervene and comment in numerous proceedings at early stages as a precautionary measure in case the Commission later decides to establish new policy, which would be an inefficient use of the resources of participants and the Commission.[101] First, we note that EEI overstates the case in maintaining that "*all* company-specific rate

---

[96] 18 C.F.R. § 385.713(d)(1).

[97] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 27.

[98] FirstEnergy Rehearing Request at 7.

[99] *Id*.

[100] EEI Rehearing Request at 11 (emphasis in original).

[101] FirstEnergy Rehearing Request at 2-3.

filings"[102] could implicate the Commission's methodology for determining base ROE. Many rate filings do not involve changes to a utility's base ROE or otherwise relate to a utility's base ROE and such filings would not implicate the Commission's methodology for analyzing base ROE. Moreover, we are not persuaded by EEI and FirstEnergy that the possible burden of having to intervene in a greater number of proceedings in the future is sufficient to warrant granting late intervention in these proceedings when doing so would impose concrete burdens on existing parties. EEI expresses concern that "[w]ithout clear Commission guidance, trade associations will continue to face challenges to their participation in specific proceedings to represent their members' interests and provide their broad-based perspectives."[103] EEI states that "[a]lready EEI faces opposition to its timely intervention in a complaint regarding one of its member companies' base ROE."[104] EEI asserts that denying its intervention in such a situation would "completely undermine the Commission's stated rationale for denying EEI's late intervention in this proceeding."[105] As an initial matter, we note that the Commission granted EEI's intervention in the complaint proceeding that it cites.[106] In addition, we find concerns about whether EEI and other trade associations, or FirstEnergy and similar entities will face opposition to their interventions in the future and, if so, how much opposition they will face, to be speculative.

38. EEI also criticizes the Commission's denial of its late motion to intervene because the Commission has previously accepted late motions to intervene in conjunction with a request for rehearing where the order under review presents issues that have broader implications, but the Commission did not distinguish these cases in Opinion No. 569-A. Similarly, FirstEnergy contends that the Commission has previously accepted late motions to intervene where, as here, parties "'had no reason to believe that the Commission would issue an order with wide-ranging precedential affect.'"[107] We are not persuaded that this precedent compels us to grant EEI's and FirstEnergy's late interventions. The Commission also has previously denied late motions to intervene in

---

[102] EEI Rehearing Request at 11 (emphasis in original).

[103] *Id.* at 14.

[104] *Id.* (citing *PP&L Industrial Customer Alliance v. PPL Elec. Utils. Corp.*, Answer of the PP&L Industrial Customer Alliance and American Municipal Power, Inc. in Opposition to Motions to Intervene, Docket No. EL20-48-000 (filed June 18, 2020)).

[105] *Id.* at 14-15.

[106] *PP&L Industrial Customer Alliance v. PPL Elec. Utils. Corp.*, 173 FERC ¶ 61,042 at P 70 (2020).

[107] *Id.* (quoting *Alcon (Puerto Rico), Inc.*, 38 FERC ¶ 61,042, at 61,118).

conjunction with a request for rehearing, including when a party claims that the decision establishes a broad policy of general application.[108] The criteria set forth in section Rule 214 that the Commission may consider in acting on a late motion to intervene are case-specific, and the Commission has applied these criteria both to accept and deny such motions, as appropriate. EEI maintains that, as a trade association, EEI will not have an opportunity to litigate specific modifications or applications of the base ROE methodology in its own proceeding. EEI argues that this fact, combined with the Commission's denial of its late intervention, effectively silences EEI's participation on this issue. We disagree. EEI sought to intervene in this proceeding late, at the rehearing stage. This required EEI to meet a higher burden to demonstrate good cause for its late intervention. The Commission found that EEI did not meet this burden in this case, but that does not mean that EEI will be silenced on the issue of the Commission's methodology for analyzing base ROEs under section 206 of the FPA. Under the facts and circumstances of a different case, the Commission could allow EEI to intervene and address the Commission's new base ROE methodology. In fact, the Commission has already granted EEI's timely, contested, motion to intervene in another case involving the application of the Commission's methodology for analyzing base ROEs under section 206 of the FPA.[109] Accordingly, we disagree that denying EEI's late motion to intervene will silence their participation on the issue of the Commission's base ROE methodology.

39. EEI asserts that its interests are not adequately represented in these proceedings because no other party can address the potential industry-wide impacts of the Commission's orders, which may have implications for transmission owners beyond MISO.[110] While this is one factor the Commission may consider in acting on a late motion to intervene,[111] it is not necessarily dispositive by itself. We find that, on balance, this consideration is not sufficient to justify granting EEI's intervention when it is viewed in context with the other considerations, as discussed above. This is especially true when

[108] *See, e.g., Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 153 FERC ¶ 61,037 at P 11; *PáTu Wind Farm LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223 at PP 39-40; *Columbia Gas Transmission Co.*, 113 FERC ¶ 61,066 at 61,243.

[109] *See PP&L Industrial Customer Alliance v. PPL Elec. Utils. Corp.*, 173 FERC ¶ 61,042 at P 70.

[110] EEI Rehearing Request at 12-13.

[111] 18 C.F.R. § 385.214(d)(1)(iii).

some parties to these proceedings have already addressed the potential industry-wide impacts of the Commission's orders in these proceedings.[112]

40. FirstEnergy also argues that its interests were not adequately represented by other parties because these proceedings may adversely impact transmission ROEs in pending or future formula rate filings and no other party can represent FirstEnergy's interests vis-à-vis its own ratemaking initiatives. We are not persuaded by FirstEnergy's argument on this point. As discussed above, in Opinion No. 569-A the Commission clarified that "[a]ny party in other proceedings will be free to argue, just as the parties to these proceedings were, that the base ROE methodology applied in any of these proceedings should be modified or applied differently because of the specific facts and circumstances of the proceeding involving that party."[113] These proceedings did not directly change any FirstEnergy rates and, as the Commission explained, in any proceeding that does involve a potential change to FirstEnergy's rates, it will have an opportunity to argue that the methodology applied in these proceedings should be modified or applied differently. Moreover, whether a movant's interests are adequately represented by other parties to the proceeding is only one consideration in acting on a late motion to intervene.

III. Presumptively Just and Reasonable ROE Ranges for Determining if an Existing ROE is Unjust and Unreasonable

A. Background

41. In *Emera Maine*, the court found that the Commission's prior practice of using "a single ROE analysis" to demonstrate both (1) that an existing ROE is unjust and unreasonable under the first prong of FPA section 206 and (2) that a new ROE is just and reasonable under the second prong, is contrary to the FPA.[114]

42. In Opinion No. 569, the Commission held the following in order to address the effects of that holding in *Emera Maine*: (1) for average risk utilities, the presumptively just and reasonable range is the quartile of the overall composite zone of reasonableness centered on the central tendency of the overall zone of reasonableness; (2) for below average risk utilities, that range is the quartile of the zone of reasonableness centered on the central tendency of the lower half of the zone of reasonableness; and (3) for above

[112] *See, e.g.*, MISO TOs December 23, 2019 Rehearing Request at 2-6; Exelon December 23, 2019 Rehearing Request at 3-4; 17-19.

[113] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 205.

[114] *Emera Maine*, 854 F.3d at 27.

average risk utilities, that range is the quartile of the zone of reasonableness centered on the central tendency of the upper half of the zone of reasonableness.[115]

43. In constructing the ranges of presumptively just and reasonable base ROEs, the Commission noted its precedent that the midpoint of the overall zone of reasonableness is a good starting place for the placement of an ROE and found that the measure of central tendency for the entire zone of reasonableness should be the starting point for identifying the range of presumptively just and reasonable base ROEs for utilities with an average risk profile.[116] The Commission then found that, similarly, the starting points for identifying the ranges of presumptively just and reasonable base ROEs for utilities with above or below average risk profiles should be the historical measures of central tendency of the upper and lower halves of the zone of reasonableness, respectively (i.e., their respective midpoints).[117]

44. The Commission explained that adopting the use of ranges of presumptively just and reasonable base ROEs was necessary to satisfy the requirements of the *Emera Maine* decision, which found that the Commission's decision that "a single ROE analysis generating a new just and reasonable ROE necessarily proved that the Transmission Owners' existing ROE was unjust and unreasonable" is contrary to the FPA.[118] Such ranges were also necessary, the Commission reasoned, because, according to the *Emera Maine* decision, "the zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE," and thus a finding that a particular ROE is just and reasonable, "standing alone, 'does not amount to a finding that every other rate of return'" is not just and reasonable.[119] In light of these findings, the Commission's explanation of the particular circumstances that support an explicit finding

[115] Opinion No. 569, 169 FERC ¶ 61,129 at P 57.

[116] *Id.* P 63 (citing *Emera Maine*, 854 F.3d at 27 (quoting *Tenn. Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1213 (D.C. Cir. 1991)) ("We have noted that the midpoint is a good 'starting place' for the placement of the ROE.")).

[117] *Id.* (citing *Emera Maine*, 854 F.3d at 30 (quoting *Tenn. Gas Pipeline*, 926 F.2d at 1213) ("[Where] the utility at issue was riskier than the proxy group . . . the midpoint of the upper half was 'an obvious place to begin.'"); *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050, at PP 270, 273 (2017) (setting ROE at the "measure of central tendency of the lower half of the zone of reasonableness . . . [g]iven [the utility's] low level of risk as compared to the proxy group")).

[118] *Id.* P 57 (citing *Emera Maine*, 854 F.3d at 26).

[119] *Id.* (citing *Emera Maine*, 854 F.3d at 26 (quoting *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 857 (D.C. Cir. 1983))).

that the existing ROE has become unjust and unreasonable must include a showing that the existing ROE is now outside some range of potentially just and reasonable ROEs within the zone of reasonableness for the public utility or utilities at issue, in light of our estimate of the current market cost of equity. Alternatively, the Commission stated that it could find that other evidence convincingly demonstrates that the existing ROE is unjust and unreasonable despite it falling within that range.[120]

45. The Commission also explained that the base ROEs that fall within the applicable range of presumptively just and reasonable base ROEs will be presumed to be just and reasonable, and those that fall outside of the applicable range will be presumed to be unjust and unreasonable.[121] The Commission further found that those presumptions would only be rebuttable presumptions because the ultimate determination of whether an existing ROE is unjust and unreasonable still "depends on the particular circumstances of the case."[122] The Commission noted that other evidence regarding the particular circumstances of the case could rebut a presumption that applies, such as evidence regarding non-utility stock prices, investor expectations for non-utility stocks, various types of bond yields and their relation to stock prices, investor and other expert testimony, and testimony regarding the effects of rates on customers.[123]

46. On rehearing in Opinion No. 569-A, the Commission revised its use of presumptively just and reasonable ROE ranges.[124] The Commission stated that the ranges of presumptively just and reasonable base ROEs will be calculated by dividing the overall composite zone of reasonableness into thirds.[125] The Commission explained that, by dividing the overall composite zone of reasonableness into quartiles, the approach set forth in Opinion No. 569 inappropriately excluded the bottom eighth and top eighth of the overall zone of reasonableness, and held that the ranges of presumptively just and reasonable ROEs should include all potentially lawful ROEs.[126] The Commission further stated that the starting points for below-average and above-average risk utilities will be

[120] *Id.* PP 61-62.

[121] *Id.* P 85.

[122] *Id.* P 68 (citing *Emera Maine*, 854 F.3d at 23).

[123] *Id.*

[124] Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 190-99.

[125] *Id.* P 190.

[126] *Id.* P 191.

the midpoint of the lower and upper thirds, respectively.[127] An illustration of the overall composite zone of reasonableness divided into three equal ranges of presumptively just and reasonable base ROEs is above in Figure 1.[128]

B. Rehearing Requests

47. CAPs and LPSC state that the Commission in Opinion No. 569 properly found that the range of presumptively just and reasonable ROEs contained within the zone of reasonableness should be determined using a quartile approach.[129] CAPs and LPSC state that the Commission in Opinion No. 569-A, however, mistakenly adopted an approach of dividing the overall zone of reasonableness into equal thirds and that the Commission should reverse that decision because it violates the court's directive in *Emera Maine*.

48. LPSC argues that the Commission's thirds approach, as established in Opinion No. 569-A, conflicts with *Emera Maine* because it allows all of the ROEs included in the zone of reasonableness to be considered presumptively just and reasonable under one of the three ranges.[130] LPSC states that the ROE results that are on the outer edges on the zone should not benefit from a rebuttable presumption because those ROEs are furthest from the midpoint and therefore are most likely to be unlawful. LPSC argues that the Commission's approach in Opinion No. 569, in which the Commission declined to apply a rebuttable presumption of lawfulness to the bottom and top eighths of the zone of reasonableness, was more appropriate and should not have been changed.

49. LPSC contends that the Commission also erred by applying a thirds framework because it "leaves very little space between ROEs that are presumptively just and reasonable and ROEs that are excluded as low-end outliers."[131] LPSC argues that this new approach impermissibly reduces the size of the buffer between the presumptively lawful ROEs and the ROEs excluded from analysis by the low-end outlier threshold. LPSC points out that in the instant cases the difference between the bottom of the zone of reasonableness and the low-end outlier is only 95 basis points for the First Complaint and 80 basis points in the Second Complaint.[132] LPSC states that the approach the

---

[127] *Id.* P 194.

[128] *See supra* P 23.

[129] CAPs Rehearing Request at 55; LPSC Rehearing Request at 46.

[130] LPSC Rehearing Request at 48.

[131] *Id.* at 49.

[132] *Id.* at 49-50.

Commission adopted in Opinion No. 569 had virtually eliminated this problem and therefore is more appropriate.[133]

50. CAPs state that the concept of a presumptive zone of reasonableness is unlawful because it contravenes the FPA's consumer protection principles, improperly favors industry over customers, introduces asymmetry between FPA section 205 and section 206 filings, and violates complainants' due process rights.[134] CAPs argue that the Commission's decision to apply thirds rather than quartiles only exacerbates these issues.[135] CAPs state that if the Commission does not reject the presumptive immunity zones, it should at least narrow the presumptive immunity zone, which, CAPs argue, is the exact opposite of what the Commission did in Opinion No. 569-A.

51. CAPs state that shifting to a thirds approach broadens the presumptive immunity zone and that the Commission did not acknowledge this fact nor explain and justify such a shift and the resulting impact on customers' ability to challenge above-cost rates.[136] CAPs explain that using only three utility risk profile groups is arbitrary and capricious, especially because MISO TOs are a group of utilities with a broad range of risk profiles. CAPs add that, contrary to the Commission's assertions in Opinion No. 569-A, MISO TOs are low risk, not average risk.[137]

52. CAPs also contend that the Commission did not rationally connect the MISO TOs' risk profile to the determination as to whether their base ROE was unjust and unreasonable. CAPs note that, in Opinion No. 569, the Commission explained that using ranges of presumptively just and reasonable base ROEs allowed "the Commission to incorporate 'a utility's risk profile into our ROE analysis in a concrete and objective way that will establish a direct connection between the most important circumstance of the case—a utility's risk profile—and our ultimate determination as to whether an existing ROE is unjust and unreasonable.'"[138] CAPs argue that, however, the Commission failed to rationally establish such a direct connection. First, CAPs assert that the Commission's risk assessment of the MISO TOs is contradicted by record evidence. They argue that the record supports a finding that the MISO TOs are of low risk because 92% of the MISO

---

[133] *Id.* at 50.

[134] CAPs Rehearing Request at 54-55.

[135] *Id.* at 55.

[136] *Id.* at 56.

[137] *Id.* at 57.

[138] *Id.* at 49 (quoting Opinion No. 569, 169 FERC ¶ 61,129 at P 65).

TOs listed in Exhibit MTO-32(II) have an investment grade credit rating in the upper half of the S&P risk spectrum, of which 49% have a credit rating at the top of the upper half of the S&P risk spectrum. Second, CAPs contend that the Commission has not explained why it is appropriate to rely on the MISO TOs' group risk profile in determining the applicable range of presumptively just and reasonable base ROEs and, at the same time, use the midpoint as the starting point to calculate the bounds of the presumptive immunity zone. CAPs argue that, if the MISO TOs are collectively treated as a utility of average risk when placing the presumptively just and reasonable zone within the composite zone of reasonableness, they also should be collectively considered a utility of average risk when calculating the presumptive zone's range, meaning that the median—not the midpoint—should be used as the starting point for calculating the bounds of the presumptively just and reasonable range for the average risk MISO TOs.[139]

53. CAPs argue that, even if MISO TOs could be treated as average risk utilities and the midpoint were the correct starting point to determine the immunity zone, there is no direct link between the risk profile of the MISO TOs and the thirds approach.[140] CAPs claim that this is because a presumptive immunity zone centered on the midpoint does not encompass all of the ROEs that correspond to utilities with a similar risk-band to the MISO TOs. CAPs claim that this narrows the breadth of MISO TO's group risk profile and therefore inappropriately allows the Commission to more easily reject legitimate complaints.

54. CAPs state that, even though the Commission, in Opinion No 569-A, increased the distance between the end points of the presumptive immunity zone and the midpoint, the Commission failed to explain why the new end points are still close enough to the midpoint to consider those points presumptively just and reasonable rather than potentially just and reasonable.[141] CAPs state that applying a presumption that such a zone is just and reasonable is impermissible because the midpoint is just a "starting point" for determining the just and reasonable ROE for MISO TOs and does not constitute sufficient evidence to make such an inference. CAPs argue that, in short, broadening the zone of reasonableness through application of a thirds approach only exacerbates the problems associated with presuming such ROE results are just and reasonable, rather than treating them only as potentially just and reasonable.[142]

---

[139] *Id.* at 49-52.

[140] *Id.* at 57.

[141] *Id.* at 58.

[142] *Id.* at 58-59.

55. CAPs argue that the Commission has more or less allowed an unjust and unreasonable rate to remain in place by rejecting the Second Complaint, due to the fact that the rate determined in the First Complaint is close to the just and reasonable ROE in the Second Complaint, and that this is true even if the midpoint is the just and reasonable ROE in the Second Complaint.[143] CAPs argue that the Commission in doing so has established the same single-step analysis as the court in *Emera Maine* rejected because the Commission is proposing to use the same second prong finding to presume that customers have not shown existing rates to be unjust and unreasonable under the first prong.[144]

56. CAPs state that the Commission's broadening of the zone of reasonableness has exacerbated the asymmetry between proceedings under sections 205 and 206 of the FPA.[145] CAPs argue that the Commission failed in Opinion No. 569-A to address this increased asymmetry. CAPs argue that this asymmetry violates court precedent stating that proceedings under sections 205 and 206 of the FPA are both subject to the same "character" and "scope"[146] and also violates the 1988 Regulatory Fairness Act which the Commission has stated was meant to add symmetry between the two proceedings.[147]

57. CAPs argue that the Commission is misinterpreting the court in *Emera Maine* when the Commission says that section 206 proceedings are different and stricter than section 205 proceedings.[148] CAPs state that the court in *Emera Maine* cannot be interpreted to have meant that the Commission is required to apply a stricter burden of proof to customers seeking to lower rates under section 206 than to utilities seeking to increase rates under section 205.

58. CAPs argue that the framework created by the Commission effectively creates a conclusive presumption of justness and reasonableness, rather than a rebuttable presumption, because parties cannot submit evidence addressing whether an ROE that the Commission has not established before the close of the record is unjust and unreasonable

[143] *Id.* at 59.

[144] *Id.* at 59-60.

[145] *Id.* at 60.

[146] *Id.* at 61 (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956)).

[147] *Id.* (citing 1988 Regulatory Fairness Act, Pub. L. No. 100-473, 102 Stat. 2299 (1988); *Env't NE v. Bangor Hydro-Elec. Co.*, 151 FERC ¶ 61,125, at P 28 (2015)).

[148] *Id.* at 62.

and customers cannot submit evidence that a future unknown rate is unjust and unreasonable.[149]

59. CAPs state that by broadening the zone of reasonableness, the Commission increased the presumptive floor and caused it to be a moving target.[150] CAPs state that it did not have an opportunity to submit additional evidence specifically addressing this new presumptive floor and that, in any event, the 12.38% charged and collected during the refund period of the Second Complaint is well above the new presumptive floor.

C. Commission Determination

60. We are not persuaded by LPSC's and CAPs' requests for rehearing. We will continue applying the ranges of presumptively just and reasonable base ROEs established in Opinion No. 569-A by dividing the overall composite zone of reasonableness into three equal portions. We are not persuaded by the requests for rehearing contending that the Commission's ranges of presumptively just and reasonable base ROEs must be divided into quartiles, especially because doing so excludes the bottom eighth and top eighth of the overall zone of reasonableness and would thereby exclude "potentially lawful ROEs."[151] Additionally, we continue to find that using a range of presumptively just and reasonable ROEs to establish base ROEs for MISO TOs is appropriate in light of *Emera Maine*. Given the court's explanation that there is "'a substantial spread' of potentially reasonable rates,"[152] we believe that a range of potentially just and reasonable ROEs will likely be the best evidence of what is a just and reasonable ROE for the utility at issue.[153]

61. We disagree with LPSC's claim that, because the ROE results in the upper eighth and lower eighth of the range being presumptively just and reasonable, this approach conflicts with *Emera Maine*. Using ranges of presumptively just and reasonable ROEs will not hinder the Commission's ability to protect customers from excessive rates or necessarily require a showing that the relevant ROE falls entirely outside of the applicable range. Consistent with the Commission's explanation in Opinion No. 569, we will use the range of presumptively just and reasonable ROEs as an additional tool to

---

[149] *Id.* at 62-63.

[150] *Id.* at 63.

[151] *Emera Maine*, 854 F.3d at 26.

[152] *Id.*

[153] Opinion No. 569, 169 FERC ¶ 61,129 at P 62.

help inform the ROE analyses.[154] The range of presumptively just and reasonable ROEs, considered alongside other evidence in the record, provides an initial indication of whether an existing ROE may be unjust and unreasonable. Critically, this presumption is rebuttable. Accordingly, the Commission can still find that the ROE is unjust and unreasonable based upon the preponderance of the evidence, even if it falls within the applicable range of presumptively just and reasonable ROEs.

62. We disagree with LPSC's claim that including the top eighth and bottom eighth of the range leaves too little space between the ROEs that are presumptively just and reasonable and ROEs that are excluded as low-end outliers. We also disagree with CAPs' similar assertion that shifting to a thirds approach impermissibly broadens the presumptive immunity zone. The overall composite zone of reasonableness is only composed of results from proxy group companies that have been screened using criteria which limit the proxies to companies that are considered to present investment risks comparable to those of the utility or group of utilities whose rates are at issue. We find that, when we have already constructed a proxy group using limitations for comparable risk, it would be too restrictive to then construct ranges of presumptively just and reasonable base ROEs using only the results of some of those risk-screen proxy group companies. Excluding the bottom eighth and top eighth—amounting to a full quarter of the data—when we have already implemented processes to construct a statistically appropriate proxy group would represent a failure to adequately consider the "broad range of potentially lawful ROEs."[155] We also disagree that there needs to be a buffer between presumably just and reasonable ROEs and proxy group ROEs that would be excluded through outlier tests. The salient fact is that only potentially just and reasonable ROEs are within the zone of reasonableness and the proximity of presumably just and reasonable ROEs to excluded proxy group ROEs is irrelevant.

63. We find that CAPs' concerns about using three utility risk profile groups are unfounded. These three utility risk profiles estimate commensurate returns for a utility in comparison to other enterprises "having corresponding risks"[156] and meet the requirements of *Emera Maine*.[157] A utility's risk profile is one of the most important

[154] *See id.* P 72.

[155] Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 190-191 (citing *Emera Maine* 854 F.3d at 26).

[156] *Hope*, 320 U.S. at 603 (emphasis added); *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698 (D.C. Cir. 2007) (discussing this standard in the context of whether rates are just and reasonable).

[157] Opinion No. 569, 169 FERC ¶ 61,129 at PP 62-65 (citing *Emera Maine*, 854 F.3d at 27, 30; *Tenn. Gas Pipeline*, 926 F.2d at 1213 (where "the utility at issue was

factors to be considered in determining whether an existing ROE is unjust and unreasonable. This approach allows us to appropriately incorporate utility risk profiles into ROE determinations under section 206, as the court required in *Emera Maine*. We continue to hold that using three utility risk profiles adequately meets these requirements and sufficiently analyzes the relative risk of MISO TOs for purposes of setting a base ROE. Use of three risk groups strikes an appropriate balance between the interests of customers and utilities because they will be narrow enough to protect customers from unjust and unreasonable ROEs while also providing utilities and all market participants with additional criteria that the Commission will use to assess whether an ROE is likely unjust and unreasonable.[158] This provides transparency and certainty without giving undue preference to either side.

64. We also disagree with CAPs' contention that MISO TOs are of below-average risk. While CAPs note that several MISO TOs have credit ratings at the top of the upper half of the S&P risk spectrum, CAPs has not shown that the MISO TOs taken as a whole are not a diverse group of companies with a variety of risk profiles.[159] Indeed, as Opinion No. 569 notes, MISO TOs' S&P corporate ratings ranged from BB- to AA, and their Moody's long-term ratings from Ba3 to Aa2. Thus, we continue to find that, for purposes of determining the range of presumptively just and reasonable ROEs, MISO TOs should be treated as average risk.[160]

65. We are not persuaded by CAPs' argument that the distance between the end points of the presumptive just and reasonable zone and the midpoint is too great to consider those points *presumptively* just and reasonable rather than *potentially* just and reasonable. The Commission, in Opinion No. 569-A, exercised its discretion to determine the ranges of presumptively just and reasonable rates. CAPs provide no evidence demonstrating that use of the slightly broader thirds ranges are too large for all points within the applicable range to be presumptively just and reasonable.

---

riskier than the proxy group . . . the midpoint of the upper half was 'an obvious place to begin.'"); *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 at PP 270, 273 (setting ROE at the "measure of central tendency of the lower half of the zone of reasonableness . . . Given [the utility's] low level of risk as compared to the proxy group.")).

[158] *See id.* P 84; Opinion No. 569-A, 171 FERC ¶ 61,154 at P 192.

[159] *See* Opinion No. 569, 169 FERC ¶ 61,129 at P 411,

[160] *Id.* PP 518-21 (explaining that MISO TOs are of average risk because they have a wide range of credit ratings similar to the proxy group and because Commission policy is to set an RTO-wide ROE at the midpoint of the zone of reasonableness).

66. We also disagree with arguments that the framework adopted by the Commission in Opinion No. 569, and modified in Opinion No. 569-A, does not, in practice, allow complainants to rebut a presumption of reasonableness for ROEs within the applicable third of the zone of reasonableness because the evidentiary record, which determines the ROE at issue, closes before the determination of that ROE. As an initial matter, parties already know the *existing* ROE with which to compare to the zone of reasonableness, established in a complaint proceeding. And, although parties may not know the exact final ROE or zone of reasonableness that the Commission will adopt, they have access to all of the underlying data on the ROE calculation as well as market conditions through which to craft an argument about whether or not an existing ROE can be presumed to be just and reasonable.

IV. DCF

A. Background

67. In Opinion No. 531,[161] the Commission modified its policy to require that the DCF analysis used to determine public utility ROEs include a projection of the long-term growth in dividends. The Commission also reopened the record in order to give participants an opportunity to present evidence concerning the appropriate long-term growth projection to be used for public utilities under the two-step DCF model.[162] In response, all participants agreed that estimated long-term growth in GDP is the appropriate growth rate to use as the long-term growth component of the two-step DCF model for public utilities, although New England TOs suggested that a GDP growth estimate underestimates investors' expectations of growth for the public utility industry. In Opinion No. 531-A,[163] the Commission determined that the long-term growth projection should be based on the growth in GDP. The long-term growth projection was given one-third weight, with a short-term growth projection given two-thirds weight. No party sought rehearing of these holdings.

68. The Commission applied the one-third weighting of the long-term growth rate in Opinion No. 569 based on the rationale of Opinion No. 531.[164] In Opinion No. 569-A, the Commission modified and set aside in part Opinion No. 569 to give the short-term growth rate 80% weighting and the long-term growth rate 20% weighting. The

---

[161] Opinion No. 531, 147 FERC ¶ 61,234 at PP 32-40.

[162] *Id.* P 43.

[163] Opinion No. 531-A, 149 FERC ¶ 61,032 at P 10.

[164] Opinion No. 569, 169 FERC ¶ 61,129 at PP 151-59.

Commission pointed out that the court in *CAPP v. FERC*[165] held that the Commission has broad discretion in its weighting choice. The Commission explained that short-term growth rate projections for electric utilities have declined and are now closer to the current GDP growth projection than those from the 1990s when the Commission adopted the two-step DCF using one-third weighting for GDP in the long-term growth rate for natural gas and oil pipelines that was subsequently adopted for public utilities.[166] The Commission noted that "average electric utility IBES growth projections are only marginally higher than GDP growth projections . . . [and] investors are likely to view electric utility IBES growth projections as more sustainable than the substantially higher natural gas pipeline IBES growth projections when the Commission established its two-thirds/one-third weighting policy."[167] In light of this, the Commission found that it is appropriate to consider the long-term growth rate to some extent, but that it is appropriate to now afford less influence to the long-term growth rate.[168]

B. Rehearing Requests

69. CAPs argue that the Commission acted arbitrarily and capriciously when it changed the weighting of the short-term and long-term growth rates used in the DCF because the Commission did not explain how its analysis of the decline in average short-term growth rates resulted in the decision to move from 2:1 to 4:1 weighting.[169]

70. CAPs explain that the Commission affirmed the use of 2:1 weighting in Opinion No. 569, which was supported by the record and consistent with established Commission precedent. However, CAPs argue that, when the 2:1 weighting was replaced with a 4:1 weighting in Opinion No. 569-A, the Commission failed to provide a reasoned explanation for its departure from the established weighting practice or to demonstrate that this change is supported by substantial evidence in the record.[170] CAPs further argue

[165] 254 F.3d 289 (D.C. Cir. 2001).

[166] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57.

[167] *Id.* PP 57-58.

[168] *Id.* P 59.

[169] CAPs Rehearing Request at 12.

[170] *Id.* at 10 (citing *Pub. Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448, 451 (D.C. Cir. 1987)).

that the spread between the short-term and long-term growth rates did not change since the issuance of Opinion No. 569 and the record has remained constant.[171]

71. CAPs also argue that, although MISO TOs requested eliminating the use of a long-term growth rate from the DCF model, no party proposed the 4:1 weighting approach or developed any record evidence in support of that modification. CAPs note that the Commission claimed it has "broad discretion in its weighting choice,"[172] but CAPs assert that the discretion must comport with the Commission's duty to engage in reasoned decision making by drawing the connection between substantial evidence and the Commission's findings. CAPs argue that the failure to draw that connection between the record evidence and the change to the weighting policy amounts to a decision that is arbitrary, capricious, and an abuse of discretion.[173]

72. CAPs assert that the Commission's weighting approach in Opinion No. 569-A contrasts with the approach set forth in the *Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines*[174] issued on the same day. CAPs note that the

---

[171] *Id.* at 16-17.

[172] *Id.* at 13 (citing Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57).

[173] *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 503 (2009) (holding that when agency action represents a change in administrative policy, then the agency must display awareness that it is changing position and show that there are good reasons for the new policy); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006) (holding that an agency is free to discard precedents or practices that it no longer believes are correct, but if an agency decides to change course, it must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored); *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (holding that the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made); *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (holding that an agency "must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record") (quoting *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)); *Pub. Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 451 (D.C. Cir. 1987) (holding that FERC bears the burden of explaining the reasonableness of any departure from a long-standing practice, and that any facts underlying its explanation must be supported by substantial evidence)).

[174] *Inquiry Regarding the Commission's Policy for Determining Return on Equity, Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines*, 171 FERC ¶ 61,155 (2020) (Pipeline Policy Statement).

Pipeline Policy Statement concluded that short-term growth rates for natural gas and oil pipelines have not decreased to the same extent as they have for electric public utilities since the 1990s, and thus, preserved the longstanding 2:1 weighting. CAPs explain that this conclusion appears to be based on a snapshot of data from February 2020 that shows that the short-term growth rate calculated for a hypothetical natural gas pipeline proxy group is 5.92%, as compared to the 5.03% short-term growth rate calculated for a study period that occurred several years ago for this proceeding.[175] However, CAPs argue that the Commission failed to explain how or why the 5.92% short-term growth rate correlates to a two-thirds weighting while the 5.03% short-term growth rate correlates to a four-fifths weighting.

73. CAPs argue that, in Opinion No. 569, the Commission did not attach significance to the fact that the IBES growth projections for a number of public utilities are less than or equal to projected growth in GDP. According to CAPs, the Commission instead focused on the fact that the IBES growth projections of the public utility proxy group companies that set the top of the DCF zone of reasonableness in both proceedings substantially exceed the projected growth in GDP.[176] CAPs argue that, in Opinion No. 569-A, the Commission then opted to examine the relationship of the IBES average rates for the proxy group, rather than the IBES growth rate for the proxy group that sets the top of the zone of reasonableness to GDP without explanation.[177]

74. CAPs argue that relative similarity of first-stage and second-stage growth rates may diminish the significance of a weighting change, but it does not diminish the relative weight that investors place on long-term growth in forecasting and valuing their stocks' streams of dividend payments. Therefore, CAPs state that, since that weight is predominantly placed on the long-term growth rate reflected in the terminal value, CAPs do not support placing 4:1 weight on short-term growth.[178] CAPs contend that the fact that near-term growth projections have moved towards long-term GDP growth projections has taught investors that in the long term, utility earnings growth does tend to converge to GDP growth. Therefore, CAPs argue that this should increase reliance on GDP growth rates.[179]

---

[175] CAPs Rehearing Request at 14 (citing Pipeline Policy Statement, 171 FERC ¶ 61,155 at P 32 n.76).

[176] *Id.* at 11 (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 158).

[177] *Id.*

[178] *Id.* at 11-12.

[179] *Id.* at 12.

75. CAPs also argue that the established 2:1 weighting is a mathematically more accurate simplification of the dividend growth stream represented by two-step growth than the new 4:1 weighting. CAPs provide examples using the composite growth rate, based on the average short-term growth rate of 5.03% and long-term growth rate of 4.39%, applied to each weighting convention to compare how a dividend of $1 in year zero would approximate dividend growth in year 50. CAPs then compare the results of each to dividend growth calculated for each year for 50 years using the average short-term growth rate for years one through five, 4.39% for year 50, and linearly interpolated amounts for the intervening years.[180]

76. LPSC argues that the Commission's reasoning that recent declines in short-term growth rates warrant a shift to a 4:1 weighting is irrational. LPSC contends that the gap between the short-term and long-term growth rates has increased since the Commission adopted the two-step DCF analysis for electric utilities. LPSC states that the growth rate gap for the DCF proxy group in Opinion No. 531 was only 19 basis points, whereas the most recent data in this proceeding shows that the gap has widened to 74 basis points.[181]

77. LPSC further argues that the Commission's finding that the short-term and long-term growth rate gap has declined is based on a flawed comparison of the growth rate gap in the instant proceeding with data from the proceeding in which MISO's 12.38% base ROE was established.[182] LPSC asserts that in the 2002 MISO proceeding, the Commission adopted a regional proxy group proposed by MISO witness, Dr. Avera[183] that is dissimilar to the national proxy group adopted in the instant proceeding. According to LPSC, the other proposed proxy groups in the 2002 MISO proceeding consisted of firms in Moody's and S&P's Electric Utilities groups, which are more akin to the proxy group adopted in this proceeding comprising a national group of companies considered electric utilities by *Value Line*.[184] LPSC asserts that the growth rate gap for Dr. Avera's S&P Electric Utility proxy group is only 110 basis points, using the same

---

[180] *Id.* at 15-16.

[181] LPSC Rehearing Request at 5 (citing Opinion No. 569-A, 171 FERC ¶ 61,154 at App. II, Second Complaint DCF Results).

[182] *Id.* at 36 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292 (2002) (2002 MISO proceeding)); Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57.

[183] LPSC Rehearing Request at 37 (citing 2002 MISO proceeding, 100 FERC ¶ 61,292 at P 9).

[184] *Id.* (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 461).

6.21% GDP calculation[185] that was noted in Opinion No. 569-A for that period.[186] Further, LPSC asserts that the gap that results from Dr. Avera's Moody's Electric Utility proxy group is even lower, resulting in a 17 basis point difference.[187] Therefore, LPSC argues that if the Commission used one of the available national proxy groups from the record in the 2002 MISO proceeding, the resulting calculation would show that the growth rate gap has not significantly changed and may have even increased since 2002.

78. LPSC states that the Commission's 2:1 weighting scheme accounts for the possibility that the gap between short- and long-term growth rates will change. Therefore, LPSC asserts that the fact that the growth-rate gap may have shrunk does not support changing the Commission's weighting ratios. LPSC contends that the Commission's remedy to re-weight the growth rates is not rationally related to its justification. According to LPSC, the Commission has always known that the growth rate gap could increase or decrease. LPSC adds that, even if the growth rate gap had decreased, this would not justify altering the degree to which the DCF should correct the difference between the two growth rates.[188]

79. Finally, LPSC contends that the Commission improperly used evidence outside of this proceeding to support its argument. LPSC explains that, because the Commission had not yet adopted a two-step DCF analysis for electric utilities in 2002, the Commission's decision in the 2002 MISO proceeding did not contain a calculation of long-term growth rates.[189] LPSC states that, in order to calculate a growth rate gap for comparison purposes in Opinion No. 569-A, the Commission instead used a GDP calculation contained in the testimony of Peter J. Williamson in a contemporaneous natural gas pipeline filing in Docket No. RP03-162-000.[190] LPSC argues that the use of that data is improper because no party had a chance to analyze or critique it in this proceeding.

---

[185] *See Trailblazer Pipeline Co.*, Testimony of Peter J. Williamson, Docket No. RP03-162-000, at P 19.

[186] LPSC Rehearing Request at 38 (citing Docket No. ER02-485-000, Ex. MISO-15).

[187] *Id.* (citing Docket No. ER02-485-000, Ex. MISO-14).

[188] *Id.* at 5-6.

[189] *Id.* at 37.

[190] *Id.* (citing Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57 n.134).

C. Commission Determination

80. For the reasons discussed below, we continue to find that the 20% long-term growth rate weighting used in Opinion No. 569-A is appropriate. We disagree with CAPs' and LPSC's assertions that giving the short-term growth rate 80% weighting and the long-term growth rate 20% weighting is unsupported by the record or inconsistent with Commission precedent. As the court held in *CAPP v. FERC*, the Commission has broad discretion in its weighting choice.[191] In Opinion No. 569-A, the Commission observed that short-term growth rate projections for electric utilities were closer to GDP growth projection than those from the 1990s when the Commission adopted the two-step DCF using one-third weighting for GDP in the long-term growth rate for natural gas and oil pipelines that was subsequently adopted for public utilities.[192] Additionally, the Commission noted that, when IBES growth projections are only marginally higher than GDP projections, investors are likely to view those rates as more sustainable than the substantially higher natural gas pipeline IBES growth projections when the Commission established its two-thirds/one-third weighting policy.[193] Accordingly, we continue to find it reasonable to give the IBES short-term growth projection more weight than the two-thirds previously adopted in Opinion No. 531.

81. CAPs assert that the Commission, without explanation, opted to examine the relationship of the IBES average rates for the proxy group, rather than the IBES growth rate for the proxy group company that sets the top of the zone of reasonableness to GDP. This argument misses the mark. The Commission focused on the fact that the IBES growth rates for the proxy group companies that set the top of the zone of reasonableness substantially exceed the projected GDP growth rate as support for requiring the use of a long-term growth projection in the DCF model at all, not as support for a specific weighting.[194] In determining the weighting of the short-term and long-term growth rates applied in the DCF model, we find that it is appropriate to examine the IBES average rates for the proxy group rather than only the IBES growth rates for the companies that set the top of the zone of reasonableness. The relationship between GDP growth rates and IBES growth rates is general and not specific to a single company. Consequently, comparing the GDP growth rate to the entire proxy group IBES short-term growth rates better demonstrates the relationship between the GDP growth rate and the IBES short-

[191] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57 (citing *CAPP v. FERC*, 254 F.3d 289).

[192] *Id.*

[193] *Id.* P 58.

[194] Opinion No. 569, 169 FERC ¶ 61,129 at P 158.

term growth rate than a comparison to only the IBES short-term growth rate of the proxy group company with the highest estimated ROE.

82. We also disagree with CAPs' contention that the reliance on GDP growth rates should increase as near-term growth projections move towards long-term GDP growth projections. We agree that short-term growth projections are getting closer to the long-term GDP growth projections, but this does not imply that long-term growth projections are becoming more reliable or more used by investors. However, consistent with the Commission's finding in Opinion No. 414-A that "long-term projections are inherently more difficult to make, and thus are less reliable, than short-term projections,"[195] we again find that investors are likely to view electric utility IBES growth projections as more sustainable as IBES growth projections and GDP growth projections converge. Similarly, we find unpersuasive the numerical examples CAPs allege demonstrate that the 2:1 weighting approximates dividend growth better than the 4:1 weighting. The differences between the results in the examples CAPs provided are small, and this does not imply that investors place more weight on the long-term growth rates.

83. Additionally, CAPs argue that the Commission failed to explain why the 5.03% short-term growth rate used in the First Complaint here merits the 4:1 weighting while the 5.92% short-term growth rate used in the Pipeline Policy Statement does not.[196] However, this characterization misses the mark. The relevant metric used by the Commission in both Opinion No. 569-A and the Pipeline Policy Statement was not the short-term growth rates, but the difference between the short-term growth rates and the projected growth in GDP. In 569-A, the difference between these two measurements was only 62 basis points for the First Complaint, which the Commission determined is small enough to warrant the 4:1 weighting.[197] In the Pipeline Policy Statement, the difference is 170 basis points, nearly three times as large, and the Commission declined to adopt the 4:1 weighting.[198]

84. Similarly, we are not persuaded by LPSC's argument that the gap between the short-term and long-term growth rates has increased since the issuance of Opinion No. 531, and thus the Commission's decision to use the 4:1 weighting is unsupported. This statement regarding the change in the gap is true, but LPSC's reference to Opinion No. 531, which the D.C. Circuit subsequently vacated in *Emera Maine*, establishes the

---

[195] *Transcontinental Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084, at 61,423 (1998).

[196] CAPs Rehearing Request at 13-14.

[197] Opinion 569-A, 171 FERC ¶ 61,154 at 57.

[198] Pipeline Policy Statement, 171 FERC ¶ 61,155 at 33 n.78.

wrong reference date. The 2:1 weighting was first adopted in 1998 in Opinion No. 414-A for natural gas and oil pipelines, and then later was adopted without modification or further consideration of the relative weighting in Opinion No. 531.[199] Therefore, we continue to find that, since short-term growth rate projections for electric utilities have declined and are now closer to the current GDP growth projection than those from the 1990s when the Commission first adopted the two-step DCF using one-third weighting for GDP, it is reasonable to give the IBES growth projection more weight and give the GDP growth projection less weight.

85. We also disagree with LPSC's argument that the short-term and long-term growth rate gap in this case cannot be compared to that from the 2002 MISO proceeding because of the regional proxy group adopted in the 2002 MISO proceeding. Although LPSC notes that other proxy groups proposed in the 2002 MISO proceeding are more akin to the proxy group adopted in this proceeding, those proxy groups were not adopted in the 2002 MISO proceeding. In other words, when evaluating its methodology, the Commission did so in light of the regional proxy group chosen, not the national proxy group. Thus, the relevant comparison is the regional proxy group.

86. We are unpersuaded by LPSC's statement that the reduction in the growth rate gap does not support changing the Commission's weighting ratio because the two-thirds/one-third weighting scheme accounts for the possibility that the gap between short and long-term growth rates will change. As previously stated, in Opinion No. 569-A, the Commission observed that short-term growth rates are closer to GDP projections and investors are likely to view those rates as more sustainable than the substantially higher natural gas pipeline IBES growth projections when the Commission established its two-thirds/one-third weighting policy. Therefore, we continue to find it appropriate to give short-term growth rates 80% weight.

87. Finally, we disagree with LPSC that the Commission's holding regarding the weighting of the short-term and long-term growth rates in the DCF model is improper because of the Commission's citation to the GDP calculation contained in the testimony in Docket No. RP03-162-000. As LPSC notes, the Commission had not yet adopted a two-step DCF analysis for electric utilities in 2002 when MISO TOs' 12.38% base ROE was established and therefore the Commission's decision in the 2002 MISO proceeding did not contain a calculation of long-term growth rates.[200] The Commission merely cited to the source in Docket No. RP03-162-000 as example of long-term growth rate data from a comparable time period to illustrate how the gap between the short-term and long-term growth rates has changed since the Commission adopted the policy of giving one-

[199] Opinion No. 531, 147 FERC ¶ 61,234 at P 32.

[200] LPSC Rehearing Request at 37.

third weighting to the long-term growth rate. Other data illustrates the same point. For example, the 2002 MISO proceeding in which MISO TOs' 12.38% base ROE was established, which the parties have cited for evidence in these proceedings,[201] contains data illustrating a similar change in the gap between the short-term and long-term growth rates. Specifically, the record in that proceeding shows that the GDP growth rate using 2001 data is 5.7%.[202] That same filing contains data showing that the average IBES short-term growth rate for transmission owning members of MISO using 2001 data is 7.11%,[203] which is 141 basis points above the 5.7% GDP growth rate. This is similar to the 158 basis point difference cited in Opinion No. 569-A, and is still meaningfully higher than the 19 basis point and 64 basis point short-term and long-term growth rate gaps for more recent periods that were cited in Opinion No. 569-A.[204] Accordingly, this data continues to show that short-term growth rate projections for electric utilities are now closer to GDP growth projections than they were when the Commission adopted the policy of giving one-third weighting to the long-term growth rate. Moreover, while LPSC criticizes the Commission's citation to the data from Docket No. RP03-162-000 because it alleges that no party had a chance to analyze or critique that data in this proceeding, LPSC in fact presents evidence to dispute the Commission's reasoning that short-term and long-term growth rates for electric utilities have converged.[205] In addition, the data that LPSC takes issue with was merely an example to illustrate the convergence of short-term and long-term growth rates for electric utilities. As described above, other data from a record that parties have cited in these proceedings similarly illustrates the same point. Although LPSC presents evidence disputing the point that short-term and long-term growth rates have converged for electric utilities, we considered that evidence and found it to be unpersuasive. For these reasons, we find LPSC's arguments regarding the Commission's citation to the GDP calculation in Docket No. RP03-162-000 unpersuasive and continue to find it appropriate to give short-term growth rates 80% weight and long-term growth rates 20% weight in the DCF model.

---

[201] *See, e.g.*, *id.* at 38-39 (citing Exs.MISO-13 and MISO-14, Docket No. ER02-485); MISO TOs, Reply to Answers to Motion to Dismiss, Docket No. EL14-12-000, at 33 (filed Feb. 20, 2014) (citing Ex. S-1, Docket No. ER02-485-000, at 35–36 (Feb. 28, 2002)).

[202] MISO TOs, Revisions to the MISO Open Access Transmission Tariff, Docket No. ER02-485-000 at Ex. WEA-1 (filed Dec. 3, 2001).

[203] *Id.* at Ex. WEA-2.

[204] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57.

[205] *See, e.g.*, LPSC Rehearing Request at 37-39.

V. CAPM

A. Use of *Value Line* short-term growth rates

1. Opinion No. 569-A

88. In Opinion No. 569, the Commission required use of IBES short-term growth rate data, without drawing a distinction between its use in DCF or CAPM analyses.[206] In Opinion No. 569-A, the Commission concluded that IBES is a reliable source of short-term growth rate data and thus found it reasonable for IBES growth rates to be used in the CAPM model. However, the Commission clarified that it would consider the use of *Value Line* short-term growth rates for the CAPM model in future proceedings. The Commission explained that *Value Line* is regularly updated, investors use it, and the Commission seeks to diversify its data sources.[207] Nonetheless, the Commission found the record insufficient to adopt use of *Value Line* growth rates in that proceeding, noting there was no CAPM analysis in the record that applied the growth rate screen to *Value Line* short-term growth rates.[208]

2. Rehearing Requests

89. CAPs argue that, to the extent the Commission's statement that it will consider the use of *Value Line* growth rates in future cases is anything other than *dicta*, it is an unexplained departure from precedent and is arbitrary and capricious. CAPs note that, although the Commission did accept the use of *Value Line* growth rate data in the CAPM in Opinion Nos. 531, 531-B, and 551, this acceptance was premised on the CAPM analysis being used to corroborate the DCF, not set the ROE. CAPs contend that the CAPM being a "new" analysis is not sufficient reason for the Commission to use it given the Commission's long history of reliance on IBES, which CAPs note the Commission has referred to as "the best and most reliable source of growth information available."[209] CAPs further argue that the Commission showed in Opinion No. 569 that IBES is more stable and robust, and that the Commission's decision in Opinion No. 569-A needlessly

---

[206] *See* Opinion No. 569, 169 FERC ¶ 61,129 at PP 101-04.

[207] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 78.

[208] *Id.* P 83.

[209] CAPs Rehearing Request at 17-19 (citing, e.g., *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048, at P 75 (2008)).

and inappropriately upsets the predictability the Commission seeks to maintain in the ROE methodology.[210]

3. **Commission Determination**

90. We disagree that allowing the use of *Value Line* growth rates in the CAPM does not constitute reasoned decision-making and we sustain the result. As the Commission explained in Opinion No. 569-A, "diversifying data sources may better reflect the data sources that investors consider in making investment decisions."[211] Further, the Commission noted that *Value Line* projections incorporate the input of multiple analysts and are updated regularly. CAPs note that, to the extent the CAPM was used before Opinion No. 569, it was used only to "corroborate the DCF" analysis. While this is true, we now find that *Value Line* data, by virtue of regular updating, a robust review process, and wide use among investors, is sufficiently robust to warrant inclusion in the CAPM ROE determination.

91. CAPs assert that the Commission should not rely on data that results in a less precise measurement of the equity cost of capital. As stated above, the Commission supported its finding of the robustness of *Value Line* data in Opinion No. 569. It also recognized the potential value in diversifying data sources, finding that "diversifying data sources may better reflect the data sources that investors consider in making investment decisions."[212] Furthermore, as the Commission pointed out in Opinion No. 569, *Value Line* growth rates are widely used by investors. However, we reiterate here that the Commission stated that it "will evaluate proposals to use *Value Line* short term growth rates in the CAPM based on the evidence produced."[213]

B. **Other Issues**

1. **Opinions Nos. 569 and 569-A**

92. In Opinion No. 569, the Commission affirmed the approach in Opinion No. 531-B that the size adjustment is "a generally accepted approach to CAPM analyses."[214] The

---

[210] *Id.* at 19-21.

[211] Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 78-79.

[212] *Id.*

[213] *Id.* P 83.

[214] Opinion No. 569, 169 FERC ¶ 61,129 at P 296 (citing Opinion No. 531-B, 150 FERC ¶ 61,165 at P 117).

Commission stated that substantial evidence in the record supported the conclusion that investors rely on *Value Line* betas. While the Commission acknowledged that there is an imperfect correspondence between the size premia being developed with different betas, it concluded that the size adjustments improve the accuracy of the CAPM results and cause it to better correspond to the costs of capital estimates employed by investors.[215]

93. The Commission also found that the application of size adjustments based on the New York Stock Exchange (NYSE) to dividend-paying members of the S&P 500 is acceptable, as the use of the NYSE for the size premium adjustment enabled Ibbotson Associates to develop a rich data set,[216] and found no evidence that companies in the S&P 500 feature different risk premia than those in the NYSE.[217]

94. The Commission disagreed with intervenors that the utility industry is unique in a way that renders the size premium inapplicable, as the size premium adjustments are supported by a robust data set. The Commission noted that there are variations in the risk profiles of firms of any industry and there was insufficient evidence in the record to conclude that factors specific to the utility industry insulate smaller utilities from risks such that the CAPM betas sufficiently account for any increased risks and corresponding returns demanded by investors.[218]

95. In Opinion No. 569-A, the Commission affirmed that the size adjustment is necessary to correct for the CAPM's inability to fully account for the impact of firm size when determining the cost of equity. The Commission reiterated its finding in Opinion No. 569 that there is substantial evidence indicating that investors rely on *Value Line* betas in making investment decisions.[219] Furthermore, the Commission explained it was not persuaded by arguments that betas calculated based on the NYSE cannot be used with the S&P 500. The Commission upheld its finding that size adjustments are appropriate for the utility industry and that they improve the overall accuracy of the CAPM results.[220]

---

[215] *Id.* P 297.

[216] Ibbotson Associates, now under Duff & Phelps, has long published a series quantifying this effect for various sizes of firms, pulling from data going back to 1926.

[217] Opinion No. 569, 169 FERC ¶ 61,129 at P 298.

[218] *Id.* P 303.

[219] *See id.* P 297.

[220] *Id.* PP 297-98, 301, 303; Opinion No. 569-A, 171 FERC ¶ 61,154 at P 75.

96. The Commission acknowledged the imperfect correspondence with applying *Value Line* betas derived from the NYSE to risk premiums developed using the S&P 500. However, the Commission found that it is not reasonable to calculate the risk premium using the full 2800 companies in the NYSE.[221]

2. Rehearing Requests

97. LPSC argues that the CAPM methodology adopted by the Commission in Opinion Nos. 569 and 569-A is riddled with errors, inherently unreliable, constitutes arbitrary decision making, conflicts with established guidance, and has an established significant known rate of error.[222] LPSC further restates many of its arguments raised in its rehearing request of Opinion No. 569, and contends that the Commission in Opinion No. 569-A introduced a new rationale for its CAPM methodology when it stated that "no parties assert that . . . *Value Line* betas . . . are materially different."[223]

3. Commission Determination

98. The Commission has addressed each of these arguments already in both Opinion Nos. 569 and 569-A. We therefore sustain the result and reiterate our findings here.

99. We continue to find that the CAPM should use a one-step DCF for its risk premium calculation. As the Commission noted in Opinion No. 569-A, this is because the rationale for using a two-step DCF methodology for a specific group of utilities does not apply when conducting a DCF study of the dividend-paying companies in the S&P 500.[224] As the Commission has found already, a long-term component is unnecessary because of the regular updates to the S&P 500.[225]

100. We also continue to find reasonable the use of *Value Line* adjusted betas in the CAPM methodology, as well as the use of raw betas based on the NYSE in the size premium adjustment. We also continue to find that the size adjustment is necessary to correct for the CAPM's inability to fully account for the impact of firm size when determining the cost of equity. As the Commission found in Opinion No. 569 and

---

[221] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 75.

[222] LPSC Rehearing Request at 28.

[223] *Id.* at 2-3, 22-28, *citing* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 76.

[224] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 85 (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 263; Opinion No. 531-B, 150 FERC ¶ 61,165 at P 113).

[225] *See* Opinion No. 569, 169 FERC ¶ 61,129 at PP 264-66.

reiterated in Opinion No. 569-A, substantial evidence indicates that investors rely on *Value Line* betas in making investment decisions.[226] Furthermore, we are not persuaded by LPSC's argument that betas calculated based on the NYSE cannot be used with the S&P 500. We continue to find that size adjustments are appropriate for the utility industry and improve the overall accuracy of the CAPM results.[227]

101. The Commission noted in Opinion No. 569-A that it agreed with LPSC that there is imperfect correspondence with applying *Value Line* betas derived from the NYSE to risk premiums developed using the S&P 500. However, the Commission found that it was not unreasonable to calculate the risk premium using the full 2,800 companies in the NYSE. While not a perfect match, the Commission continued to find that the use of *Value Line* betas was appropriate for the CAPM calculation. LPSC asserts that the Commission's statement in Opinion No. 569-A that "no parties assert that . . . *Value Line* betas . . . are materially different from betas derived from only the S&P 500" was erroneous.[228] However, LPSC only argued that *Yahoo! Finance* betas comparing companies to the S&P 500 differed from those published by *Value Line*. We note, though, that the Commission was speaking to comparisons of *Value Line* betas derived from the S&P 500 versus those derived from the NYSE, which is not the comparison LPSC was making.

VI. Risk Premium Model

A. Background

102. The Risk Premium methodology, in which interest rates are also a direct input, is "based on the simple idea that since investors in stocks take greater risk than investors in bonds, the former expect to earn a return on a stock investment that reflects a 'premium' over and above the return they expect to earn on a bond investment."[229]

103. In the Briefing Order, the Commission included the Risk Premium in the four models that would be averaged to develop the ROE under the second prong of the section 206 analysis, though it did not include it for use in the first prong because it did not create

[226] *See* Opinion No. 569, 169 FERC ¶ 61,129 at P 297.

[227] *See id.* PP 297-98, 301, 303.

[228] LPSC Rehearing Request at 22 (citing Opinion No. 569-A, 171 FERC ¶ 61,154 at P 76).

[229] Opinion No. 531, 147 FERC ¶ 61,234 at P 147 (citing Morin at 108).

a zone of reasonableness.[230] In Opinion No. 569, the Commission decided not to use the Risk Premium model, as proposed by the MISO TOs, to determine the ROE. The Commission cited potential redundancy between the Risk Premium and CAPM models due to the fact that they are both risk premium methodologies. It also discussed suboptimalities of using past ROE determinations, which the Commission found may be problematic in certain cases.[231] The Commission expressed concern with the results of MISO TOs' regression analysis because it considered just nine observations, and the Commission questioned whether the results meaningfully reflected changes in capital market conditions.[232]

104. In Opinion No. 569, the Commission also found there to be insufficient evidence to conclude that investors rely on risk premium analyses employing historic regulated ROEs to determine risk premiums to inform investment decisions.[233] Additionally, the Commission explained that the Risk Premium model would require numerous judgement calls and potential areas of dispute, increasing litigation costs and reducing predictability.[234] The Commission also noted that the Risk Premium model did not produce a zone of reasonableness, leading to an asymmetry between the ROE determination and the determination of whether existing ROEs are just and reasonable.[235]

105. In Opinion No. 569-A, the Commission reversed its decision in Opinion No. 569 and found that, with certain the modifications,[236] the defects of the Risk Premium model do not outweigh the benefits of model diversity and reduced volatility resulting from the averaging of more models.[237] The Commission found that the Risk Premium model is sufficiently distinct from the CAPM to use in its ROE analysis, noting among other differences that the Risk Premium model relies on corporate utility bonds while the

---

[230] *See* Briefing Order, 165 FERC ¶ 61,118 at PP 34-35.

[231] *See* Opinion No. 569, 169 FERC ¶ 61,129 at PP 340-42.

[232] *Id*. P 344.

[233] *Id.* P 345.

[234] *Id*. PP 346-50.

[235] *Id*. P 351.

[236] The Commission adjusted which ROE proceedings the model includes, aligned the timing of bond yields to ROEs, and used individual cases rather than annual averages to address certain implementation suboptimalities that it had cited in Opinion No. 569.

[237] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 104.

CAPM uses Treasury Bond yields.[238] The Commission further found that the averaging of the Risk Premium model's results with those of the DCF and CAPM models sufficiently mitigates circularity concerns.[239] Further, the Commission made modifications to the Risk Premium model, such as using individual cases instead of averages and aligning ROEs with the test periods on which they are based. The Commission also found that the Risk Premium model could apply to both prongs of FPA 206 analyses by imputing a zone of reasonableness based on the average width of the DCF and CAPM zones of reasonableness onto the ROE from the Risk Premium model.

B. Use of the Risk Premium Model

1. Rehearing Requests

106. CAPs state that using a Risk Premium model based on 2006-2015 settlement and litigated outcomes is arbitrary and inadequately explained. CAPs state that, from the adoption of the DCF method in the 1980s until Opinion No. 569-A, the Commission consistently rejected direct reliance on risk premium models.[240] CAPs state that the Commission applied something similar to risk premium analysis "when it trended record-based ROEs for post-record trends in treasury bond yields, but abandoned that approach in 2014, finding that in the years following the 2008 financial crisis, treasury bond yield trends were not a reliable predictor of the direction or magnitude of changes in equity costs."[241]

107. CAPs note that, in Opinion No. 569, the Commission agreed with CAPs that the Risk Premium model is likely to provide a less accurate cost of equity estimate than the DCF model or CAPM because it relies on previous ROE determinations which may not be directly determined by a market-based method. CAPs also note that the Commission found that it lacked a basis to conclude that investors rely on risk premium analyses, that using the Risk Premium method together with CAPM would place too much weight on a family of analyses that add an equity risk premium to observable bond yields, that ROEs

---

[238] *Id.* P 105.

[239] *Id.* P 106.

[240] CAPs Rehearing Request at 22 (citing, e.g., *N. Ind. Pub. Serv. Co.*, Opinion No. 462, 101 FERC ¶ 61,394, at P 38 (2002)).

[241] CAPs Rehearing Request at 22 (citing *So. Cal. Edison Co.*, 147 FERC ¶ 61,240, at P 9 (2014)).

stated in settlements do not reliably indicate the contemporaneous cost of equity, and the Risk Premium model faces an issue of circularity.[242]

108. CAPs state that Opinion No. 569-A did not satisfactorily address any of the fundamental problems with relying on the Risk Premium method that were identified in Opinion No. 569.[243] CAPs note that Opinion No. 569-A concluded that "the defects of the Risk Premium model do not outweigh the benefits of model diversity and reduced volatility resulting from the averaging of more models."[244] CAPs argue that, while there is no *per se* bar on an agency changing its methodological approaches, such changes must be explained and justified.[245] CAPs aver that, given the Commission's vacillating history on use of a Risk Premium model, the decision in Opinion No. 569-A to place direct, one-third weight on risk premium analysis faces a heavy justification burden.[246]

109. CAPs assert that the averaging of the Risk Premium model's results with those of the DCF and CAPM models to mitigate circularity is not a reasoned response and agree with Commissioner Glick's dissent that circular models should not be used in the first place.[247] CAPs also state that the circularity of the DCF and CAPM models differ from the Risk Premium model. CAPs also argue that weighing the regression analysis by the number of cases associated with each year means that a disproportionate number of cases will come from 2008-2009, when bond yields were highly volatile, and, while the Commission states that the year was an anomaly, the Commission's method puts extra weight on bond yields during anomalous market conditions.[248]

---

[242] *Id.* at 22-23.

[243] *Id.* at 23-24.

[244] *Id.* at 24 (citing Opinion No. 569-A, 171 FERC ¶ 61,154 at P 104).

[245] *Id.* (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (stating that an agency has a duty to "explain its departure from prior norms")).

[246] *Id.* at 25.

[247] *Id.* at 26 (citing Opinion No. 569-A, 171 FERC ¶ 61,154 (Glick, Comm'r, concurring in part and dissenting in part, at P 14)).

[248] *Id.* at 28.

110. CAPs contend that the nominal ROEs stated in settlement agreements commonly do not reflect any agreed-upon estimate of the cost of equity; rather, it blends an integrated package that cannot be parsed.[249]

111. LPSC states that the Risk Premium method adopted in Opinion No. 569-A is a unique contortion of a market-based method in which the Commission uses its own past rate of return decision and settlements as the basis to determine a return. LPSC states that, contrary to the economic theory underlying the Risk Premium method, changes in the Commission-allowed ROEs bear no statistical relationship to changes in the cost of debt.[250] LPSC provides a regression that shows that there is no statistically significant relationship between the changes in bond yields and allowed ROEs. LPSC states that the results are completely random.[251] LPSC states that the Commission uses a distorted version of the Risk Premium model that produces results that would largely invalidate the essential premise underlying the Risk Premium method—that interest rate changes produce parallel changes in the cost of equities.[252] LPSC also asserts that the determination in Opinion No. 569-A to impute the average width of the zones of reasonableness from the CAPM and DCF models onto the ROE produced by the Risk Premium model further distinguishes its unique approach from accepted financial models.

112. LPSC states that Opinion No. 569 cited the deficiencies in this one-of-a-kind version of the Risk Premium model. LPSC alleges that the model does not rely on market data and use of a Commission allowance suffers from circularity. LPSC asserts that the inverse relationship of interest rate changes and risk premium exceeds the relationship found in empirical studies. It alleges the method keeps the ROE stable despite changes in interest rates. LPSC also states that the method would not be relied on by an investor to determine the cost of equity, does not use a long time period, involves numerous judgement calls, and the output of the method does not produce a range of just and reasonable ROEs.[253] According to LPSC, the Commission did not correct these deficiencies in Opinion No. 569-A.

---

[249] *Id.* at 29.

[250] *Id.* at 11.

[251] *Id.* at 6, 13-14.

[252] *Id.* at 11.

[253] *Id.*

2. Commission Determination

113. As discussed below, we disagree with CAPs' and LPSC's rehearing arguments regarding the use of the Risk Premium model. The Risk Premium model has a strong theoretical basis. We continue to find that the defects of the Risk Premium model do not outweigh the benefits of model diversity and reduced volatility resulting from the averaging of more models.[254] Although CAPs note that the Commission has not used the Risk Premium model in the past, we continue to believe that the current model mitigates the defects of a Risk Premium model. While the Commission in Opinion No. 569 noted its concerns with the Risk Premium model as proposed by the Briefing Order, the Commission found in Opinion No. 569-A that these concerns are mitigated by modifications that the Commission made to the Risk Premium model as well as the fact that the Commission will average the results of the Risk Premium with the DCF and CAPM. We reaffirm this finding here.

114. We continue to find that the Risk Premium model is sufficiently distinct from the CAPM to use in the ROE analysis. For example, the Risk Premium model adds data diversity by using corporate utility bond yields while the CAPM uses Treasury bond yields. We are not persuaded by CAPs' assertion that this distinction does not justify giving each of the Risk Premium and CAPM models the same one-third weight as the DCF model. In addition, the Commission found that the Risk Premium model relies on the risk premiums implicit in regulatory judgements, including those using the DCF model, while the CAPM relies upon a substantially different set of inputs, including S&P 500 dividend yields and growth rates as well as adjusted betas.

115. Regarding circularity of the Risk Premium model, consistent with the Commission's finding in Opinion No. 569-A, we find that such circularity is not substantial enough to be fatal.[255] Although the Risk Premium model entails some circularity, all models contain some level of circularity, including the CAPM and DCF models. As the Commission stated in Opinion No. 569-A, we believe that such circularity can be mitigated through a number of avenues, like averaging results with other models.[256] We continue to find that averaging the Risk Premium results with those of the DCF and CAPM models sufficiently mitigates the circularity found in each of these models.

116. We disagree that the imputed zone of reasonableness is arbitrary and does not resolve issues with the Risk Premium model. We continue to find that the imputed zone

---

[254] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 104.

[255] *Id*. P 106.

[256] *Id*.

of reasonableness as laid out in Opinion No. 569-A is appropriate to enable the Risk Premium model to inform the first prong of the FPA section 206 analysis, thereby rendering it more robust and more consistent with the second prong analysis. The imputed zone of reasonableness directly addresses the Commission's concern in Opinion No. 569 that asymmetry between the two prongs is a disadvantage of the Risk Premium model.[257] Use of consistent models in both of the two prongs also prevents the midpoint from differing from the center of the middle third or even being outside of the middle third if the Risk Premium ROE were to differ enough from that of the CAPM and DCF. Further, as explained in Opinion No. 569-A,[258] the imputed zone of reasonableness does not affect the size of the overall composite zone of reasonableness – it merely shifts the composite zone of reasonableness to reflect the results of the Risk Premium model. Finally, we note that the imputed zone of reasonableness equals the average width of the CAPM and DCF zones of reasonableness, which are derived from credible models that produce zones of reasonableness and can produce the best estimate of how far a zone of reasonableness should span.

117. CAPs argue that the Risk Premium model should instead use quarterly observations. CAPs argue that the current methodology, which weights each decision equally, results in a weighting that skews heavily towards 2008 and 2009, when bond yields were highly volatile. We disagree that the weighting is problematic and continue to find that each ROE approved by the Commission should be given equal consideration in the Risk Premium model. While we disagree that the model results in a weighting problem, we note that as the model's sample size increases, the particular weight placed on any one observation or group of observations will decrease. Additionally, using quarterly observations, or annual ones as MISO TOs had done, affords disproportionate weight to the ROEs resulting from proceedings in quarters or years with few proceedings.

118. Regarding assertions that the use of settlements is a deficiency of the Risk Premium model, we continue to recognize that parties may consider many factors when settling rate case proceedings. However, because of how directly ROEs affect rates, we conclude that parties engaged in arms-length negotiations seriously consider the ROE in the course of reaching settlements, even if the records in certain proceedings do not contain specific ROE calculations or testimony. Even if some settlements are integrated packages where the ROE reflects tradeoffs elsewhere, CAPs offer no evidence that this is either common or systematically biases the ROE. Consequently, we continue to find that the ROEs from such settlements are reasonable to include in the Risk Premium analysis.

[257] Opinion No. 569, 169 FERC ¶ 61,129 at P 351.

[258] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 107.

119. LPSC argues that there is not a strong statistical relationship with bond yields and the ROE, and thus the Commission's Risk Premium model is fundamentally flawed. LPSC posits that the use of settlements is a "big reason" for this, before asserting that settlement ROEs are likely to mirror recent Commission allowances. We are not persuaded by the argument that Commission-allowed ROE changes are largely unresponsive to market conditions. LSPC claims that settlements are not based on market data, but we disagree. Settlements that include ROE determinations are often the result of complex negotiations in which one or more sophisticated parties, as well as Commission trial staff, rely on market data and models to inform their litigation positions.

120. We also remain unconvinced by LPSC's assertion that its regression analysis shows that there is no relationship between changes in allowed ROEs and changes in bond yields. First, the relevant metric is not the bond yield itself, but the allowed risk premium, i.e. the difference between the bond yield and the ROE. Second, it is not clear how LPSC arrived at its regression results, but it appears that LPSC, when calculating its changes in ROE and changes in bond yield, arranged observations from the Commission's Appendix to Opinion No. 569-A and ran a regression on the differences from observation to observation. We do not find such an analysis convincing. Among other things, this specification is highly dependent on the ordering of observations within a given month. LSPC's reliance on case sequencing causes undue sensitivity to the order of near concurrent proceedings, potentially causing LPSC's regression results to materially vary depending on what date ordering it chooses despite this having no relevance to the Commission's analysis. The Commission's Risk Premium model, like the DCF, does not distinguish between days for its test period. Indeed, test periods historically have been measured by monthly cutoffs.

121. Additionally, we clarify that the Risk Premium model adopted in Opinion No. 569-A employs historical Baa utility bond yields.[259] Although the Commission inadvertently used projected bond yields in the Risk Premium analysis referenced in the Briefing Order,[260] we clarify that, consistent with the Commission's finding in Opinion No. 551, Risk Premium models should employ historical and not forward-looking bond yields.[261] Although the Commission generally prefers that inputs be ultimately forward-

[259] *Id.* P 111 and Appendix 1.

[260] Trial Staff Initial Br. (I) at 24 (citing Keyton Aff. at P 53).

[261] Opinion No. 551, 156 FERC ¶ 61,234 at P 194.

looking, we find it appropriate in this instance to use historical bond yields because they align with the test periods of Risk Premium cases and are not unduly speculative..[262]

122. Regarding assertions that investors do not use the Commission's formulation of the Risk Premium model, we reiterate the Commission's finding in Opinion No. 569-A that investors expect to earn a return on a stock investment that reflects a premium above the return they expect to earn on a bond investment, and that the Risk Premium model is a method of estimating the premium over bond yields that investors require to invest in electric utility equities. We continue to find that, as the Commission noted in Opinion No. 569-A, investors observe regulatory ROEs and how changes in authorized ROE levels could affect utility earnings, and while such considerations differ from the type of analysis employed by the Risk Premium model, it is a model that considers regulatory ROEs in estimating the premium that investors require to make equity investments instead of bond investments.

C. Implementation Details

1. Rehearing Request

123. CAPs state that many of the details of the Commission's Risk Premium model are entirely new to the record, and the Commission should make some adjustments.[263] CAPs contend that the case set used by the Commission excluded two cases that CAPs argue should be included.[264] CAPs also argue that several cases in which the Commission authorized an incentive ROE without revisiting the utility's base ROE should be excluded from the Risk Premium model.[265] In addition, CAPs contend that the Risk Premium model contained typographical dating errors, and other flaws as detailed below.

124. CAPs contend that, in many cases, the settlement in principle is reached a month or more before the final settlement papers are filed and this should be reflected in the bond yield dating because the period when parties evaluated the ROE on which the parties agreed is the period predating their agreement in principle.[266] CAPs argue that the Risk Premium model is thus distorted by delays between a publicly announced agreement

---

[262] *See id.*

[263] CAPs Rehearing Request at 34.

[264] *Id.* at 34-35.

[265] *Id.* at 35.

[266] *Id.* at 39-40 (citing *PJM Interconnection, L.L.C.* et al., Settlement Agreement and Offer of Settlement, Docket No. ER15-303-000 (2015)).

in principle and the filing of a completed set of settlement agreement documents, and does not consistently use the bond yield from the six months ending with the month before the month within which a settlement was reached. CAPs argue the Commission should change the dates used in the model by looking to the earliest public record of when a settlement was reached.

125. CAPs also contend that, when an individual case includes multiple ROEs, it should only be included as a single case using the average of the multiple ROEs. CAPs also state that Opinion No. 569-A included two cases that use the nominal, face-value ROE, but should have used what CAPs assert is the true effective ROE that includes a 10% discount on the resulting rate.[267] CAPs further state that Opinion No. 569-A incorrectly included a case due to an error in the dating of the case.

126. CAPs also state that the ROEs associated with cases that are litigation results should not be adjusted for any trends in yields on 10-year Treasury bonds. CAPs further state that that in Opinion No. 569-A, the Commission appropriately excluded any adjustment for post-study-period trends in yields on 10-year U.S. Treasury bonds in its ROE finding associated with Docket No. ER08-375 as 10.55%.[268]

2. Commission Determination

127. We modify and set aside in part Opinion No. 569-A. While we are denying rehearing with respect to most of the arguments advanced by CAPs, we agree with CAPs that the Risk Premium model contained certain typographical errors and inadvertently omitted one case. Remedying these errors leaves the results of the Risk Premium model unchanged. We deny the rehearing request to include one other case,[269] and CAPS' other implementation arguments, as explained below.

128. In calculating the Risk Premium model in Order No. 569-A, the Commission inadvertently included typographical errors wherein some test periods were incorrect, generally being off by one or two months.[270] However, these errors have a *de minimis* impact on the model results in large part because the model uses a six-month rolling

---

[267] *Id.* at 42.

[268] *Id.* at 43.

[269] *Midcontinent Independent System Operator, Inc.*, 161 FERC ¶ 61,059 (2017) (Opinion No. 556).

[270] In addition, two cases had typographical errors in their base ROE. The incorrect base ROEs and the incorrect dates have been corrected here. A full list of these changes is included in App. 1.

average of Baa utility bond yields. In addition, as noted above, one case was improperly excluded from the dataset.[271] After correcting for these errors, the First Complaint and Second Complaint results remain unchanged.

129. Regarding CAPs' argument that the date of the settlement should be based on when the settlement is reached, if indicated by a Settlement Judge's public status report, rather than when the offer of settlement is filed, we disagree. Although this may be appropriate in certain cases, a publicly announced agreement in principle is not available for all cases. Additionally, the Settlement Judge's public status report is not as consistent a measure to use, and it is not clear from the record that the base ROE is always set when the parties indicate a settlement is reached. Therefore, to ensure that we are consistent across all cases, we continue to find that the six months preceding the month in which an offer of settlement is filed is the appropriate method to date a settlement and the comparative bond yield.

130. We disagree with CAPs that Opinion No. 556 should be included in the Risk Premium model. While we want to include all relevant cases in the Risk Premium model, this proceeding included factual evidence that makes that proceeding unique and not well suited for this purpose. For example, the DCF results were used to determine an "economic cost of capital" instead of a typical rate of return. Therefore, we decline to include Opinion No. 556 in the list of applicable cases for the Risk Premium calculation. However, as noted above, we agree with CAPs regarding the inclusion of *Delaware Division*, and have added it to the Risk Premium model.

131. We also disagree with CAPs that the base ROE should include any discount agreed upon in a settlement. A discount agreed upon as part of a settlement is not a part of the base ROE and, rather, may be the result of agreeing to other terms as part of the settlement agreement. Therefore, we find that the referenced base ROEs are correctly included in Opinion No. 569-A. In addition, we disagree with CAPs' contention that multiple ROEs from the same proceeding should not be used. Use of multiple ROEs may be appropriate where the ROEs apply to distinct periods.

VII. High-End Outlier Test

A. Opinion No. 569-A

132. In the Briefing Order, the Commission recognized that the CAPM can produce unsustainably high results for a particular proxy company, because, unlike the two-step DCF analysis, it does not include a long-term growth projection based on GDP that would normalize the ROEs produced by the model. Moreover, the Commission

[271] *Delaware Division of the Public Advocate v. Baltimore Gas & Elec. Co.* 154 FERC ¶ 61,125 (2016) (*Delaware Division*).

recognized that, in unusual circumstances, the two-step DCF analysis could also produce unsustainably high results. Therefore, the Commission proposed to apply a high-end outlier test to the results of both these models.[272]

133. The Commission proposed to treat as high-end outliers any proxy company whose cost of equity estimated under the model in question is more than 150% of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a "natural break" analysis similar to the approach the Commission uses for low-end DCF analysis results. The Commission stated that this test should identify those companies whose cost of equity under the model in question is so far above the cost of equity of a typical proxy company as to suggest that it is the result of atypical circumstances that are not representative of the risk profile of a more normal utility.

134. In Opinion No. 569, the Commission adopted the high-end outlier test proposed in the Briefing Order. The Commission found it necessary to apply a high-end outlier test to the results of the DCF and CAPM models. Additionally, given that the Commission would use the midpoint as the measure of central tendency for region-wide ROEs, the Commission found it appropriate that there be a high-end outlier test to eliminate members of the proxy group whose ROEs were unreasonably high.[273]

135. In Opinion No. 569-A, the Commission modified the high-end outlier test to treat any proxy company as a high-end outlier if its cost of equity estimated under the model in question was more than 200% of the median, as opposed to 150% of the median. The Commission found that it was appropriate to increase the threshold for the high-end outlier test because doing so would reduce the risk that rational results were inappropriately excluded. The Commission affirmed that it was appropriate to maintain the test as an objective check to help identify observations that were irrationally or anomalously high.[274] The proxy group companies would still be subject to the natural break analysis.

B. Rehearing Requests

136. LPSC argues that the Commission made the high-end outlier test essentially useless by raising the threshold too high so that it is unlikely to ever exclude a company

---

[272] As noted below, the high-end outlier test only applies to the DCF model and CAPM because they utilize results of the relevant analysis applied to a proxy group, while the Risk Premium model is derived from actual ROEs.

[273] Opinion No. 569, 169 FERC ¶ 61,129 at PP 375-76.

[274] Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 154-55.

from the Commission's DCF and CAPM analyses.[275] LPSC notes that no company comes close to being eliminated as a high-end outlier in either the First Complaint or Second Complaint proceedings. LPSC states that a wide spread between the high DCF result and the high-end outlier threshold does not indicate there is a risk that rational results might be eliminated. LPSC asserts that the Commission's remedy of increasing the high-end outlier test to 200% of the median expands that spread by approximately 400 basis points, potentially more than what is needed to eliminate the risk of inappropriately excluding rational DCF inputs.[276]

137. CAPs similarly state that the Commission's decision to increase the threshold is arbitrary and capricious, is not adequately supported by substantial evidence, and is not based in reasoned decision-making. CAPs state that the Commission provided no record evidence supporting this threshold increase. CAPs argue that the sole stated basis for increasing the high-end outlier threshold was that it would reduce the risk that such rational results are inappropriately excluded. CAPs state that the Commission provided no evidence of the alleged risk or that the Commission's proposed solution is necessary to alleviate the risk.[277]

138. CAPs argue that this increase to the high-end outlier test threshold exacerbates the effect of reliance on the midpoint of the averaged extremes of the utilized methods, rather than the averaged medians of the utilized methods, the average midpoint found by first identifying one composited-methods result per proxy, or the averaged median found by first identifying one composited methods result per proxy. CAPs contend that any of these options would be superior to the midpoint method. CAPs contend that the median should be used instead of relying on the midpoint and that reliance on the averaged midpoints of the utilized methods, when formed through a national proxy group that includes a broad risk band is arbitrary, erratic, and contrary to the laws of statistics.[278]

139. LPSC asserts that the updated high-end outlier test from Opinion No. 569-A results in a large average deviation that substantially favors utilities over ratepayers. LPSC argues that this result does not fit with the Commission's goal of balancing investor and consumer interests consistent with *Hope* and *Bluefield*.[279]

---

[275] LPSC Rehearing Request at 40-41.

[276] *Id.* at 7.

[277] CAPs Rehearing Request at 50-51.

[278] *Id.* at 53.

[279] LPSC Rehearing Request at 45.

C. Commission Determination

140. We sustain the result that the Commission reached on the high-end outlier test in Opinion No. 569-A and will continue to treat any proxy company as a high-end outlier if its cost of equity estimated is more than 200% of the median. We disagree with LPSC's assertion that the Commission raised the threshold so high as to render the high-end outlier test essentially useless. The high-end outlier test is an objective test to identify proxy group ROEs that are irrationally or anomalously high because, for example, they are the result of atypical circumstances that are unrepresentative of the subject utility's risk profile or are otherwise likely to be in error. We again note that the high-end outlier test is the first, but not the only, method for screening a high-end result from the proxy group.

141. We disagree with LPSC that the high-end outlier test disproportionately favors utilities over ratepayers compared to the low-end outlier test. The high-end and low-end outlier tests have different purposes and thus do not have to be proportionate or symmetric. The purpose of the low-end outlier test is to eliminate from the proxy group companies with ROEs that are so low that they are essentially indistinguishable from debt. The high-end outlier test, on the other hand, is meant to screen for observations that are the result of atypical circumstances that are unrepresentative of the subject utility's risk profile or are otherwise likely to be in error.

142. We disagree with LPSC and CAPs that the Commission did not support the increase to the high-end outlier test threshold and that the revision of the test does not eliminate a risk. The high-end outlier test only screens for observations resulting from atypical circumstances that are unrepresentative of the subject utility's risk profile or are likely erroneous. Upon reconsideration, the Commission found that proxy group member ROEs could exceed 150% of the median without being either the result of atypical circumstances that are unrepresentative of the subject utility's risk profile or likely erroneous. Further, the high-end outlier test is used in conjunction with the natural break analysis, which allows results that appear illogical to be removed from the proxy group despite not violating the low or high-end thresholds. In adopting the revised high-end outlier test, the Commission expressly included a discretionary element to screening high-end results, with the high-end outlier test used for the most extreme observations and the natural break analysis for all others.

VIII. Refund Issues

A. Background

143. In Opinion No. 569, the Commission found that the challenged 12.38% base ROE in the First Complaint proceeding was unjust and unreasonable, and additionally found that a replacement base ROE of 9.88% was just and reasonable—instead of the 10.32% replacement ROE that was set in Opinion No. 551. The Commission made the 9.88%

ROE effective as of September 28, 2016, the date on which Opinion No. 551 was issued.[280] The Commission ordered MISO and the MISO TOs to provide refunds, with interest for the 15-month refund period for the First Complaint proceeding from November 12, 2013 through February 11, 2015 and for the period from September 28, 2016—the date on which Opinion No. 551 was issued—to November 21, 2019—the date of Opinion No. 569.[281]

144. The Commission found that the 9.88% base ROE established in the First Complaint proceeding was the existing rate to be analyzed for purposes of the Second Complaint proceeding. In brief, the Commission reasoned that, for purposes of deciding whether a rate charged by a utility is unjust and unreasonable and determining a new just and reasonable rate "to be thereafter observed" pursuant to section 206(a) of the FPA, it must assess whether the public utility's currently effective rate is unjust and unreasonable, not some earlier rate that may have been in effect when the complaint was filed but has now been superseded. The Commission explained that in order to determine a new rate to be thereafter observed, it must examine the currently effective rate because that is the rate that will need to be replaced if it is unjust and unreasonable. The Commission explained that, because the 9.88% base ROE established in the First Complaint proceeding is effective prospectively from September 28, 2016, that is the currently effective rate that the Commission would have to find unjust and unreasonable under the first prong of section 206 before requiring a new ROE "to be thereafter observed" pursuant to the second prong of section 206.[282]

145. The Commission concluded that the 9.88% ROE was just and reasonable based on the facts and circumstances of the Second Complaint and therefore dismissed the Second Complaint. Based on FPA section 206(b), the Commission concluded that refunds may be ordered in a complaint proceeding only when the Commission grants prospective relief in that proceeding (i.e., the Commission sets a new just and reasonable rate which it "orders to be thereafter observed and in force.").[283] The Commission therefore determined that it could not order refunds for the Second Complaint proceeding it was dismissing the complaint and not granting any prospective relief. The Commission found that ordering refunds in the Second Complaint proceeding despite the fact that it was granting no prospective relief would exceed the statutory authority in section 206 because it would effectively extend the 15-month refund period for the First Complaint since the

---

[280] *See* Opinion No. 569, 169 FERC ¶ 61,129 at P 20.

[281] *Id.* at ordering para. (B).

[282] *Id.* P 530.

[283] *Id.* P 568.

refunds would be based on the relief granted in the First Complaint and not any action taken in the Second Complaint.

146. In Opinion No. 569-A, the Commission disagreed with requests for rehearing of the Commission's decision in Opinion No. 569 to order refunds for the period from September 28, 2016, to November 21, 2019, based on its decision in the First Complaint proceeding. The Commission explained that the decision to modify the rate established in Opinion No. 551 for the First Complaint proceeding takes effect as of the date of the order setting that rate (i.e., Opinion No. 551), not as of the date of Opinion No. 569 or Opinion No. 569-A. The Commission noted that it has explained that, "rate changes required in section 206 proceedings should take effect as of the date of the order setting rates, *not* the date of the rehearing—regardless of whether and to what extent the rehearing order changes the rates originally allowed."[284] The Commission further explained that, because the changed rate set on rehearing of Opinion No. 551 is effective as of the date of that order, it is appropriate to direct refunds for the period from that date through the date of Opinion No. 569-A, which established the finally determined just and reasonable rate of 10.02%.[285]

147. In Opinion No. 569-A, the Commission continued to find that refunds should not be ordered for the Second Complaint proceeding because the complaint was denied. The Commission continued to find that, for purposes of deciding whether a rate charged by a public utility is unjust and unreasonable and determining a new just and reasonable rate "to be thereafter observed" pursuant to section 206(a) of the FPA, the Commission must assess whether the public utility's currently effective rate is unjust and unreasonable, not some earlier rate that may have been in effect when the complaint was filed but has now been superseded. The Commission explained that, for purposes of reaching a determination on the Second Complaint, the base ROE resulting from resolution of the First Complaint proceeding was the existing rate to be evaluated. The Commission found that complainants did not show that this rate was unjust and unreasonable under the facts and circumstances of the Second Complaint proceeding. The Commission reasoned that, therefore, the Commission's resolution of the Second Complaint proceeding would not result in a new just and reasonable rate "to be thereafter observed" and no refunds could be issued for the Second Complaint proceeding.[286]

---

[284] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 242 (quoting *Ariz. Pub. Serv. Co.*, 26 FERC ¶ 61,087, at 61,221 (1984)).

[285] *Id.* PP 242-49.

[286] *Id.* PP 260-67.

B. Rehearing Requests

1. CAPs

148. CAPs argue that the Commission erred in treating the Second Complaint as challenging the base ROE that was established in Opinion No. 569 for the First Complaint proceeding. CAPs contend that the Commission dismissed the Second Complaint and denied associated refunds because it determined that the base ROE of 9.88% set in Opinion No. 569 would have been just and reasonable if it had been in force during the Second Complaint study period, but CAPs assert that this is incorrect because that 9.88% base ROE was not in force then.[287] CAPs argue that the Commission's holding on this issue means that refunds are available only if a proceeding concludes with an order reducing the base ROE going forward from that in effect immediately before the proceeding concludes, but that this is in error because the statutory text only requires "'that the Commission find that customers paid an unjust and unreasonable rate during the refund period and that the Commission identify a replacement just and reasonable rate.'"[288]

149. CAPs contend that, under the language of section 206 of the FPA, the rate challenged by the Second Complaint must logically be the ROE that was in effect when the Second Complaint was filed or the ROE that was collected during the Second Complaint refund period. CAPs argue that the ROE at both of those times was 12.38%, not the 9.88% set in Opinion No. 569 upon resolution of the First Complaint proceeding. CAPs disagree with the Commission's interpretation of the "to be thereafter observed" language in section 206, arguing that it simply refers to the Commission's general inability to set retroactive rates, and does not change the rate that is relevant for purposes of the analysis under the first prong of section 206 of the FPA.[289]

150. CAPs argue that the Commission's interpretation of section 206 imposes a burden on complainants that they cannot possibly meet. CAPs assert that, if a complaint alleging that a rate is unjust and unreasonable is already pending before the Commission, then complainants filing any subsequent complaint will not know what rate they must show is unjust and unreasonable until after that pending complaint is resolved. CAPs contend that the Commission will not be able to determine if a subsequent complaint presents sufficient evidence to demonstrate that a challenged base ROE might no longer be just

[287] CAPs Rehearing Request at 27-30.

[288] *Id.* at 29-30 (quoting Opinion No. 569, 169 FERC ¶ 61,129 (Glick, Comm'r, dissenting in part, at P 4)).

[289] *Id.* at 30-32.

and reasonable if the rate that is being challenged by the complaint will not be known until after the already pending complaint proceeding is resolved.[290]

151. CAPs argue that the Commission's interpretation of the existing ROE for purposes of the Second Complaint contradicts the Commission's actions in the Second Complaint Hearing Order. CAPs assert that, in that order, the Commission set for hearing the question of whether the 12.38% base ROE that was in effect at the time the Second Complaint was filed remained just and reasonable. CAPs contend that the Commission did not define the currently effective rate as one that would be decided at some future date. CAPs further argue that other Commission precedent supports their position that the rate to be analyzed in the Second Complaint proceeding is not the rate resulting from resolution of the First Complaint proceeding.[291]

152. CAPs assert that, in rejecting an assertion that a later-filed complaint served "'only to extend the refund period associated with'"[292] an earlier-filed complaint, the Commission stated that "'[i]n assessing the 2013 Complaint, the relevant comparison is between the current ROE and the ROE sought in the 2013 Complaint.'"[293] CAPs contend that, in that order, the Commission did not state that the relevant comparison was between the ROE that would eventually result from the earlier-filed complaint and the ROE sought in the later-filed complaint. CAPs also point to another order in which the Commission rejected an argument that a complaint should be dismissed because it sought a base ROE that was 10 basis points higher than the relief that the complainants sought in an earlier docket, and explained that "'[t]he relief Complainants seek here is an ROE that falls well below the current ROE, using financial data for a later period than the DCF analysis presented in the [earlier] complaint.'"[294] CAPs also take issue with the Commission's explanation that its holding on this issue is consistent with precedent. CAPs argue that the *San Diego Gas & Electric*[295] order cited by the Commission did not

[290] *Id.* at 32-34.

[291] *Id.* at 34-37.

[292] *Id.* at 34 (quoting *Golden Spread Elec. Coop. Inc. v. Southwestern Pub. Serv. Co.*, 151 FERC ¶ 61,126, at P 24 (2015)).

[293] *Id.* at 34-35 (quoting *Golden Spread Elec. Coop. Inc. v. Southwestern Pub. Serv. Co.*, 151 FERC ¶ 61,126 at P 24).

[294] *Id.* at 35 (quoting *Delaware Div. of Pub. Advocate v. Baltimore Gas and Elec. Co.*, 150 FERC ¶ 61,081, at P 19 (2015)).

[295] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,191 (2009).

involve a denial of refunds notwithstanding a Commission finding that the rate charged during the refund period was unjust and unreasonable. CAPs contend that *San Diego Gas & Electric* instead found that section 206 "'provides that the Commission may order refunds of amounts paid in excess of those which would have been paid under the just and reasonable rate or charge,'"[296] which is the relief sought here by CAPs.

153. In addition, CAPs assert that the Commission has previously ordered refunds under FPA section 206(b) without also ordering a prospective rate reduction to apply thereafter. CAPs cite *Bangor Hydro*,[297] in which they assert that the Commission "mainly considered an ROE increase request filed pursuant to FPA section 205," but "also addressed an ROE reduction complaint filed under FPA section 206 during the course of the proceeding, based on evidence that had been presented in the section 205 proceeding."[298] CAPs contend that, while the Commission set the prospective ROE under section 205 alone, it nonetheless ordered refunds below the prior "last clean rate" for the fifteen-month section 206 complaint refund period, which is a remedy available only under section 206. CAPs argue that, therefore, the Commission ordered refunds even though there was no prospective ROE reduction under section 206.[299] CAPs assert that the Commission took similar action in *Blue Ridge Power*[300] and *Golden Spread Electric Cooperative*.[301] CAPs assert that, in *Blue Ridge Power*, the Commission entertained Appalachian's section 205 filing to increase its ROE while Blue Ridge Power Agency's section 206 complaint to reduce it was still pending, and held that the section 205 filing limited relief under the section 206 complaint to a locked-in period.[302] CAPs

---

[296] CAPs Rehearing Request at 35-36 (quoting *San Diego Gas & Electric*, 127 FERC ¶ 61,191 at P 16).

[297] *Bangor Hydro-Elec. Co.*, 120 FERC ¶ 61,093 (2007) (*Bangor Hydro*).

[298] CAPs Rehearing Request at 36.

[299] *Id.*

[300] *Blue Ridge Power Agency v. Appalachian Power Co.*, Opinion No. 363, 55 FERC ¶ 61,509, at 62,785-86, *on reh'g*, Opinion No. 363-A, 57 FERC ¶ 61,100 at 61,371 (1991).

[301] *Golden Spread Elec. Co-op. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047 (2008).

[302] CAPs Rehearing Request at 37.

contend that, in *Golden Spread Electric Cooperative*, the Commission granted an ROE reduction on a section 206 complaint that was "locked in" by a section 205 filing.[303]

154. CAPs also argue that the Commission is *de facto* imposing barriers to bringing successive ROE complaints by using the ROE established at the conclusion of prior complaint proceedings to evaluate subsequent complaint proceedings. CAPs assert that the Commission has failed to explain its departure from precedent that allows later-filed ROE complaints to proceed to hearing while an earlier ROE complaint was still pending. CAPs contend that, while the Commission did not state that it was changing precedent that permits the filing of overlapping complaints, it has nonetheless overturned this precedent because any complaint filed while a preceding complaint has not yet been decided must now rebut the presumed justness and reasonableness of a rate that will not exist until some time in future. CAPs argue that, while an agency is not foreclosed from departing from its own precedent, the Commission has not justified this departure.[304]

155. CAPs disagree with the Commission reasoning that, if it used the 12.38% base ROE for purposes of analyzing the Second Complaint, then its decision in the First Complaint proceeding could serve as the predicate for effectively extending the statutory 15-month refund limitation. CAPs assert that, in the Second Complaint Hearing Order, the Commission explained that it was not instituting a proceeding duplicative of the First Complaint proceeding because the Second Complaint was an entirely new proceeding based a separate factual record and the conclusion in the Second Complaint proceeding may or may not be the same as the conclusion reached in the First Complaint proceeding. CAPs argue that, therefore, the basis on which the Second Complaint would be granted would not be mere repetition of the determination in the First Complaint proceeding, but rather a finding that the 12.38% base ROE that was in effect when the Second Complaint was filed is unjust and unreasonable as demonstrated by the record evidence of what equity cost during the Second Complaint's relevant study period.[305]

156. In addition, CAPs assert that the Commission's dismissal of the Second Complaint is contrary to the Regulatory Fairness Act.[306] CAPs cite to an order in which the Commission stated that "'[t]he Commission has consistently interpreted the Regulatory Fairness Act—in the specific context of public utility ROE cases—to allow subsequent

[303] *Id.*

[304] *Id.* at 37-39.

[305] *Id.* at 40.

[306] Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

complaints in the circumstances of this case.'"[307] CAPs also cite an order in which the Commission stated that "'[u]tilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints.'"[308] CAPs assert that, in Opinion No. 569 and Opinion No. 569-A, the Commission effectively reversed these positions without explanation. CAPs contend that, in practice, the Commission's holdings in those orders impose a "one complaint at a time" rule which conflicts with the Regulatory Fairness Act's intent "to make 'the system for bringing utility rates down . . . similar to the system for bringing rates up.'"[309]

157. CAPs also argue that, by allowing MISO TOs to retain the revenues collected based on the 12.38% base ROE for the Second Complaint's 15-month refund period, the Commission is allowing an unjust and unreasonable rate to be charged, which is contrary to the FPA. CAPs assert that section 206 of the FPA provides that, whenever a rate is found to be unjust, unreasonable, or unduly discriminatory, the Commission "shall" fix a substitute rate. They argue that, however, the Commission did not find that 12.38% was a just and reasonable base ROE for the Second Complaint proceeding's study period and therefore permitting MISO TOs to continue to recover that 12.38% base ROE for the Second Complaint proceeding's refund period violated the Commission's obligation under section 206 of the FPA.[310]

158. CAPs further assert that the Commission's holdings also deprived complainants of any opportunity to rebut a presumption that the base ROE resulting from the First Complaint proceeding was just and reasonable. CAPs contend that, because that ROE was not in existence at the time the Second Complaint was filed, complainants could not present evidence regarding whether the base ROE resulting from the First Complaint proceeding is unjust and unreasonable and could not present the types of other evidence that the Commission stated could overcome the presumption that a base ROE is just and reasonable. CAPs argue that imposing the presumption is unjust and unreasonable

---

[307] CAPs Rehearing Request at 40-41 (quoting *Golden Spread Electric Coop. Inc. v. Southwestern Public Service Co.*, 151 FERC ¶ 61,126 at P 21 (internal citations omitted)).

[308] *Id.* at 41 (quoting *Golden Spread Electric Coop. Inc. v. Southwestern Public Service Co.*, 151 FERC ¶ 61,126 at P 21).

[309] *Id.* at 43 (quoting Regulatory Fairness Act: Hearing Before the Comm. on Energy and Natural Res., 100th Cong. 2 (Nov. 18, 1987) (Statement of Sen. Bumpers)).

[310] *Id.* at 44-46.

because there is no way to rebut a presumption that, at the time of hearing, was not known to exist.[311]

159. In addition, CAPs contend that granting refunds in the Second Complaint proceeding would not violate the 15-month statutory limit on refunds. They argue that the First Complaint and Second Complaint were two separate complaints, brought by two different sets of parties, with two separate refund periods, and that the Commission itself acknowledged that each complaint had demonstrated the base ROE in effect at the time of that complaint's filing may be unjust and unreasonable sufficiently to proceed to hearing, based on the evidence of market conditions during the relevant study period. CAPs assert that, in light of this, the mere fact that the two refund periods for the two complaints add up to more than 15 months does not create a statutory violation.[312]

160. CAPs also reiterate their argument that ordering refunds in a section 206 proceeding only when there is a prospective rate reduction in that proceeding creates a loophole that utilities can use to frustrate the consumer protection intended by section 206 of the FPA. CAPs contend that, for example, upon the issuance of an initial decision on a section 206 complaint, a utility could submit a section 205 filing to reduce its ROE to a level well above the ROE the initial decision correctly determined was just and reasonable, but just within the top end of what the initial decision identifies as the zone of presumptively just and reasonable ROEs. CAPs assert that the utility's newly-filed ROE would become the newly-established ROE to which the initial decision's zone of presumptively just and reasonable ROEs would have to be compared. CAPs argue that, in such a scenario, the Commission would be forced to find that the newly-established ROE falls within the zone of presumptively just and reasonable ROEs and that the complainants had not met their burden. CAPs contend that, as a result, the utility would have successfully shielded itself both from refunds and from a prospective reduction down to the cost-based level found in the initial decision. CAPs assert that this cannot be the outcome anticipated by the authors of the Regulatory Fairness Act, and that, at a minimum, the Commission should make clear how it would prevent such tactics from vitiating relief under section 206.[313]

161. CAPs argue that, even if the Commission's interpretation of section 206 of the FPA were correct in the First Complaint, the record as a whole still rebuts the presumption that base ROE resulting from the First Complaint is just and reasonable based on the data in the Second Complaint proceeding. CAPs assert that the models the Commission used in Opinion No. 569's section 206 analysis point to a base ROE of

[311] *Id.* at 46-49.

[312] *Id.* at 52-53.

[313] *Id.* at 53-54.

9.72% for the MISO TOs in the Second Complaint, which is materially below the base ROE of 9.88% that the Commission initially established in Opinion No. 569. CAPs therefore argue that the Opinion No. 569 versions of the DCF model and CAPM themselves rebut this presumption and that, even assuming only other evidence can rebut the presumption, such evidence is plentiful.

162. CAPs also contend that the Commission has, and should exercise, discretion to grant refunds in the Second Complaint proceeding. CAPs assert that the Commission's decision to not order prospective relief in the Second Complaint proceeding was ultimately based on the Commission's decision to use ranges of presumptively just and reasonable ROEs, which was a decision that the Commission made as a matter of discretion because it was not required by *Emera Maine*. CAPs argue that the Commission should similarly exercise discretion to grant refunds in the Second Complaint proceeding because denying refunds would simply permit MISO TOs to keep some revenues from a rate that the Commission itself acknowledged was unjust and unreasonable. CAPs further contend that the Commission also had the discretion to act on the Second Complaint before the First Complaint, and the Commission should have done so here because it would have entitled MISO TOs' customers to refunds for the Second Complaint since the ROE set by an order in the Second Complaint could not be deemed to be the existing ROE for purposes of deciding the First Complaint.[314]

2. <u>LPSC</u>

163. LPSC argues that the Commission is incorrect in determining that the new rate resulting from resolution of the First Complaint is the existing rate for purposes of the Second Complaint because the language of section 206 of the FPA makes clear that such new rate cannot be effective until after the order establishing that rate is issued.[315] LPSC contends that Opinion No. 569-A appears to conflict with Opinion No. 569, without acknowledging the contradiction. LPSC asserts that the Commission in Opinion No. 569 found that the base ROE established in the "lower-numbered paragraphs"[316] in resolving the First Complaint was the "currently effective ROE as of today" that had to be analyzed for the Second Complaint period.[317] LPSC asserts that Opinion No. 569 appears to have relied on the remedial order, which made the decision in that case "effective

[314] *Id.* at 56-59.

[315] LPSC Rehearing Request at 3-4.

[316] *Id.* at 29.

[317] *Id.* (quoting Opinion No. 569, 169 FERC ¶ 61,129 at P 530).

prospectively from September 28, 2016."[318] LPSC argues that this reasoning assumes that the remedial ROE was effective before the Opinion No. 569 was issued for that remedial period. LPSC contends that, in Opinion No. 569-A, "the Commission shifted its rationale, stating that 'the Commission's decision in the First Complaint proceeding made the new base ROE established in that proceeding the rate that was demanded, observed, charged and collected for the First Complaint proceeding's refund period.'"[319] LPSC asserts that this suggests that the Commission's refund retroactively set the rate, so that it was effective when the Second Complaint was filed within that refund period.[320] LPSC contends that the Commission needs to clarify which of these descriptions constitutes its official rationale, or if there is another.[321]

164. LPSC argues that, under either rationale, the decision conflicts with the language of the statute. LPSC states that section 206(a) provides that, if it finds a rate unjust and unreasonable, the Commission can set a new just and reasonable rate to be "thereafter" in force.[322] LPSC states that section 206(b), which provides refund authority for a complaint's refund period, provides that the Commission may order refunds for the amounts paid "in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force."[323] LPSC contends that, in each case, the word "thereafter" refers to a time after the issuance of the Commission's order and "thereafter" in each section cannot mean "for the previous refund period" or "in the "lower-numbered paragraphs."[324] LPSC argues that, if the Commission means that a lower-numbered paragraph set a new rate and made it effective before the issuance of the decision, this rationale is incorrect because all the findings in an order are issued simultaneously and there is no basis for contending that some are effective before others. LPSC asserts that, if the Commission contends that providing a refund is the same thing as retroactively setting a new rate for the First

[318] *Id.* (quoting Opinion No. 569, 169 FERC ¶ 61,129 at P 230).

[319] *Id.* at 30 (quoting Opinion No. 569-A, 171 FERC ¶ 61,154 at P 264).

[320] *Id.*

[321] *Id.*

[322] *Id.* (quoting 16 U.S.C. § 824e).

[323] *Id.* (quoting 16 U.S.C. § 824e(b)).

[324] *Id.* at 31.

Complaint period, then this rationale conflicts with the Commission's precedent prohibiting it from fixing a rate retroactively.[325]

165. LPSC argues that the Commission should have used the most recent study period to set the prospective rate, consistent with its precedent supporting the use of the most recent data in record, which would have been the Second Complaint study period in this case. LPSC contends that, if the Commission had done this, no presumption of reasonableness would have applied in the First Complaint proceeding because it preceded the Second Complaint and the Commission would have determined what the just and reasonable rate "would have been" for purposes of ordering refunds for the First Complaint period. LPSC also asserts that providing refunds for each complaint refund period is not an extension of the refund period. LPSC contends that the Commission could determine the just and reasonable rate based on data for the First Complaint, provide a refund for the first refund period, and use that ROE for determining refunds for the Second Complaint period if it remains just and reasonable. LPSC argues that, while the same "decision" may require refunds for each period, this is not an extension of a refund period, but merely providing refunds for each of the two, separate refund periods.[326]

166. LPSC asserts that, if the Commission had expedited its action on the First Complaint so that it was issued within 180 days of when the proceeding was initiated as contemplated in section 206(b), a just and reasonable rate would have been in place for the Second Complaint refund period and if that rate were just and reasonable, there would be no need for refunds. LPSC argues that it is only because of the Commission's delay that action on the Second Complaint could be characterized as extending the First Complaint's refund period. LPSC also contends that the rate actually in effect and paid in both complaint refund periods was unjust and unreasonable, and therefore it is contrary to the statutory text to deny refunds for the Second Complaint refund period.[327]

167. LPSC also questions whether the Commission, in Opinion No. 569-A, relied on the fact that the refund periods for the two complaints overlapped by a day in reaching its holdings. LPSC takes the position that the Commission's rationale could not treat the new base ROE resulting from the First Complaint as the existing rate for the Second Complaint if the Second Complaint refund period "is lagged by a day."[328]

---

[325] *Id.*

[326] *Id.* at 32-33.

[327] *Id.* at 33-34.

[328] *Id.* at 34.

168. In addition, LPSC argues that the Commission fails to reconcile its holdings with precedent that provides that refunds can be granted for successive complaints.[329] LPSC further contends that the Commission's holdings are inconsistent with precedent that holds that since utilities are free to file multiple section 205 rate increase requests, consumers should be able to file multiple rate decrease requests.[330]

C. Commission Determination

169. We are not persuaded by CAPs' and LPSC's arguments on rehearing. As an initial matter, we note that many of the arguments that they raised on rehearing were raised on rehearing of Opinion No. 569 and the Commission addressed them in Opinion No. 569-A. In Opinion No. 569-A, the Commission did not modify its determinations regarding the existing rate to be analyzed for purposes of the Second Complaint or whether resolution of the Second Complaint requires refunds. Accordingly, arguments requesting rehearing of those determinations on which the Commission did not modify and set aside in Opinion No. 569-A are impermissible requests for rehearing.[331] Below we address the arguments raised by CAPs and LPSC that are not impermissible requests for rehearing.

170. While LPSC's arguments that the Commission erred in determining the existing rate for purposes of the Second Complaint constitute an impermissible request for rehearing, LPSC attempts to reframe its arguments as pointing out that "Opinion No. 569-A appears to conflict with Opinion No. 569, without acknowledging the

---

[329] *Id.* at 34-35 (citing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W. Va. v. Allegheny Generating Co.*, 68 FERC ¶ 61,207, at 61,998-99 (1994); *Southern Co. Servs., Inc.*, 83 FERC ¶ 61,079, at 61,386 (1998)).

[330] *Id.*

[331] *See, e.g.*, *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 129 FERC ¶ 61,276, at PP 10-11 (2009) ("The Commission generally does not allow rehearing of an order denying rehearing . . . Rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection."); *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,045, at P 10 (2009) ("The Commission generally does not allow rehearing of an order denying rehearing unless the order denying rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection."); *Entergy Servs., Inc.*, 124 FERC ¶ 61,203, at P 10 (2008) ("The Commission does not allow rehearing of an order denying rehearing."); *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-424 (1st Cir. 2001).

contradiction."[332] LPSC argues that, in Opinion No. 569, the Commission found that the base ROE established in resolving the First Complaint was the "currently effective ROE as of today" that had to be analyzed for the Second Complaint period.[333] LPSC asserts that Opinion No. 569 appears to have relied on the remedial order, which made the decision in that case effective prospectively from September 28, 2016. LPSC claims that, in Opinion No. 569-A "the Commission shifted its rationale, stating that 'the Commission's decision in the First Complaint proceeding made the new base ROE established in that proceeding the rate that was demanded, observed, charged and collected for the First Complaint proceeding's refund period.'"[334] LPSC asserts that this suggests that the Commission's refund retroactively set the rate, so that it was effective when the Second Complaint was filed within that refund period.[335] LPSC contends that the Commission needs to clarify which of these descriptions constitutes its rationale.

171. We disagree that Opinion No. 569-A and Opinion No. 569 conflict on this point. As the Commission explained in Opinion No. 569, the base ROE that was in effect when the Second Complaint was filed on February 12, 2015 was superseded by the base ROE resulting from resolution of the First Complaint, and therefore the base ROE resulting from resolution of the First Complaint is the currently effective ROE for purposes of deciding whether MISO TOs' base ROE is unjust and unreasonable and should be modified prospectively pursuant to FPA section 206 in the Second Complaint proceeding.[336] In Opinion No. 569-A, the Commission addressed an argument by LPSC that the Commission's decision in Opinion No. 569 to not order refunds in the Second Complaint proceeding is inconsistent with section 206. LPSC argued that section 206 requires the Commission to determine whether a rate "demanded, observed, charged, or collected by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential" but MISO TOs have never "demanded, observed, charged, or collected" the base ROE that was established in the First Complaint proceeding. LPSC asserted that, therefore the rate established in the First Complaint proceeding should not be the one that the Commission analyzes in making its determination in the Second Complaint proceeding.[337] In finding this argument unpersuasive, the Commission explained that evaluating the base ROE resulting from the First Complaint proceeding as the existing

---

[332] LPSC Rehearing Request at 29.

[333] *Id.* (quoting Opinion No. 569, 169 FERC ¶ 61,129 at P 530).

[334] *Id.* at 30 (quoting Opinion No. 569-A, 171 FERC ¶ 61,154 at P 264).

[335] *Id.*

[336] Opinion No. 569, 169 FERC ¶ 61,129 at P 530.

[337] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 264.

rate for purposes of the Second Complaint proceeding was not inconsistent with section 206. This was because, while at the time the Second Complaint was filed, the new just and reasonable rate established in the First Complaint proceeding had not yet been demanded, observed, charged or collected, the Commission's decision in the First Complaint proceeding made the new base ROE established in that proceeding the rate that was demanded, observed, charged and collected for the First Complaint proceeding's refund period.[338] Contrary to LPSC's assertion that this "suggests that the Commission's refund retroactively set the rate, so that it was 'effective' when the [S]econd [C]omplaint was filed within that refund period,"[339] the Commission's holding in Opinion No. 569-A did not retroactively set a rate, but merely explained that the base ROE resulting from resolution of the First Complaint proceeding was a rate that had been demanded, observed, charged and collected such that it was consistent with section 206 to consider that base ROE as the existing rate for purposes of the Second Complaint.

172. This holding is consistent with the Commission's holding in Opinion No. 569. There, the Commission explained that, in evaluating a section 206 complaint challenging a base ROE, the Commission must analyze the currently effective base ROE, not some earlier rate that may have been in effect when the complaint was filed but has now been superseded because any new just and reasonable rate that we require "to be thereafter observed" pursuant to section 206(a) will replace the currently effective rate, not some previously effective rate.[340] In Opinion No. 569-A, the Commission addressed why the base ROE resulting from resolution of the First Complaint was a rate "demanded, observed, charged, or collected" within the meaning of section 206 such that it was consistent with the statute to use that base ROE as the existing rate for purposes of evaluating the Second Complaint. In Opinion No. 569-A, the Commission explicitly stated that the base ROE resulting from resolution of the First Complaint was effective as of September 28, 2016[341]—the date of Opinion No. 551, which was the order modified by the Commission's holdings in Opinion No. 569—and not effective when the Second Complaint was filed within the First Complaint's refund period. Together, the Commission's holdings in Opinion No. 569 and Opinion No. 569-A merely mean that, when analyzing a section 206 complaint challenging a base ROE, the Commission must analyze the currently effective rate because that is the rate that would be replaced if the complaint is granted, and that, in this case, that currently effective rate was a rate "demanded, observed, charged, or collected" within the meaning of section 206 because

---

[338] *Id.*

[339] LPSC Rehearing Request at 30.

[340] Opinion No. 569, 169 FERC ¶ 61,129 at PP 529-30.

[341] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 268, Ordering Paragraph (B).

it was observed for the First Complaint's refund period. Opinion No. 569-A did not retroactively set a rate, but explained why the Commission's interpretation of the existing rate for purposes of the Second Complaint was consistent with section 206 and made the rate effective as of the date of Opinion No. 551, which is the order whose holdings were modified by Opinion Nos. 569 and 569-A. Accordingly, LPSC's argument does not persuade us to modify the Commission's holdings on this issue in Opinion No. 569-A.

173. In addition, CAPs take issue with the Commission's interpretation of the existing ROE for purposes of the Second Complaint because they allege that it contradicts the Commission's actions in the Second Complaint Hearing Order. CAPs assert that, in that order, the Commission set for hearing the question of whether the 12.38% base ROE that was in effect at the time the Second Complaint was filed remained just and reasonable. CAPs contend that the Commission did not define the currently effective rate as one that would be decided at some future date.[342] We find this argument unavailing. When the Commission issued the Second Complaint Hearing Order, the currently effective based ROE was 12.38% because the Commission had not yet acted on the First Complaint and the 12.38% base ROE had not been superseded. The Commission did not explicitly define the rate to be analyzed for purposes of the Second Complaint as one that would be decided at some future date because it was unknown at that time whether the 12.38% base ROE would be superseded such that it would no longer be the currently effective rate. Consistent with the Commission's holding in Opinion No. 569, in the Second Complaint Hearing Order, the Commission used the 12.38% base ROE as the currently effective rate because that was the rate in effect at the time the Second Complaint Hearing Order was issued and it had not been superseded. However, when the Commission issued Opinion No. 569, the base ROE resulting from resolution of the First Complaint proceeding superseded that 12.38% base ROE as the currently effective rate for purposes of evaluating the Second Complaint. Accordingly, the Commission's interpretation of the existing rate for purposes of the Second Complaint is not inconsistent with the Second Complaint Hearing Order because when the Second Complaint Hearing Order was issued, the 12.38% base ROE would have been the rate that would have been replaced if the Commission granted the complaint and required a new just and reasonable rate to be "thereafter observed," but when Opinion No. 569 was issued, that 12.38% base ROE was superseded and the rate resulting from resolution of the First Complaint—which became effective prospectively on September 28, 2016—became the rate that would be replaced if the Second Complaint was granted. Thus, in the Second Complaint Hearing Order, and Opinion Nos. 569 and 569-A, the Commission considered the rate to be analyzed in the Second Complaint as the rate that would have to be replaced if the complaint were granted and the Commission ordered a new rate to be thereafter observed. The fact that when the Second Complaint Hearing Order was issued, the 12.38% base ROE had not yet been superseded, but when Opinion No. 569 was

[342] *See* CAPs Rehearing Request at 34-35.

issued, the resolution of the First Complaint superseded that base ROE, does not mean that the Second Complaint Hearing Order is inconsistent with the Commission's actions in Opinion Nos. 569 and 569-A. The currently effective rate described in the Second Complaint Hearing Order is consistent with the Commission's interpretation of the currently effective rate in Opinion Nos. 569 and 569-A, and is different only because of the difference in when the orders were issued and the resolution of the First Complaint that occurred after the date of the Second Complaint Hearing Order.

174. CAPs further argue that the Commission's determination of the existing rate for purposes of the Second Complaint is inconsistent with precedent. CAPs point to two orders in which the Commission explained that it was using "the current ROE" as the point of comparison in evaluating a successive complaint against an ROE, and they argue that Opinion No. 569-A is inconsistent with these orders because those orders did not describe the relevant comparison as an ROE that would eventually result from resolution of an earlier complaint. We find this argument unpersuasive. Consistent with the two orders cited by CAPs, Opinion No. 569-A explained that, in deciding whether to grant a complaint challenging a base ROE, the Commission must assess whether the public utility's "currently effective rate is unjust and unreasonable."[343] When the Commission is acting on a complaint, the rate analyzed must be the currently effective rate at the time that the Commission is acting because that is the rate that would be replaced if the Commission granted the complaint. Opinion No. 569-A and the orders cited by CAPs are consistent with this. The fact that developments in other proceedings may change what the currently effective rate is at different times does not change that the proper inquiry at the time the Commission is taking action is whether the currently effective rate is unjust and unreasonable. The question in those orders, as it was in Opinion No. 569-A, was whether the currently effective rate at the time the Commission was acting was unjust and unreasonable, and the Commission's description of that question in the orders cited by CAPs and in Opinion No. 569-A are consistent.

175. CAPs also take issue with the Commission's explanation that *San Diego Gas & Electric*[344] is consistent with the Commission's holding that refunds may be issued in a section 206 complaint proceeding only if prospective relief is granted. CAPs argue that *San Diego Gas & Electric* did not involve a denial of refunds notwithstanding a Commission finding that the rate charged during the refund period was unjust and unreasonable, and instead states that the "Commission may order refunds of amounts paid in excess of those which would have been paid under the just and reasonable rate or

[343] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 231.

[344] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,191.

charge."[345] In Opinion No. 569, the Commission cited *San Diego Gas & Electric* for the proposition that Commission can only order refunds in a section 206 complaint proceeding if it finds the challenged rate to be unjust, unreasonable or unduly discriminatory or preferential.[346] The Commission did not state that *San Diego Gas & Electric* involved directly analogous facts nor was that necessary for the Commission to cite it for the general proposition that refunds may only be ordered in a section 206 complaint proceeding if the Commission finds the challenged rate to be unjust, unreasonable or unduly discriminatory or preferential. Accordingly, we find this argument unavailing.

176. In addition, CAPs assert that Opinion No. 569-A is inconsistent with precedent because the Commission has previously ordered refunds under FPA section 206(b) without also ordering a prospective rate reduction to apply thereafter. CAPs argue that *Bangor Hydro*, *Blue Ridge Power*, and *Golden Spread Electric Cooperative* are all orders in which the Commission did so. As an initial matter, we note that these orders all involved a directly related section 205 filing, as CAPs explain. Accordingly, these orders are distinguishable from the issue before us here, which is whether the Commission can order refunds in a section 206 complaint with no directly related section 205 filing if it does not grant prospective relief in that complaint proceeding. Specifically, *Bangor Hydro* involved the intersection of the "last clean rate" doctrine for section 205 filings and a section 206 complaint[347] and the last clean rate doctrine is not at issue in these proceedings. Similarly, *Blue Ridge Power* and *Golden Spread Electric Cooperative* both involved the consideration of a section 206 complaint together with a section 205 filing that created a "locked-in" period for rates and how to adjust equity allowances during such a locked-in period.[348] Conversely, these proceedings do not involve a section 205

---

[345] CAPs Rehearing Request at 35-36.

[346] Opinion No. 569, 169 FERC ¶ 61,129 at P 572.

[347] *Bangor Hydro*, 120 FERC ¶ 61,093 at P 16 ("The last clean rate doctrine applies when a company has filed under section 205 of the FPA for an increase in a previously-accepted rate.") (internal citations omitted); *id.* P 23 ("the application of the FPA section 205 last clean rate doctrine in this proceeding is limited by the existence of the FPA section 206 refund effective date and fifteen-month refund period that we established.").

[348] *See Blue Ridge Power Agency v. Appalachian Power Co.*, Opinion No. 363-A, 57 FERC ¶ 61,100 at 61,371 ("[D]uring the pendency of a section 205 proceeding, the commencement of a section 206 proceeding and the establishment of a refund effective date creates a locked-in period for purposes of updating the common equity allowance . . . we consider it equally appropriate to allow a section 205 filing during a section 206 proceeding to create a locked-in period for purposes of updating the common equity

filing or a locked-in period for any rates at issue. Accordingly, these orders are distinguishable from the issue in these proceedings.

177. CAPs argue that the Commission's interpretation of section 206 imposes a burden on complainants that they cannot meet because, if a complaint alleging that a rate is unjust and unreasonable is already pending before the Commission, then complainants filing any subsequent complaint will not know what rate they must show is unjust and unreasonable until after that pending complaint is resolved. We disagree. The fact that a preceding complaint against a base ROE remains pending when a subsequent complaint is filed is not a burden on complainants. As evidenced by the Commission's actions in the Second Complaint Hearing Order, complainants in such a subsequent complaint can present a *prima facie* case that a base ROE is unjust and unreasonable sufficient to proceed to hearing even if a preceding complaint against that base ROE remains pending. Moreover, as the Commission explained in Opinion No. 569-A, "[i]t would have been possible for the Commission to order refunds for the refund periods in both complaint proceedings if the base ROE resulting from resolution of the First Complaint proceeding was no longer just and reasonable based on the facts and circumstances of the Second Complaint proceeding."[349] Accordingly, it is possible for complainants in a subsequent complaint to meet their burden to justify granting the complaint even if there is a pending, preceding, complaint that could result in a new currently effective rate for purposes of analyzing the subsequent complaint.

178. CAPs similarly contend that, while the Commission did not state that it was changing precedent that permits the filing of successive complaints, it has nonetheless overturned this precedent, and not justified this departure. CAPs argue that any complaint filed while a preceding complaint has not yet been decided must now rebut the presumed justness and reasonableness of a rate that will not exist until some time in the future. We disagree. Nothing in Opinion No. 569-A changes the Commission's precedent permitting the filing of successive complaints. As noted above, it is possible—and indeed happened in this case with the Second Complaint—for a subsequent complaint to be filed and proceed to hearing even if there is a pending, preceding complaint. Whether a challenged base ROE is unjust and unreasonable, regardless of whether it may be changed by resolution of a preceding complaint or not, depends on the data in the record for the applicable complaint proceeding. The fact that this data may need to be compared to a currently effective rate that is different than the currently

---

allowance."); *Golden Spread Elec. Co-op. v. Southwestern Pub. Serv. Co.*, Opinion No. 501, 123 FERC ¶ 61,047, at P 65 ("[W]here the rate under consideration is 'locked-in' . . . the Commission updates the equity allowance for the locked-in period based on the change in average yields on ten-year constant maturity U.S. Treasury bonds.").

[349] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 261.

effective rate at the time the complaint was filed does not change the burden on complainants or otherwise overturn the Commission's precedent permitting the filing of successive complaints.

179. CAPs contend that the Commission's holdings in Opinion No. 569-A impose a "one complaint at a time" rule that is inconsistent with Commission precedent finding that the Regulatory Fairness Act allows subsequent complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints. LPSC makes a similar argument, contending that the Commission fails to reconcile its holdings with precedent that provides that refunds can be granted for successive complaints, and that since utilities are free to file multiple section 205 rate increase requests, consumers should be able to file multiple rate decrease requests. We disagree. As noted above, nothing in Opinion No. 569-A changes the Commission's precedent permitting the filing of successive complaints. Complainants remain able to file successive complaints against a base ROE even if a preceding complaint is still pending and any such successive complaint could be granted if the complainants can demonstrate that the applicable currently effective rate is unjust and unreasonable based on the study period, data, and other record evidence in that proceeding.

180. CAPs argue that the Commission erred in denying the Second Complaint because the record as a whole rebuts the presumption that base ROE resulting from the First Complaint is just and reasonable based on the data in the Second Complaint proceeding.[350] CAPs requested rehearing of this determination in their previous requests for rehearing of Opinion No. 569 and in Opinion No. 569-A the Commission disagreed with their arguments and did not modify its determination on this issue in Opinion No. 569.[351] Accordingly, CAPs' arguments requesting rehearing of this determination constitute an impermissible request for rehearing of Opinion No. 569-A's findings on this issue which did not modify Opinion No. 569. Furthermore, we find that this presumption has not been rebutted by the evidence in the Second Complaint proceeding. We see no evidence in the record, such as state ROEs, ROEs of non-utility companies, and other methodologies that rebuts this presumption. Accordingly, we do not find that the MISO TOs' ROE established in the First Complaint proceeding and in effect as of the date of this order is unjust and unreasonable under the first prong of section 206.

181. LPSC contends that providing refunds for each complaint refund period is not an extension of the refund period because the Commission could determine the just and reasonable rate based on data for the First Complaint, provide a refund for the first refund period, and use that ROE for determining refunds for the Second Complaint period if it

---

[350] *See* CAPs Rehearing Request at 27-32; LPSC Rehearing Request at 3-4, 34.

[351] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 217.

remains just and reasonable. As noted above, section 206 of the FPA dictates that refunds may be ordered in a complaint proceeding only when the Commission grants prospective relief in that proceeding. Because the Commission concluded that it could not grant prospective relief in the Second Complaint proceeding, it was unable to order refunds for the Second Complaint proceeding. Section 206 of the FPA does not permit the Commission to order refunds in the Second Complaint proceeding unless the Commission grants prospective relief in that proceeding. Accordingly, we find this argument unavailing.

182. We are also not persuaded by CAPs' argument that the Commission should otherwise exercise its discretion to grant refunds in the Second Complaint proceeding. As discussed above and in Opinion Nos. 569 and 569-A, the Commission's decision to not order refunds in the Second Complaint proceeding is dictated by the language of section 206 of the FPA. LPSC questions whether the Commission relied on the fact that the refund periods for the two complaints overlapped by a day in reaching its holdings. We clarify that the Commission did not rely on this to reach its holdings with respect to refunds. Rather, the language of section 206 dictated these Commission holdings.

IX. Conclusion

183. In response to the requests for rehearing, Opinion No. 569-A is hereby modified and set aside in part, as discussed above. However, those modifications do not affect the 10.02% base ROE that was adopted in Opinion No. 569-A. Accordingly, we continue to require the MISO TOs to adopt a 10.02% base ROE effective September 28, 2016, the date Opinion No. 551 initially required the MISO TOs to adopt a 10.32% base ROE. As discussed above, we therefore require the MISO TOs to provide refunds based on that 10.02% base ROE, with interest, for the First Complaint proceeding's 15-month refund period from November 12, 2013 through February 11, 2015, and for the period from September 28, 2016 to the date of this order. Further, as discussed above we are sustaining the Commission's dismissal of the Second Complaint in Opinion No. 569-A and its finding that no refunds will be ordered in the Second Complaint proceeding.

The Commission orders:

(A) In response to the requests for rehearing, Opinion No. 569-A is hereby modified and set aside in part, as discussed in the body of this order.

(B) MISO TOs' base ROE is set at 10.02% with a total or maximum ROE including incentives not to exceed 12.62%, effective as of September 28, 2016, as discussed in the body of this order.

(C) MISO and MISO TOs are directed to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2020), by September 23, 2021, for the 15-month refund period for the First Complaint from November 12, 2013 through

February 11, 2015 and for the period from September 28, 2016 to the date of this order, as discussed in the body of this order.

(D) MISO and MISO TOs are directed to file a refund report detailing the principal amounts plus interest paid to each of their customers by September 23, 2021.

By the Commission. Commissioner Glick is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix I: Risk Premium Model Results

Risk Premium Model Results

	First Complaint	Second Complaint
Current Equity Risk Premium		
Average Yield Over Study Period	6.11%	6.02%
Baa Utility Bond Yield	4.65%	5.41%
Change in Bond Yield	-1.46%	-0.61%
Risk Premium/Interest Rate Relationship	-0.7110	-0.6946
Adjustment to Average Risk	1.04%	0.43%
Average Risk Premium over Study Period	4.41%	4.45%
Adjusted Risk Premium	**5.45%**	**4.88%**
Implied Cost of Equity		
Baa Utility Bond Yield	4.65%	5.41%
Adjusted Equity Risk Premium	5.45%	4.88%
Risk Premium Cost of Equity	**10.10%**	**10.29%**

Docket Number	Utility	Test Period	Base ROE	Baa Bond Yield	Implied Risk Premium
ER05-515	BG&E	Feb-06	10.80%	6.07%	4.73%
ER05-515	BG&E	Feb-06	11.30%	6.07%	5.23%
ER05-925	Westar	Jun-06	10.80%	6.36%	4.44%
ER07-284	SDG&E	Feb-07	11.35%	6.14%	5.21%
ER06-787	Idaho Pwr	May-07	10.70%	6.15%	4.55%
ER06-1320	Wisconsin Elec. Pwr	May-07	11.00%	6.15%	4.85%
ER06-1549	Duquesne	Sep-07	10.90%	6.41%	4.49%
ER07-583	Commonwealth Edison	Sep-07	11.00%	6.41%	4.59%
ER08-92	VEPCO	Oct-07	10.90%	6.43%	4.47%
ER08-374	Atlantic Path	Nov-07	10.65%	6.44%	4.21%
ER08-396	Westar	Nov-07	10.80%	6.44%	4.36%
ER08-413	Startrans IO	Nov-07	10.65%	6.44%	4.21%
ER08-686	Pepco Holdings	Jan-08	11.30%	6.41%	4.89%
ER07-562	Allegheny	Feb-08	11.20%	6.42%	4.78%
ER07-1142	Ariz. Pub. Service	Apr-08	10.75%	6.54%	4.21%
ER08-1207	VEPCO	May-08	10.90%	6.62%	4.28%
ER08-1402	Duquesne	Jun-08	10.90%	6.69%	4.21%
ER08-1423	Pepco Holdings	Jun-08	10.80%	6.69%	4.11%
ER09-35/36	Tallgrass / Prairie Wind	Jul-08	10.80%	6.80%	4.00%
ER09-249	Public Service Elec. & Gas	Sep-08	11.18%	6.94%	4.24%
ER09-187	SoCal Edison	Sep-08	10.04%	6.94%	3.10%
ER09-548	ITC Great Plains	Sep-08	10.66%	6.94%	3.72%
ER09-75	Pioneer	Sep-08	10.54%	6.94%	3.60%
ER08-1584	Black Hills	Nov-08	10.80%	7.60%	3.20%
ER08-375	SoCal Edison	Nov-08	10.55%	7.60%	2.95%
ER09-745	Baltimore Gas & Elec.	Dec-08	10.80%	7.80%	3.00%
ER07-1069	AEP - SPP Zone	Jan-09	10.70%	7.95%	2.75%
ER09-681	Green Power Express	Jan-09	10.78%	7.95%	2.83%
ER08-281	Oklahoma Gas & Elec.	Mar-09	10.60%	8.22%	2.38%
ER08-1457	PPL Elec. Utilities Corp.	Apr-09	11.10%	8.13%	2.97%
ER08-1457	PPL Elec. Utilities Corp.	Apr-09	11.14%	8.13%	3.01%
ER08-1588	Kentucky Utilities Co.	Apr-09	11.00%	8.13%	2.87%
ER08-552	Niagara Mohawk	Jul-09	11.00%	7.62%	3.38%
ER08-313	Southwestern Public Service Co.	Aug-09	10.77%	7.39%	3.38%
ER09-628	National Grid Generation LLC	Sep-09	10.75%	7.08%	3.67%
ER10-160	SoCal Edison	Sep-09	10.33%	7.08%	3.25%
ER08-1329	AEP - PJM Zone	Mar-10	10.99%	6.20%	4.79%

ER10-230	Kansas City Power & Light Co.	Aug-10	10.60%	6.05%	4.56%
ER10-355	AEP Transcos - PJM	Aug-10	10.99%	6.05%	4.95%
ER10-355	AEP Transcos - SPP	Aug-10	10.70%	6.05%	4.66%
ER11-1952	So. Cal Edison	Sep-10	10.30%	5.93%	4.37%
EL11-13	Atlantic Grid Operations	Oct-10	10.09%	5.84%	4.26%
ER11-2895	Duke Energy Carolinas	Oct-10	10.20%	5.84%	4.37%
ER11-2377	Northern Pass Tx	Nov-10	10.40%	5.79%	4.62%
ER12-2300	PSCo	Nov-10	10.25%	5.79%	4.47%
ER10-1377	Northern States Power Co. (MN)	Mar-11	10.40%	5.94%	4.46%
ER10-516	South Carolina Electric and Gas	Apr-11	10.55%	6.00%	4.55%
ER10-992	Northern States Power Co.	Apr-11	10.20%	6.00%	4.20%
ER11-4069	RITELine	May-11	9.93%	5.98%	3.95%
ER12-296	PSEG	Aug-11	11.18%	5.71%	5.47%
ER08-386	PATH	Sep-11	10.40%	5.57%	4.83%
ER11-2560	Entergy Arkansas, Inc.	Dec-11	10.20%	5.21%	4.99%
ER11-2853	PSCo	Mar-12	10.10%	5.08%	5.03%
ER11-2853	PSCo	Mar-12	10.40%	5.08%	5.33%
ER12-1378	Cleco	Nov-12	10.50%	4.74%	5.77%
ER12-778	Puget Sound Energy	Jan-13	9.80%	4.65%	5.16%
ER12-778	Puget Sound Energy	Jan-13	10.30%	4.65%	5.66%
ER12-2554	Transource Missouri	Jan-13	9.80%	4.65%	5.16%
ER11-3643	PacifiCorp Inc.	Feb-13	9.80%	4.62%	5.18%
ER12-1650	Maine Public Service Co.	Feb-13	9.75%	4.62%	5.13%
ER11-3697	SoCal Edison	Jul-13	9.30%	4.82%	4.49%
ER13-941	San Diego Gas and Electric	Jan-14	9.55%	5.22%	4.33%
ER12-1589	PSCo	Aug-14	9.72%	4.76%	4.96%
ER12-91	Duke Energy Ohio	Sep-14	10.88%	4.73%	6.15%
EL12-101	Niagara Mohawk	Jan-15	9.80%	4.66%	5.14%
ER13-685	Public Service Company New Mexico	Feb-15	10.00%	4.62%	5.38%
ER14-1661	MidAmerican Central California	Mar-15	9.80%	4.58%	5.22%
EL14-93	Westar Energy	May-15	9.80%	4.58%	5.22%
ER15-303	American Transmission Systems, Inc.	Jun-15	9.88%	4.65%	5.23%
EL12-39	Duke Energy Florida	Jun-15	10.00%	4.65%	5.35%
ER15-303	American Transmission Systems, Inc.	Jun-15	10.56%	4.65%	5.91%
ER14-192	SPS	Jul-15	10.00%	4.79%	5.21%
ER13-2428	Kentucky Utilities	Jul-15	10.25%	4.79%	5.46%
ER14-2751	XEST	Sep-15	10.20%	5.07%	5.13%

EL15-27	BG&E (Complaint)	Oct-15	10.00%	5.23%	4.77%
ER15-572	New York Transco LLC	Oct-15	9.50%	5.23%	4.27%
ER15-2237	Kanstar Transmission LLC	Dec-15	9.80%	5.41%	4.39%
ER15-2114	Transource West Virginia	Dec-15	10.00%	5.41%	4.59%

* Highlighted cases only used in Second Complaint.
^ Baa Bond Yield and Implied Risk Premium values are rounded to the hundredths place.

List of Risk Premium Model Corrections

Corrected ROE:
ER09-745 BG&E
ER08-1457 PPL

Corrected Test Period:
ER08-1584 Black Hills
ER09-249 PSEG
ER09-628 National Grid
ER15-303 ATSI
ER12-2300 SPS

Missing from original data set:
EL15-27 BG&E (Second Complaint only)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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	Docket No.	EL14-12-015

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

Arkansas Electric Cooperative Corporation Docket No. EL15-45-014
Mississippi Delta Energy Agency
Clarksdale Public Utilities Commission
Public Service Commission of Yazoo City
Hoosier Energy Rural Electric Cooperative, Inc.

v.

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

(Issued November 19, 2020)

GLICK, Commissioner, *concurring in part and dissenting in part*:

1. For more than a decade now, the Commission has struggled with the fact that its long-standing ROE methodology produces cost-of-equity estimates well below the ROEs it permitted public utilities to collect in the years before the Great Recession. Today's order is the latest step in that saga. Although the order is hardly a perfect outcome, I largely concur in the determination as I agree that the end result—a 10.02% ROE—is just and reasonable.

2. I write separately to make three points. First, the experience of the last decade has made it hard to believe that the Commission's history of fiddling with its ROE models is a purely technocratic exercise in financial modeling rather than a concern about the output of those models—*i.e.*, the ROE itself. That is understandable; ROE policy will always be as much art as science. But we owe it to all interested parties to be open and transparent about the factors actually guiding our ROE decisions. If the Commission has concerns about the ROE produced by the various models on which it relies, we ought to come right out and say so rather than papering those concerns over with hundreds of pages' worth of discussion about dividend yields, growth rates, proxy groups, and the like.

3. Second, some of the fiddling in Opinion No. 569-A[1] was indefensible on its face. In particular, the Commission's results-oriented about-face on the Risk Premium model, announced in Opinion No. 569-A and affirmed in today's order, represents an unreasoned departure from the well-explained rejection of that model in Opinion No 569.[2] Although the Commission's ROE policy is badly in need of stability, that stability cannot come at the cost of reasoned decisionmaking. Accordingly, while I believe that the end result of today's order is just and reasonable, I continue to have serious misgivings about the decision to rely on the Risk Premium model in future proceedings.

4. Finally, the one constant throughout this proceeding has been the Commission's confounding refusal to grant certain refunds of rates that the Commission itself found to be unjust and unreasonable. The Federal Power Act (FPA) gives us the authority to refund those unjust and unreasonable rates, and the Commission's refusal to do so is arbitrary and capricious. I also dissent from the portion of today's order that affirms that refusal to order refunds.

I. The Commission Must Stop the Endless Fiddling with Its ROE Methodology

5. In my dissent from the underlying order, I went through the last decade of the Commission's ROE policy in some detail. That history bears repeating here as it helps to explain why I support the end result in this proceeding—an ROE of 10.02%—even though I do not support certain of the decisions reached in Opinion No. 569-A and affirmed in today's order. ROE is an area where stability is paramount and, in an effort to bring stability to what has been a particularly turbulent aspect of the Commission's

---

[1] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020).

[2] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019), *order on rh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154.

authority, I can support an outcome that is just and reasonable even if it might not be the most just and reasonable.[3]

6. Between 2011 and 2015, various entities representing customers' interests filed a series of complaints under section 206 of the FPA [4] arguing that the base ROE available to transmission owners in ISO New England, Inc. and the Midcontinent Independent System Operator, Inc. (MISO) was unjust and unreasonable. In Opinion No. 531, the Commission addressed the first of those complaints, with its most significant findings being that "anomalous capital market conditions" required the Commission to consider a variety of financial models and that those models supported an elevated ROE.[5] The Commission subsequently applied that approach to a similar complaint involving the MISO Transmission Owners.[6] Shortly thereafter, however, the D.C. Circuit vacated Opinion No. 531, sending it back to the Commission and the Commission back to the drawing board.[7] Following that remand, the Commission proposed to expressly rely on the four financial models considered in Opinion No. 531.[8] A year later, in Opinion No. 569, the Commission narrowed it to two models, while making a number of changes to how it implemented those models.[9] Then, in Opinion No. 569-A, the Commission went back up to three models, with another round of tweaks to those models.[10]

---

[3] *Cf. Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC is not required to choose the best solution, only a reasonable one.").

[4] 16 U.S.C. § 824e.

[5] *Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co*., Opinion No. 531, 147 FERC ¶ 61,234, at PP 41, 152 (2014).

[6] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016).

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

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

[9] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019), *order on rh'g*, Opinion No. 569-A, 171 FERC ¶ 61,154 (2020).

[10] Opinion No. 569-A, 171 FERC ¶ 61,154. Although the complaints against the RTO-wide ROEs in MISO and ISO New England garnered the most attention, the last 10 years have also seen a host of other complaints against individual transmission owners' ROEs, which have also been affected by the Commission's back-and-forth over these

7. With the exception of the Commission's finding that anomalous market conditions supported an elevated ROE, which provided a window into its real concern, the Commission's various orders in this saga have suggested that each new iteration of its ROE methodology is an entirely technical affair that turns on the Commission's evaluation of discrete issues with the various financial models on which it relies to set ROE. In so doing, the Commission has added new models,[11] removed some of those models,[12] tweaked some of those models,[13] introduced new inputs,[14] modified existing

---

complaints.

[11] *See, e.g.*, Opinion No. 551, 156 FERC ¶ 61,234 at P 9 (relying on four alternative models to place the ROE within the zone of reasonableness).

[12] *See, e.g.*, Opinion No. 569, 169 FERC ¶ 61,129 at PP 200, 340 (declining to rely on the Expected Earnings or Risk Premium methodologies). Indeed, at this point, the Commission has considered, but not relied on the Risk Premium model to set the specific ROE, Opinion No. 551, 156 FERC ¶ 61,234 at P 191, proposed relying on the Risk Premium model, Briefing Order, 165 FERC ¶ 61,118 at PP 18-19**,** declined to rely on the Risk Premium model, Opinion No. 569, 169 FERC ¶ 61,129 at P 340, and then reversed course and decided to rely on the Risk Premium model, Opinion No. 569-A, 171 FERC ¶ 61,154 at P 104.

[13] *See, e.g.*, Opinion No. 569-A, 171 FERC ¶ 61,154 at P 107 (modifying the Risk Premium model to produce a zone of reasonableness rather than a single point estimate).

[14] *Compare* Opinion No. 569, 169 FERC ¶ 61,129 at P 274 (rejecting the use of *Value Line* short-term growth rates in the capital asset pricing model (CAPM)) *with* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 78 ("clarify[ing]" that the Commission "will consider the use of *Value Line* short-term growth rates for the CAPM").

inputs,[15] introduced new screens,[16] modified existing screens,[17] and even altered how the Commission places the ROE within the zone of reasonableness.[18] But, with each new twist, it becomes harder to buy that the Commission is genuinely reassessing the mechanics of each model rather than disagreeing with the ROE numbers that those models produce.[19]

8. Opinion No. 569-A was the culmination of all that. Not long after completing a year-long process to re-evaluate our approach to setting ROEs following the D.C. Circuit's decision in *Emera Maine*, the Commission again charted a major change of course, adding back the Risk Premium model and elevating the final ROE. In so doing, the Commission again portrayed its change of heart as a technical matter based on its reassessment of a handful of discrete issues related to its financial models rather than what I believe it was: A determination that the old number was too low and we needed to establish a higher one.

---

[15] *See, e.g.*, Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57 (reducing the weighting of the long-term growth rate in the two-step discounted cash flow model (DCF) from one-third to one-fifth).

[16] Briefing Order, 165 FERC ¶ 61,118 at P 54 (proposing a high-end outlier screen that would apply to "any proxy company whose cost of equity estimated with a given model is more than 150 percent of the median result of all of the potential proxy group members in that model"); Opinion No. 569, 169 FERC ¶ 61,129 at P 375 (adopting the proposed high-end outlier screen).

[17] *See, e.g.*, Opinion No. 569-A, 171 FERC ¶ 61,154 at P 154 (increasing the threshold for the high-end outlier screen from 150% of the median of the zone of reasonableness to 200% of the median of the zone of reasonableness).

[18] *See, e.g.*, *id.* P 193 (changing the start points for setting ROEs for above- and below-average ROEs); Opinion No. 551, 156 FERC ¶ 61,234 at P 275 (setting the MISO-wide ROE at the midpoint of the upper half of the zone of reasonableness).

[19] At the same time that it issued Opinion No. 569-A, the Commission added even more complexity to its ROE methodology by issuing a policy statement regarding oil and natural gas pipelines that largely adhered to the approach outlined in Opinion No. 569, rather than Opinion No. 569-A. In particular, that policy statement did not use the Risk Premium model, adjust the weighting of long- and short-term growth rates for the two-step DCF model, or adopt a particular high-end outlier screen. *See Pol'y Statement on Determining Return on Equity for Nat. Gas and Oil Pipelines*, 171 FERC ¶ 61,155 at PP 2, 87 (2020). The Commission, it seems, just cannot settle on an analytically consistent approach to this important issue.

9. To be fair, I am sympathetic to the impulse to consider subjective factors. The Commission's approach to setting a just and reasonable ROE will often implicate broader policy considerations, equity, and other factors that cannot be captured in, for example, a discussion of dividend yields or the appropriate sources of growth rate calculations. But while ROE policy will always be as much art as science, that is no excuse to pretend that art is science. If broader considerations, including policy goals, are preventing the Commission from settling on or consistently applying an ROE methodology, then we must acknowledge those considerations and give the interested entities the chance to weigh in on them just as they do for the intricacies of dividend yields, growth rates, and the like.

10. All approaches to setting ROEs have their shortcomings, but the worst outcome by far is to continually fiddle with those approaches, undermining the certainty and predictability that help transmission owners make long-term investments. If the Commission is going to purport to rely entirely on financial models to evaluate and set ROEs, it has to take those models at face value without second-guessing them when it does not like the results. Otherwise, we're going to end up promoting full employment for energy lawyers rather than a stable investment climate for transmission owners.

11. In addition, today's order illustrates the problems with disguising subjective policy considerations as technical determinations. In a number of instances, Opinion No. 569-A reversed determinations made in Opinion No. 569 using rationales that remain far less convincing than those that supported the opposite outcome in Opinion No. 569. Shifting from such strong arguments to such suspect ones opens the Commission up to considerable risk on judicial review, creating even more of the uncertainty we ought to be trying to minimize.

12. Take the Risk Premium model. Although Opinion No. 569 declined to utilize the Risk Premium model based on a long list of shortcomings, Opinion No. 569-A reversed course, adding it back into consideration in addition to the discounted cash flow (DCF) analysis and CAPM, which the Commission had settled upon in Opinion No. 569. Today's order affirms that result.

13. The record before us does not support that reversal. As an initial matter, and as explained in Opinion No. 569, the Risk Premium model does essentially the same thing as the CAPM by attempting to calculate the "premium that investors require over the risk-free rate of return."[20] Opinion No. 569 rightly pointed out that nothing in the record supports having two thirds of the Commission's ROE methodology composed of such analytically redundant approaches.[21] Both Opinion No. 569-A and today's order respond

[20] Opinion No. 569, 169 FERC ¶ 61,129 at P 341.

[21] *Id.*

by arguing that the two models are "sufficiently distinct" since they use different inputs, such as corporate bonds and U.S Treasury bonds.[22] But that response ignores the point made in Opinion No. 569 that the problem with relying on both models is that they replicate the same basic analytical approach—comparing the relative risk of two different investments—irrespective of their differing inputs.[23]

14. The problem of over-weighting that approach is exacerbated because, as Opinion No. 569 explained, the Risk Premium model is, in most respects, just an inferior version of the CAPM. In particular, the Risk Premium model eschews more reliable market-based cost-of-equity estimates[24] and introduces significant circularity concerns by relying on *past* judgments.[25] As the Commission explained in Opinion No. 569, "[w]hile all models, including the DCF, feature some circularity, such circularity is particularly direct and acute with the Risk Premium model because it directly relies on past Commission ROE decisions."[26] The Commission responds to those circularity concerns by contending that they are "mitigate[d]" by the fact that the Commission will average the results of the Risk Premium model with the DCF and the CAPM, which do not present the same

---

[22] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-B, 173 FERC ¶ 61,159, at P 114 (2020); Opinion No. 569-A, 171 FERC ¶ 61,154 at P 105.

[23] Opinion No. 569, 169 FERC ¶ 61,129 at P 341 ("We find that using the Risk Premium model in conjunction with the CAPM model would confer too much weight towards risk premium methodologies. The Commission has long used and, over time, refined the DCF model and we find that it would be inappropriate for variations of the risk premium model to receive twice its weight.").

[24] *Id.* P 342 ("[T]he Risk Premium model is likely to provide a less accurate current cost of equity estimate than the DCF model or CAPM because it relies on previous ROE determinations, whose resulting ROE may not necessarily be directly determined by a market-based method, whereas the DCF and CAPM methods apply a market-based method to primary data."). In addition, as the Commission noted, many of the ROEs included in the Risk Premium analyses in the record were never determined to be just and reasonable. For example, many of the ROEs were set through uncontested settlements, which involve compromise across a host of issues, of which ROE is just one. The Commission frequently approves uncontested settlements without directly passing on whether the individual terms are just and reasonable. *See id.*

[25] *See id.* P 343.

[26] *Id.*

concerns.[27] But observing that the Commission will *also* use models without significant circularity concerns is not a reasoned response to the argument that you should not use circular models in the first place. You wouldn't eat a rotten apple just because, at the same time, you're also going to eat two fresh ones.

15. In addition, the Commission convincingly explained in Opinion No. 569 how "the record contains insufficient evidence 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."[28] The Commission noted that, while allowed ROEs are certainly important to investors' decisionmaking, that does not suggest that investors perform anything remotely close to the analysis contemplated by the Risk Premium model—*i.e.*, a backward-looking comparison between riskless assets and allowed ROEs—when making their investment decisions.[29] In reversing course, Opinion No. 569-A observed that investors in regulated utilities expect to earn a return above a risk-free asset (which is obviously true) and that "investors . . . observe regulatory ROEs and how changes in authorized ROE levels could affect utility earnings" (which is equally obvious).[30] It should go without saying that investors pay attention to ROEs earned by public utilities and expect them to be higher than debt backed by the U.S. government. But those self-evident statements do not provide *any* reason—much less substantial evidence—to believe that investors perform a Risk Premium analysis

---

[27] Opinion No. 569-B, 173 FERC ¶ 61,159 at P 115; Opinion No. 569-A, 171 FERC ¶ 61,154 at P 106.

[28] Opinion No. 569, 169 FERC ¶ 61,129 at P 345.

[29] *Id.*

[30] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 112. Today's order is somehow even less convincing. It notes only that "investors observe regulatory ROEs and how changes in authorized ROE levels could affect utility earnings, and while such considerations differ from the type of analysis employed by the Risk Premium model, it is a model that considers regulatory ROEs in estimating the premium that investors require to make equity investments instead of bond investments." *See* Opinion No. 569-B, 173 FERC ¶ 61,159 at P 122. The fact that investors consider the returns a company is likely to earn in no way supports the notion the investors rely on a historical comparison between those returns and certain risk-free—and generally quite dissimilar—assets when making investment decisions.

comparing past differences between risk-free assets and Commission-allowed ROEs when evaluating whether to invest in Commission-regulated public utilities.[31]

16. And, finally, the Risk Premium model does not at all fit with the Commission's new approach for evaluating whether an existing ROE is just and reasonable. Opinion No. 569 established a framework for evaluating whether an existing ROE is just and reasonable based on ranges of presumptively just and reasonable results derived from the financial models used by the Commission.[32] Unlike every other financial model used, or even seriously considered by the Commission in this proceeding, the Risk Premium model produces a single point estimate of the just and reasonable ROE, not a zone of reasonableness.[33]

17. Recognizing this "serious concern," but nevertheless determined to fit a square peg into a round hole, Opinion No. 569-A attempted to "impute" the average width of the zone of reasonableness created by the DCF and CAPM methodologies to the Risk Premium model.[34] For example, if the DCF and CAPM produce an average zone of 200 basis points, the Commission resolved to just assume that the Risk Premium model does too. Neither Opinion No. 569-A nor today's order, however, has identified a single piece of evidence suggesting that such imputation is appropriate or that any investors or financial experts would even contemplate an approach similar to the Commission's method. Presumably that is because the record lacks any evidence supporting such an odd repurposing of the Risk Premium model.[35] The Commission's approach to using the Risk Premium model in evaluating whether an existing ROE is just and reasonable is the equivalent of making someone a "custom" suit based on their siblings' measurements:

---

[31] *Cf.* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 112 (recognizing that the Risk Premium analysis differs from the factors that investors consider when making decisions based on allowed ROEs).

[32] Opinion No. 569, 169 FERC ¶ 61,129 at P 57. With certain exceptions, *see, e.g.*, *infra* PP 19-24, Opinion No. 569-A and Opinion No. 569-B largely uphold that framework.

[33] Opinion No. 569, 169 FERC ¶ 61,129 at P 351.

[34] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 107.

[35] That becomes especially clear when compared with the Commission's thorough and well-reasoned rejection of the Risk Premium model on this basis, among others, in Opinion No. 569. *Compare id.* P 107 *with* Opinion No. 569, 169 FERC ¶ 61,129 at P 351.

Maybe it will fit, but there is no reason to believe that it will and, in any case, it misses the point of the exercise.

18. In many ways, the Commission's justification for its novel "imputation" approach to using the Risk Premium model epitomizes my concerns about pretending that our ROE decisions are purely technical determinations about the best way to deploy certain financial models. There is simply no record to support the Commission's use of the Risk Premium model and certainly not the mangled version of that model that the Commission relies upon to fit it within our new approach under section 206 of the FPA. If the actual concern is that the ROE figures produced by the DCF and CAPM are too low, we—and all interested parties—would be better served by stating that fact frankly and litigating that issue, rather than twisting the Risk Premium model so that it can be used to support a particular result.

19. In addition, today's order adopts a series of equally unreasoned modifications to Opinion No. 569's framework for conducting the first step of the section 206 inquiry. As noted, Opinion No. 569 established a practice of dividing the zone of reasonableness into ranges of presumptively just and reasonable ROEs within the broader zone of reasonableness.[36] In particular, the Commission created risk-adjusted "quartiles" within the zone of reasonableness centered on the three points that the Commission uses as the starting point for setting ROEs for utilities of different risk profiles[37]—the midpoint of the entire zone of reasonableness for average-risk utilities, the midpoint of the lower half of the zone of reasonableness for below-average risk utilities, and the midpoint of the upper half of the zone of reasonableness for above-average risk utilities.[38]

20. The Commission justified the end points of each quartile by explaining that "[l]ogic dictates that the end points of those ranges should not be closer to the starting points for the ranges of utilities with different risk profiles than they are to their own starting point."[39] In other words, it would not make sense to presume that an existing

[36] That change responded to the D.C. Circuit's holding that the FPA contemplates "a 'broad' range of potentially just and reasonable ROEs, 'not an exact dollar figure.'" *Emera Me.*, 854 F.3d at 23 (quoting *Panhandle E. Pipe Line Co. v. FERC*, 777 F.2d 739, 746 (D.C. Cir. 1985)).

[37] Opinion No. 569, 169 FERC ¶ 61,129 at P 57.

[38] *Id*. The midpoint is the measure of central tendency that the Commission uses when setting the ROE for a diverse range of utilities. *Id.* PP 398, 409. By contrast, the Commission uses the median as the measure of central tendency when setting the ROE for a single utility. *Id.* P 398.

[39] *Id.* P 63.

ROE is just and reasonable if it was closer to the starting point used to set the ROE for a utility of a different risk profile than the starting point for a utility of the same risk profile. The Commission's quartile-based approach made sense given the emphasis that the Commission has historically placed on relative risk profiles when placing ROEs within the zone of reasonableness[40] and it ensured that the ranges of presumptively just and reasonable results were not just arbitrary sub-sections of the zone of reasonableness.

21. Opinion No. 569-A abandoned that well-reasoned approach and arbitrarily divided the entire zone of reasonableness into thirds, with each third providing a presumptively just and reasonable range of ROEs for certain utilities. The Commission suggested[41] that the maneuver was necessary to comply with the D.C. Circuit's statement in *Emera Maine* that "the zone of reasonableness creates a broad range of *potentially* lawful ROEs."[42] *Emera Maine* requires nothing of the sort. Read in context, the quoted language stands only for the proposition that the Commission cannot prove that an existing rate is unjust and unreasonable simply by showing that its ROE methodology would produce a different number using current data.[43] The court certainly did not suggest that every point within the zone of reasonableness must be *presumptively* just and reasonable for some utility, as Opinion No. 569-A suggested. The Commission's reading of *Emera Maine* effectively replaces the word "potentially" with "presumptively"—a major revision that is unsupported by anything in the court's opinion.

22. In today's order, the Commission adds a slightly different spin: That because the Commission applies various screens when assembling a proxy group, using a quartile approach would ignore the same admonition in *Emera Maine* that the FPA contemplates a broad range of just and reasonable results because it would not consider the highest and

---

[40] *See id.* P 62 ("We also find that the circumstance most relevant to determining that range is the utility's risk profile."); *see also FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."); *Petal Gas Storage*, 496 F.3d at 699-700 (explaining the emphasis that the Commission and courts have placed on the role of risk in setting ROEs).

[41] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 190.

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

[43] *Id.* ("But, as we have explained, the zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE, meaning that FERC's finding that 10.57 percent was a just and reasonable ROE, standing alone, did not amount to a finding that every other rate of return was not." (internal quotations and citation omitted)).

lowest numbers within the zone of reasonableness to be presumptively just and reasonable for any utility.[44] That argument fails for the same reasons discussed above. The Commission has always used various screens when selecting a proxy group and, even so, neither *Emera Maine* nor any other court or Commission precedent has endorsed the proposition that every point within the zone of reasonableness established by the Commission's financial models must be presumptively just and reasonable.

23. In any case, the quartile-based approach in Opinion No. 569 easily complied with *Emera Maine*'s observation regarding a broad range of potentially lawful ROEs. Because the quartile-based ranges contemplated in Opinion No. 569 were only presumptive findings, a public utility could still argue that an ROE outside those ranges was nevertheless just and reasonable based on other considerations.[45] That fact makes every ROE within the zone of reasonableness at least "potentially" just and reasonable.

24. The problems with the Commission's new approach go even deeper. Recognizing that the decision to divide the zone of reasonableness into thirds obliterates the rationale for the ranges outlined in Opinion No. 569,[46] Opinion No. 569-A announced, without any explanation, that it will change the starting points it uses when setting the ROE for below- and above-average risk utilities to the midpoint of the lower third of the zone of reasonableness and the midpoint of the upper third of the zone of reasonableness, respectively.[47] Now the tail is truly wagging the dog. As noted, Opinion No. 569 justified the ranges of presumptively just and reasonable ROEs based on the Commission's longstanding approach to handling companies' relative risk profiles, namely the use of the upper and lower midpoints for utilities of above- and below-average risk, respectively.[48] Opinion No. 569-A uprooted that longstanding approach, selecting entirely new starting points for placing ROEs within the zone of reasonableness in order to support its new ranges of presumptively just and reasonable results. That gets it entirely backwards; the ranges of presumptively just and reasonable results should reflect how we set ROEs, not the other way around. In any case, at no point in Opinion No. 569-A or today's order does the Commission explain why the new starting points

---

[44] Opinion No. 569-B, 173 FERC ¶ 61,159 at P 62 (citing *Emera Maine*, 854 F.3d at 26).

[45] Opinion No. 569, 169 FERC ¶ 61,129 at PP 60-64, 68 (discussing how the Commission would apply the new framework, including what other factors it would consider).

[46] *See supra* P 20 & notes 40-40.

[47] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 194.

[48] Opinion No. 569, 169 FERC ¶ 61,129 at PP 62-64.

themselves are an appropriate place to begin the process of placing the ROE for an above- or below-average risk utility within the zone of reasonableness.[49] That makes the Commission's new policy of setting an ROE for an above- or below-average risk utility at the measure of central tendency within the upper or lower third of the zone of reasonableness an unreasoned departure from past practice.[50]

25. Suffice it to say, the Commission has never justified Opinion No. 569-A's change of course with respect to either the Risk Premium model or its approach to step one of the section 206 inquiry. Nevertheless, while I believe that Opinion No. 569 was a superior approach to setting ROEs, I also recognize that the roughly 10% ROE established in today's order falls within a range of just and reasonable ROEs and I support the ultimate outcome in today's order on that basis.[51]

II. <u>The Commission Should Order Refunds for Unjust and Unreasonable Rates Paid by Consumers</u>

26. I also continue to disagree with the Commission's refusal to order refunds for the 15-month refund period established pursuant to the second of the two complaints now before us.[52] Throughout that period, customers within MISO paid an unjust and unreasonable ROE. Nevertheless, the Commission has consistently refused to order refunds on the specious basis that the FPA requires it to act as if the 10.02% ROE affirmed in today's order was in effect throughout that second fifteen-month period. In reality, however, customers paid a 12.38% ROE—a difference that could potentially be

---

[49] That failure is particularly glaring because the new starting points for that analysis will now be closer to either the top or bottom of the zone of reasonableness than the midpoint. Nothing in Opinion No. 569-A—or today's order—explains why those starting points should be biased towards the most extreme costs of equity in the zone of reasonableness.

[50] *Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020) ("When an agency seeks to change policy, we assess its actions under the rigorous standards of *FCC v. Fox Television Stations, Inc.*, by requiring the agency to 'display awareness that it *is* changing position,' show 'the new policy is permissible under the statute,' and 'show that there are good reasons for the new policy.'" (quoting *Fox Television*, 556 U.S. 502, 515-16, (2009))).

[51] *See Hope*, 320 U.S. at 602 ("Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling.").

[52] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 (Glick, Comm'r, concurring in part and dissenting in part at PP 23-33); Opinion No. 569, 169 FERC ¶ 61,129 (Glick, Comm'r, dissenting in part).

worth tens, or even hundreds, of millions of dollars. Nothing in the FPA requires us to pretend that customers paid lower rates than they actually did.

27. The relevant facts are straightforward. On November 12, 2013, multiple parties filed a complaint (First Complaint) alleging that the MISO Transmission Owners' 12.38% ROE was unjust and unreasonable.[53] The Commission set the matter for hearing and established a refund effective date of November 12, 2013 (the date the First Complaint was filed),[54] meaning that the 15-month refund period for the First Complaint lasted until February 12, 2015.[55] On February 12, 2015, a different set of parties filed another complaint (Second Complaint) against the MISO Transmission Owners' ROE. The Commission again set the matter for hearing and established a refund effective date of February 12, 2015,[56] meaning that the 15-month refund period for the Second Complaint lasted until May 12, 2016. Both proceedings were fully litigated and produced initial decisions by Administrative Law Judges.[57] And, in both cases, the Commission did not get around to issuing orders on the initial decisions until well after the refund periods expired, meaning that customers paid rates that reflected a 12.38% ROE throughout both refund periods.[58]

---

[53] Opinion No. 569, 169 FERC ¶ 61,129 at P 3. The authorized base ROE for the ATCLLC zone was 12.20%, but I will follow the underlying order's practice of referring to the MISO-wide ROE as 12.38%. *Id.* P 3 & n.11.

[54] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 188 (2014), *order on reh'g*, 156 FERC ¶ 61,060 (2016).

[55] Pursuant to the Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988) (codified at 16 U.S.C. § 824e(b)), as part of any proceeding under section 206 of the FPA, the Commission shall establish a refund effective date and, at the conclusion of that proceeding, it may order refunds for the difference between an unjust and unreasonable rate in effect during the period up to 15 months following the refund effective date and the new just and reasonable rate fixed by the Commission.

[56] *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, at P 1 (2015), *order on reh'g*, 156 FERC ¶ 61,061 (2016) (Second Complaint Rehearing Order).

[57] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 (2015); *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 (2016).

[58] The Commission originally issued an order on the First Complaint in September 2016. *See* Opinion No. 551, 156 FERC ¶ 61,234 at P 9. But, shortly thereafter, the D.C. Circuit issued its opinion in *Emera Maine*, 854 F.3d 9, which vacated the precedent on which Opinion No. 551 relied. Following briefing on remand, the Commission issued

28. Today's order affirms the conclusion that the 12.38% ROE was unjust and unreasonable and that the new just and reasonable ROE should be 10.02%. That is sufficient to order refunds for the refund periods established pursuant to *both* the First and Second Complaints. To see why, let's start with the text of section 206(b) of the FPA, which provides that

> At the conclusion of any proceeding under this section [i.e., section 206], 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.[59]

That text is unambiguous. It provides that if an unjust and unreasonable rate was charged during a refund period, the Commission can order refunds for the difference between that rate and the just and reasonable rate set by subsequent Commission order. Both conditions are satisfied here: Customers paid 12.38% through the Second Complaint refund period and the Commission has determined that they should have paid 10.02%. That is sufficient to order refunds pursuant to section 206(b).[60]

29. Throughout this proceeding, the Commission has suggested that it can grant refunds only when it sets a new rate pursuant to the complaint associated with a particular refund effective date.[61] Nothing in the text of section 206(b) supports that limitation. As explained above, all section 206(b) requires is that the Commission determine that customers paid an unjust and unreasonable rate and that it also determine the just and reasonable rate that they should have paid. Moreover, the statutory text allows the Commission to order refunds "[a]t the *conclusion* of *any* proceeding under this

---

Opinion No. 569.

[59] 16 U.S.C. § 824e(b).

[60] *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (holding that where "the plain language . . . is 'unambiguous,' 'our inquiry begins with the statutory text, and ends there as well.'" (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion))).

[61] *See, e.g.*, Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 260-62; *see also* Opinion No. 569-B, 173 FERC ¶ 61,159 at PP 171-73 (suggesting that the rate in effect during the refund period for the Second Complaint was the rate set by the First Complaint).

section"—*i.e.*, section 206.[62] Congress surely understood that not every section 206 proceeding would be resolved against the public utility and, had it so desired, it could have limited the Commission's refund authority to only those instances in which the Commission grants a particular complaint. Congress's decision not to impose any such conditions reinforces the conclusion that the Commission should look only to the factors identified by Congress when deciding whether to require refunds, namely whether customers paid an unjust and unreasonable rate and whether the Commission set a new just and reasonable rate.[63]

30. Instead of following the plain text of section 206(b), the Commission sought to wring an implicit limitation on the Commission's refund authority from Congress's use of the phrase "thereafter observed and in force."[64] The idea, as I understand it, is that "thereafter observed and in force" is supposed to reflect Congress's understanding that the Commission would be setting a new rate in each complaint proceeding prior to ordering any refunds.[65] Thus, the argument appears to go, the Commission cannot order refunds unless it sets a new rate in the complaint proceeding corresponding to each individual refund period.

31. That would be a remarkably convoluted way of limiting the Commission's refund authority under section 206. It postulates that, instead of explicitly limiting the Commission's refund authority, Congress snuck an implicit limitation on that authority at the end of the sentence that describes how the Commission should calculate refunds.

---

[62] 16 U.S.C. § 824e(b) (emphasis added).

[63] In today's order, the Commission attempts to resuscitate its reliance on *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 127 FERC ¶ 61,191 (2009)—a case that it mentioned briefly in Opinion No. 569 and then abandoned altogether in Opinion No. 569-A. *See* Opinion No. 569-B, 173 FERC ¶ 61,159 at P 175; Opinion No. 569, 169 FERC ¶ 61,129 at P 572. But as I explained in my partial dissent from Order No. 569, that precedent did not involve pancaked complaints and, accordingly, does not shed any light on the specific question before us. Opinion No. 569, 169 FERC ¶ 61,129 (Glick, Comm'r, dissenting in part at n.11). Instead, the only thing that the Commission's continued reliance on *San Diego Gas & Electric Co.* reveals is the complete absence of any precedent that actually supports the abdication of its refund authority.

[64] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 262.

[65] *Id.*

Such a bizarre and overly complex interpretation is not a reasonable way to read an otherwise straightforward statute.[66]

32. That is particularly true when there is a far more obvious interpretation at hand. The better reading of the "thereafter observed and in force" language in section 206(b) is that it refers back to the use of the same phrase in section 206(a)—the provision that provides the Commission with the authority to set a new just and reasonable rate.[67] Under that interpretation, the "thereafter observed and in force" language clarifies that the ceiling on the Commission's refund authority under section 206(b) is the difference between the rate in effect during the refund period and the just and reasonable rate that the Commission established pursuant to subsection 206(a).[68] In other words, that phrase tells the Commission *how* to calculate refunds, not *when* it may order them. I see no reason to abandon a straightforward reading of the statute that protects customers from paying unjust and unreasonable rates, in favor of a convoluted one that does not.[69]

33. The Commission's next argument is even more of a head scratcher. It contends that it cannot order refunds because the rate in effect during the second refund period was the 10.02% ROE established in the First Complaint proceeding.[70] But that rate was not in effect. Instead, customers paid the 12.38% ROE.

---

[66] *Cf. City of Anaheim v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009) ("declin[ing] FERC's invitation to mangle" section 206).

[67] *See* 16 U.S.C. § 824e(a) (requiring the Commission to establish a new just and reasonable rate to be "thereafter observed and in force" whenever it finds that an existing rate is unjust and unreasonable or unduly discriminatory or preferential).

[68] That interpretation makes even more sense when you consider that section 206(b) was added more than 50 years after section 206(a), which was part of the original FPA, and so it would have been necessary to clarify how the amendment worked in conjunction with the pre-existing language. *See supra* note 55.

[69] *Cf., e.g.*, *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004) (rejecting "an interpretation [that] comports neither with the statutory text nor with the Act's 'primary purpose' of protecting consumers"); *City of Chicago v. FPC*, 458 F.2d 731, 751 (D.C. Cir. 1971) ("[T]he primary purpose of the Natural Gas Act is to protect consumers." (citing, *inter alia*, *City of Detroit v. FPC*, 230 F.2d 810, 815 (D.C. Cir. 1955)); S. Rep. No. 100-491, at 5-6 (1988) ("The Committee intends the Commission to exercise its refund authority under section 206 in a manner that furthers the long-term objective of achieving the lowest cost for consumers consistent with the maintenance of safe and reliable service.").

[70] *See* Opinion No. 569-A, 171 FERC ¶ 61,154 at P 260; Opinion No. 569-B, 173

34. To skirt that rather obvious conclusion, the Commission responds with what might charitably be called a regulatory fiction. It argues that Opinion No. 569 made the new just and reasonable ROE set in the First Complaint proceeding effective as of the beginning of the First Complaint refund period. As a result, the Commission argues, we must pretend that the 10.02% ROE was in effect throughout the refund period for the Second Complaint.

35. That approach has two problems. First, it is demonstrably false. As noted, the ROE that the MISO Transmission Owners collected during the refund period for the Second Complaint was 12.38%, no ifs, ands, or buts. Second, the Commission's interpretation is flatly prohibited by the FPA. Under the filed rate doctrine, the MISO Transmission Owners were prohibited from collecting any ROE other than 12.38% during the refund period for the Second Complaint.[71] Section 206 is not a general abrogation of the filed rate doctrine. Instead, it is forward looking and gives the Commission the ability to set a new just and reasonable rate as of the date on which the Commission makes the findings required by section 206.[72] The only exception to that forward-looking nature is for the refund period, during which time the Commission is permitted to act as if the new rate were in effect when ordering refunds.[73] The refund period for the Second Complaint, however, fell *after* the conclusion of the refund period for the First Complaint and *before* the date on which the Commission issued Opinion No. 551. That means that the Commission lacked the authority to make the 10.02% ROE set in the First Complaint proceeding effective during the refund period for the Second Complaint. Suffice it to say, it is arbitrary and capricious for the Commission to deny refunds by assuming that it did that which it was legally prohibited from doing.

FERC ¶ 61,159 at PP 172-73.

[71] *Towns of Concord, Norwood, & Wellesley v. FERC,* 955 F.2d 67, 71 (D.C. Cir. 1992) (explaining that the filed rate "doctrine generally 'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.'" (quoting *Ark. La. Gas Co. v. Hall,* 453 U.S. 571, 577 (1981))); *see also Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes.").

[72] *See, e.g.*, *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1299 (D.C. Cir. 2014) (explaining that section 206 provides for prospective relief only with the exception of the refund period). After all, that forward-looking effect is the result of the "thereafter observed and in force" language on which the Commission relies so heavily in seeking to disclaim any authority to order refunds pursuant to the Second Complaint. *See supra* P 30.

[73] *Id.* P 28.

36. In Opinion No. 569-A, the Commission also argued that ordering refunds for the Second Complaint would represent an end-run around the 15-month limitation on refunds established in section 206(b).[74] That argument appears to have both a legal dimension and a policy dimension. Beginning with the former, the Commission seems to take the position that ordering refunds in the Second Complaint period would effectively extend the refund period established for the First Complaint, contrary to congressional intent. As an initial matter, suppositions about congressional policy or intent cannot overcame clear and unambiguous text.[75] Because the text of section 206(b) unambiguously does not preclude pancaked complaints, the Commission's suspicions about what Congress would have wanted are irrelevant.

37. Moreover, the Commission has repeatedly held that the FPA permits successive or "pancaked" complaints, which are "entirely new proceeding[s]" and not "duplicative proceeding[s] intended solely to expand the amount of refund protection beyond 15 months,"[76] provided that they raise new facts or arguments.[77] The Commission has already concluded that the Second Complaint met that standard.[78] Accordingly, rather than effectively extending the refund period for the First Complaint, ordering refunds pursuant to the Second Complaint would simply reflect the fact that the MISO

---

[74] Opinion No. 569-A, 171 FERC ¶ 61,154 at P 260.

[75] *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1751 (2020) (explaining that "'in the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'" (quoting *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 208 (1998))).

[76] Second Complaint Rehearing Order, 156 FERC ¶ 61,061 at P 33 (quoting *S. Co. Servs.*, *Inc.*, 83 FERC ¶ 61,079, 61,386 (1998)).

[77] *Id.* P 33 ("[T]he Commission has allowed multiple complaints regarding the same ROE, where the subsequent complaints are based on new, more current data, explaining that this is particularly critical given that what is at issue is return on equity, which, in contrast to other cost of service issues can be particularly volatile." (internal alterations, quotations, and citations omitted)).

[78] *Id.* P 34.

Transmission Owners collected an unjust and unreasonable ROE during a period when all parties were on notice that the Commission might order refunds of such excessive rates.[79]

38. From the perspective of public policy, I recognize that permitting pancaked complaints with multiple refund periods may be sub-optimal. After all, pancaked complaints can create significant uncertainty and, as noted, ROE is an area where certainty is especially important as transmission owners decide whether and how to invest in transmission infrastructure. But the desirability of pancaked complaints is something for Congress to consider, not a reason for us to twist the text of the FPA. So long as the FPA and the Commission's precedents permit pancaked complaints, then the Commission should not let its antipathy toward such complaints prevent customers from receiving the refunds to which they are entitled.

For these reasons, I respectfully concur in part and dissent in part.

____
Richard Glick
Commissioner

[79] *Cf. La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) (noting that the filing of a section 206 complaint put all parties on notice of the possibility that the Commission would order refunds).