

156 FERC ¶ 61,061  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Arkansas Electric Cooperative Corporation  
Mississippi Delta Energy Agency  
Clarksdale Public Utilities Commission  
Public Service Commission of Yazoo City  
Hoosier Energy Rural Electric Cooperative, Inc.

Docket No. EL15-45-001

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

Midcontinent Independent System Operator, Inc.

Docket No. EL16-99-000

ORDER ON REHEARING AND INSTITUTING SECTION 206 PROCEEDING AND  
COMMENCING PAPER HEARING PROCEDURES AND ESTABLISHING REFUND  
EFFECTIVE DATE

(Issued July 21, 2016)

1. On June 18, 2015,<sup>1</sup> in response to a February 12, 2015 complaint filed by certain non-public utilities (2015 Complainants)<sup>2</sup> against certain of Midcontinent Independent System Operator, Inc.'s<sup>3</sup> (MISO) transmission owners (MISO TOs)<sup>4</sup> (2015 Complaint), the Commission established hearing procedures and set a refund effective date of February 12, 2015. The MISO TOs named in the 2015 Complaint are all subject to the Commission's jurisdiction as public utilities under the Federal Power Act (FPA). In this

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<sup>1</sup> *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219 (2015) (Hearing Order).

<sup>2</sup> 2015 Complainants 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).

<sup>3</sup> Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

<sup>4</sup> MISO TOs named in the 2015 Complaint are: ALLETE, Inc. (for its operating division Minnesota Power, Inc. and its wholly-owned subsidiary Superior Water Light, & Power Company; Ameren Illinois Company; Union Electric Company (identified as Ameren Missouri); Ameren Transmission Company of Illinois; American Transmission Company LLC; Cleco Power LLC; Duke Energy Business Services, LLC d/b/a Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC Transmission (ITC Transmission), ITC Midwest LLC (ITC Midwest), and Michigan Electric Transmission Company, LLC (METC); 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 d/b/a Vectran Energy Delivery of Indiana, Inc.

order, we grant in part and deny in part the requests for rehearing of the Hearing Order. We also find that the MISO Transmission, Energy and Operating Reserve Markets Tariff (Tariff) may be unjust, unreasonable, unduly discriminatory or preferential because it does not include a refund commitment by non-public utility transmission owners whose revenue requirements are recovered under the MISO Tariff. Accordingly, we institute a proceeding in Docket No. EL16-99-000 pursuant to FPA section 206 to examine the MISO Tariff, as discussed more fully below.

## **I. Background**

2. On November 12, 2013, a different group of parties (2013 Complainants)<sup>5</sup> filed a complaint in Docket No. EL14-12-000 (2013 Complaint) with respect to, among other issues, the justness and reasonableness of the current 12.38 percent base return on equity (ROE) earned by MISO TOs.<sup>6</sup> The 2013 Complaint included a one-step Discounted Cash Flow (DCF) analysis, which was consistent with the Commission's then-current methodology for determining ROE for public utilities. Subsequent to the filing of the 2013 Complaint but prior to the issuance of an order on that complaint, the Commission, in *Martha Coakley v. Bangor Hydro-Electric Company*, announced a new approach for determining the base ROE for public utilities that includes a two-step DCF methodology.<sup>7</sup> On October 16, 2014, the Commission granted in part, denied in part, and dismissed in part the 2013 Complaint. It granted the 2013 Complaint with respect to the base ROE, established hearing and settlement judge procedures and set a refund effective date of November 12, 2013.<sup>8</sup>

3. The 2015 Complaint included an updated two-step DCF analysis. The 2015 Complainants alleged that the current 12.38 percent base ROE earned by MISO TOs

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<sup>5</sup> Association of Businesses Advocating Tariff Equity (ABATE); Coalition of MISO Transmission Customers (Coalition of MISO Customers); Illinois Industrial Energy Consumers; Indiana Industrial Energy Consumers, Inc.; Minnesota Large Industrial Group; and Wisconsin Industrial Energy Group.

<sup>6</sup> American Transmission Company, which has a base ROE of 12.2 percent, is an exception.

<sup>7</sup> 147 FERC ¶ 61,234 (Opinion No. 531), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015).

<sup>8</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. System Operator, Inc.*, 149 FERC ¶ 61,049 (2014).

through the Tariff is unjust and unreasonable and that the ROE should not exceed 8.67 percent. On June 18, 2015, the Commission established hearing procedures and set a refund effective date of February 12, 2015.

4. In its answer to the 2015 Complaint, Xcel Energy Services, Inc. (Xcel) argued that, if the Commission does not dismiss the 2015 Complaint, it should require the two non-jurisdictional transmission owners, Arkansas Electric Cooperative (Arkansas Electric) and Hoosier Cooperative (Hoosier) who joined in the 2015 Complaint to provide a voluntary commitment to provide refunds based on any change in their ROEs. In addition, Xcel requested that the Commission institute a proceeding under FPA section 206 into the base ROE collected by non-jurisdictional MISO TOs. Xcel requested that the Commission require MISO to make a compliance filing that either (1) includes voluntary refund commitments by all MISO non-jurisdictional TOs or (2) removes their revenue requirement from the MISO tariff. In the Hearing Order, the Commission found the issues of the base ROE of non-jurisdictional MISO TOs and their refund obligations are not before the Commission in this proceeding, because they were not raised in the 2015 Complaint.<sup>9</sup> Additionally, the Commission noted that, in the 2013 Complaint proceeding, the two non-jurisdictional transmission owners mentioned by Xcel – Arkansas Electric and Hoosier –voluntarily committed to change their ROEs consistent with the outcome of the proceeding as of the established refund effective date.<sup>10</sup>

5. MISO TOs argued that the Commission should deny the 2015 Complaint in its entirety because the base ROE is within the zone of reasonableness, and cannot, as a matter of law, be unjust and unreasonable. They also argued that, in *Bangor Hydro-Electric Company*, the Commission erred in finding that an ROE can still be unjust and unreasonable even if it falls within the zone of reasonableness.<sup>11</sup> The Commission disagreed with this argument, stating it had previously rejected the contention that every ROE within the zone of reasonableness is just and reasonable.<sup>12</sup>

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<sup>9</sup> Hearing Order, 151 FERC ¶ 61,219 at P 50.

<sup>10</sup> *Id.* (citing Arkansas Electric and Hoosier Answer at 3, 11-12).

<sup>11</sup> MISO TOs Mar. 11, 2015 Answer at 43 (citing *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,038, at P 11 (2008) (*Bangor Hydro*)).

<sup>12</sup> Hearing Order, 151 FERC ¶ 61,219 at P 49 (citing both *Bangor Hydro* and Opinion No. 531, 147 FERC ¶ 61,234 at PP 51-55).

6. MISO TOs and Xcel argued that the 2015 Complaint violates FPA section 206 because it seeks to extend the 15-month period established in the 2013 Complaint proceeding. MISO TOs argued that the 2015 Complaint does not include a new analysis from that provided by the 2013 Complaint.<sup>13</sup> The Commission disagreed, asserting that it has allowed successive complaints that present new analysis and concluded that Complainants' two-step DCF analysis using new, more current data constituted new evidence.<sup>14</sup> Consequently, the Commission concluded that the fact that 2015 Complainants have the mere opportunity to challenge the base ROE in the 2013 Complaint proceeding is irrelevant.

7. On June 30, 2016, the Administrative Law Judge issued an initial decision in this proceeding.<sup>15</sup>

## II. Discussion

### A. Procedural Matters

8. Timely requests for rehearing were filed by MISO TOs and Xcel.

### B. Substantive Matters

#### 1. ROE Within the Zone of Reasonableness

##### a. Rehearing Request

9. MISO TOs contend that the Commission should have denied the 2015 Complaint because their existing ROE remains within the zone of reasonableness. They argue that

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<sup>13</sup> Xcel Answer at 9, 11-12.

<sup>14</sup> Hearing Order, 151 FERC ¶ 61,219 at P 49 (citing *Consumer Advocate Div. of the Pub. Serv. Of West Virginia v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at 62,000 (1994) (*Consumer Advocate I*); *Southern Co. Servs., Inc.*, 68 FERC ¶ 61,231 (1994) (*Southern Co. I*), order on reh'g, 83 FERC ¶ 61,079 (1998); see also *San Diego Gas & Electric Co. v. Pub. Serv. Co. of New Mexico*, 85 FERC ¶ 61,414 (1998) (*San Diego Gas & Elec.*), reh'g denied, 86 FERC ¶ 61,253 (1999), reh'g denied, 95 FERC ¶ 61,073 (2001). But see *EPIC Merchant Energy NJ/PA, L.P. v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,130 (2010) (*EPIC I*), reh'g denied, 136 FERC ¶ 61,041 (2011) (rejecting the "pancaked" complaint, by distinguishing it from the complaints in *Consumer Advocate I*, *Southern Co. II*, and *San Diego Gas & Elec.*).

<sup>15</sup> *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 (2016).

the D.C. Circuit has stated that a court “may only set aside a rate that is outside a zone of reasonableness,” which, according to MISO TOs, suggests that any point within this zone should be considered just and reasonable to withstand an FPA section 206 challenge.<sup>16</sup> MISO TOs further state that the Commission claims “broad discretion to establish returns on equity anywhere within the zone of reasonableness” and that such flexibility “could not exist” unless all points within this zone satisfy the statutory standard.<sup>17</sup> They further state that the Commission recently reaffirmed this point in *Southern California Edison Company*.<sup>18</sup>

10. For this reason, MISO TOs ask the Commission to deny the 2015 Complaint and disregard its decision in *Bangor Hydro-Electric Co.*, where the Commission held that an ROE within the zone of reasonableness can still be unjust and unreasonable.<sup>19</sup> MISO TOs contend that decision was not subject to judicial review and is inconsistent with prior Commission and court decisions. Furthermore, MISO TOs consider this precedent inapplicable in the FPA section 206 context because the time for setting a rate at a point in the applicable zone of reasonableness is not until and unless the Commission first finds the challenged rate unjust and unreasonable. MISO TOs contend that, in an FPA section 206 context, “the zone of reasonableness is determinative” in finding the rate unjust and unreasonable.<sup>20</sup>

11. MISO TOs concede that Opinion No. 531 conflicts with their position. Still, they take issue with the Commission’s citation of *Southern California Edison Co. v. FERC* to “bolster its decision,” arguing that, reliance on this decision is unpersuasive because “of the very nature of the difference between section 205 and 206.”<sup>21</sup> To support this

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<sup>16</sup> MISO TOs Rehearing Request at 7 (citing *Montana-Dakota Utils. Co.*, 341 U.S. 246, 251 (1951) (*Montana-Dakota*) and *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) (*PG&E*)).

<sup>17</sup> *Id.* at 8 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679-A, at P 67, FERC Stats. & Regs. ¶ 31,236, at P 67 (2007) (Order No. 679-A), *order on reh’g*, 119 FERC ¶ 61,062 (2007)).

<sup>18</sup> *Id.* at 7 (citing *S. Cal. Edison Co.*, 139 FERC ¶ 61,042, at PP 47, 65 (2012) (*SoCal Edison*)).

<sup>19</sup> *Id.* at 7-9 (citing *Bangor Hydro*, 122 FERC ¶ 61,038 at PP 10-11).

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 10-11 (citing *S. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D. C. Cir. 2013)).

contention, MISO TOs argue that in an FPA section 206 proceeding, the Commission cannot reach the question of establishing an ROE until the existing ROE is found unjust and unreasonable, which it cannot do if the existing rate remains within the applicable zone of reasonableness.

**b. Commission Determination**

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

13. We disagree with MISO TOs' assertion that, in determining whether an existing ROE is unjust and unreasonable under FPA section 206, the Commission must treat "all points within the zone of reasonableness" as satisfying the just and reasonable standard. MISO TOs rely on precedent setting forth the general ratemaking principle under the FPA that there can be more than one just and reasonable rate. For example, MISO TOs point out that the Supreme Court has stated, "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high."<sup>22</sup> MISO TOs equate references to a "an area" of "statutory reasonableness" or to a "zone of reasonableness" in these cases to the "zone of reasonableness" produced by the DCF analysis we use to determine the ROE to include in a public utility's cost of service. On that basis, MISO TOs contend that the Commission must show that their existing ROE is outside the DCF zone of reasonableness in order to satisfy its FPA section 206 burden to show that their ROE is unjust and unreasonable.

14. However, as explained in Opinion No. 531-B,<sup>23</sup> when the Commission determines the ROE component of a public utility's cost of service pursuant to a DCF analysis, the term "zone of reasonableness" has a particular, more technical meaning that differs from

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<sup>22</sup> *Montana-Dakota*, 341 U.S. at 251. MISO TOs also cite the D.C. Circuit's statement in *PG&E*, 306 F.3d at 1116, that a "court may only set aside a rate that is outside a zone of reasonableness, bounded on one end by investor interest and the other by the public interest against excessive rates," and the Commission's statement in *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275, at 62,218 (2001), that "whether prices are just and reasonable depends on whether those prices fall with a 'zone of reasonableness.'"

<sup>23</sup> 150 FERC ¶ 61,165 at PP 22-25.

its meaning when used in general descriptions of what constitutes a just and reasonable rate charged by a public utility for jurisdictional service, such as in *Montana-Dakota, PG&E*,<sup>24</sup> and *San Diego Elec.* The Commission uses a three-step process to determine the just and reasonable ROE component of the cost of service of a public utility or a group of public utilities. First, the Commission establishes a proxy group of companies of comparable risk. Second, the Commission performs a DCF analysis of each member of the proxy group in order to determine a “zone of reasonableness,” within which to set a just and reasonable ROE. That DCF zone of reasonableness is the range from the lowest proxy member ROE to the highest proxy member ROE. Finally, the Commission establishes a just and reasonable ROE at a single point within the DCF zone of reasonableness.

15. Thus, in the context of determining an ROE, the establishment of the DCF zone of reasonableness is simply one step in the process of determining a just and reasonable ROE for inclusion in the cost of service of the subject public utility or utilities. Typically, the DCF zone of reasonableness is relatively broad. For example, in Opinion No. 531, the DCF zone of reasonableness was from 7.03 percent to 11.74 percent, or nearly 500 basis points. As the Commission held in Opinion No. 531-B, not every ROE within such a relatively broad DCF “zone of reasonableness” is a just and reasonable ROE for the particular public utility or utilities at issue.

16. This conclusion is supported by the decision of the D.C. Circuit in *Southern California Edison Co. v. FERC*.<sup>25</sup> In that case, the utility filed to modify its rates under FPA section 205. The court stated that section 205 required the Commission to approve the utility’s rate proposal “as long as the new rates are just and reasonable.”<sup>26</sup> Nevertheless, the court also held that the Commission had authority to require the utility’s ROE to be set at the median of the zone of reasonableness, even though the midpoint of the zone, proposed by the utility, was also within the DCF zone of reasonableness. In short, the court recognized that the Commission need not treat every ROE within the zone of reasonableness as a just and reasonable ROE. If the Commission were required to find any and every ROE within the zone of reasonableness to be just and reasonable, the requirement that the Commission approve any section 205 rate proposal

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<sup>24</sup> *PG&E* is distinguishable on the further ground that the passage cited by MISO TOs relates entirely to the level of deference that the court applies to a rate determination made by the Commission because “of the highly technical and policy-based nature of rate design.” *PG&E*, 306 F.3d at 1116.

<sup>25</sup> *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 181-82.

<sup>26</sup> *Id.* at 181.

“as long as the new rates are just and reasonable”<sup>27</sup> would require the Commission to accept any ROE proposed by a utility in a section 205 rate case, as long as that ROE did not exceed the top of the range of reasonableness. However, the FPA has never been understood to require such a result, which would be contrary to the consumer protection purpose of the FPA.

17. MISO TOs argue that *SoCal Edison* is distinguishable because of the “very nature of the difference between [FPA] section 205 and section 206” and that the Commission cannot reach the question of establishing a just and reasonable ROE under the second prong of FPA section 206 unless and until it finds the existing rate unjust and unreasonable under the first prong of FPA section 206.<sup>28</sup> MISO TOs thus contend that, while the Commission can find that a utility’s proposed ROE is not just and reasonable in a FPA section 205 case, even though it is within the zone of reasonableness, the Commission cannot find that same ROE to be unjust and unreasonable in a FPA section 206 case.

18. In making these arguments, MISO TOs confuse the differences in who bears the burden of persuasion as between FPA sections 205 and 206 with the substantive “just and reasonable” standard contained in both those sections. The two sections differ as to who bears the burden of persuasion, because under FPA section 206 the Commission or complainant must show that the utility’s existing rate is unjust and unreasonable and the Commission must show that its replacement rate is just and reasonable, whereas under FPA section 205 the utility need only show that its proposed rate is just and reasonable. However, as the Supreme Court has stated, sections 205 and 206 are “parts of a single statutory scheme under which . . . all rates are subject to being modified by the Commission upon a finding that they are unlawful.”<sup>29</sup> While the party bearing the burden of persuasion is different under FPA section 205 and FPA section 206, “the scope and purpose of the Commission’s review remains the same – to determine whether the rate fixed by the [utility] is lawful.”<sup>30</sup> The effect of the MISO TOs’ argument, if that

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<sup>27</sup> *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007).

<sup>28</sup> MISO TOs Request at 11.

<sup>29</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 341 (1956). While this case involved the Natural Gas Act, the Supreme Court held in a companion case that the provisions of the FPA relevant to this question are substantially identical to the equivalent sections under the Natural Gas Act. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

<sup>30</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. at 341.

argument were to be accepted, would turn the statute on its head. FPA section 206 would no longer be a tool to challenge an ROE that was no longer reasonable, but rather would serve to insulate that ROE from challenge as long as it fell somewhere—anywhere—within the zone of reasonableness produced by a DCF analysis. Under that reading, a statute that was intended to protect ratepayers from exploitation,<sup>31</sup> would instead protect and preserve just such exploitation.

19. The Commission has long required the use of a DCF methodology to determine a zone of reasonableness, with the lawful just and reasonable ROE set at a single numerical point within that range based on the circumstances and record of that case.<sup>32</sup> Therefore, when the Commission finds a utility's base ROE to be just and reasonable in a particular case, it finds *only* that single point to be just and reasonable given the facts and circumstances of that case.<sup>33</sup> It does *not* find any other base ROE within the DCF zone of reasonableness, either above or below the approved ROE, to be a just and reasonable base ROE for that utility or group of utilities. Thus, the DCF zone of reasonableness does not establish a continuum of just and reasonable base ROEs, any one of which the utility would equally be free to charge to ratepayers; rather, only the single point approved by the Commission within the DCF zone of reasonableness is the just and reasonable base ROE.<sup>34</sup> It follows that showing the existing base ROE established in the prior case is unjust and unreasonable merely requires showing that the Commission's ROE methodology now produces a numerical value below the numerical value of the existing ROE. Contrary to MISO TOs' assertion, the fact that both of the burdens of proof under FPA section 206 can be satisfied using a single ROE analysis—one that generates an ROE that both is below the existing ROE (thus demonstrating that the existing ROE is excessive) and that also is a just and reasonable ROE (thus demonstrating what numerical point the new ROE should be)—does not alter those two burdens. In short, the statute does not require that the Commission treat all ROEs within the DCF zone of

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<sup>31</sup> See, e.g., *Pub. Sys. v. FERC*, 606 F.2d at 979 n.27.

<sup>32</sup> See, e.g., *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 57 (D.C. Cir. 1999).

<sup>33</sup> Cf. *Montana-Dakota*, 341 U.S. at 251 (explaining that while statutory reasonableness is an abstract concept represented by an area rather than a pinpoint the Commission must translate that concept into a concrete rate, and it is the rate—not the abstract concept—that governs the rights of the buyer and seller).

<sup>34</sup> As discussed below in P 23, the addition of an incentive adder for a project can justify a higher overall just and reasonable ROE (i.e., the base ROE plus the incentive adder) for that project.

reasonableness as just and reasonable. Rather, the statute requires that, under section 206, before we may change an ROE we must find it unjust and unreasonable.

20. For the reasons discussed above, we further disagree with MISO TOs' assertion that *Bangor Hydro* conflicts with court and Commission precedent. In that decision, the Commission stated that "assuming that every rate within the zone of reasonableness is equally just and reasonable . . . would leave no room for the Commission to exercise its judgment in determining the just and reasonable rate."<sup>35</sup> The Commission went on to explain that the term, zone of reasonableness, "must be understood as a shorthand way of expressing the concept that ratemaking is not an exact science and that the Commission 'must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.'"<sup>36</sup> As described above, Opinion Nos. 531 and 531-B reaffirmed and further explained our holdings in *Bangor Hydro* and we do not depart from them here.

21. As MISO TOs state, in the context of incentive ROE adders authorized for projects pursuant to Order No. 679,<sup>37</sup> the Commission has capped the overall ROE for a particular project (i.e., the sum of the utility's base ROE and the incentive ROE adder for that project) at the top of the DCF zone of reasonableness.<sup>38</sup> However, it does not follow from this fact that all ROEs within the DCF zone of reasonableness must be treated as just and reasonable for purposes of the first prong of FPA section 206. The Commission awards an incentive adder based on a separate, independent showing that a particular project is of a type that qualifies for such an adder, and—as directed by Congress—the Commission allows the adder to be added to the base ROE and charged to ratepayers so long as the sum of the adder and base ROE for that project is just and reasonable under

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<sup>35</sup> *Bangor Hydro*, 122 FERC ¶ 61,038, at P 14 (2008) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 ((1968))).

<sup>36</sup> *Id.* (citing *Permian Basin Area Rate Cases*, 390 U.S. at 797).

<sup>37</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006).

<sup>38</sup> See, e.g., *Northeast Utils. Serv. Co.*, 124 FERC ¶ 61,044, at P 71 (2008); *Central Maine Power Co.*, 125 FERC ¶ 61,079, at P 74 (2008); *Desert Southwest Power, LLC*, 135 FERC ¶ 61,143, at P 96 (2011). The Commission uses the DCF zone of reasonableness in the same manner to ensure that the sum of a utility's base ROE plus an incentive adder for joining an RTO is just and reasonable.

FPA section 205.<sup>39</sup> The Commission makes that determination by looking at whether the utility's base ROE plus the incentive ROE adder(s) for that project remain within the zone of reasonableness. That is, the Commission looks to whether the sum of the base ROE and the adder(s) for that project falls within the DCF-determined zone of reasonableness, or instead falls outside the zone of reasonableness, for that project. This use of the DCF-determined zone of reasonableness to place an outer limit on the overall ROE that a utility may earn on a particular project does not in any way suggest that any base ROE up to the top of the DCF-determined zone of reasonableness must be treated as just and reasonable for purposes of FPA section 206. To the contrary, it is only the separate, independent finding that the project qualifies for an incentive adder that justifies increasing the overall ROE for that project to a point within the DCF-determined zone of reasonableness above the utility's base ROE.

22. Consistent with this discussion, MISO TOs' reliance upon the Commission's 2012 *SoCal Edison* order finding that a utility's overall ROEs, including incentive adders, to be just and reasonable misinterprets the basis of that decision. In that case, after a paper hearing, the Commission determined the base ROE for three of Southern California Edison Company's transmission projects. To do so, the Commission applied a DCF analysis to a national proxy group of companies with comparable risks, determined an ROE zone of reasonableness, and then established the base ROE at the median point within that zone. Then, the Commission updated the base ROE by adjusting for the change in average yields on ten-year Treasury bonds. Finally, the Commission added previously approved incentive adders for the projects and, only at that point, concluded that, "pursuant to Order No. 679," the ROEs determined for the transmission projects were consistent with FPA section 205 because the "overall ROEs are set within the zone of reasonableness."<sup>40</sup>

23. MISO TOs' analysis misapprehends this decision in several respects. First, a base ROE, such as the one discussed in *SoCal Edison* and the base ROE at issue here, does not include incentive ROE adders. Second, in *SoCal Edison*, the Commission only reached the question regarding the upper bound of the zone of reasonableness after calculating the base ROE. At that point, because the projects at issue qualified for ROE incentive adders, the Commission followed the policy laid out in Order No. 679. In that rulemaking, which implemented the congressional directives regarding transmission incentives laid out in FPA section 219, the Commission stated that it "will provide ROEs

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<sup>39</sup> See 16 U.S.C. § 824s(d) (2012) ("All rates approved under the rules adopted pursuant to [FPA section 219] . . . are subject to the requirements of sections [205 and 206] of this title that all rates . . . be just and reasonable.").

<sup>40</sup> *S. Cal. Edison Co.*, 139 FERC ¶ 61,042, at P 47 (2012).

at the upper end of the zone of reasonableness for transmission investments that meet the requirements of [FPA] section 219.”<sup>41</sup> It was only the separate, independent finding that the projects qualified for an incentive adder that justified increasing the utility’s overall ROE to a point within the DCF-determined zone of reasonableness above the utility’s base ROE. Thus, MISO TOs’ reliance on *SoCal Edison* is misplaced because that decision does not stand for the principle that any ROE that falls within the zone of reasonableness must be just and reasonable.

24. In any event, the 2015 Complainants provided evidence in the form of a DCF study that produced a zone of reasonableness of 5.81 percent to 11.40 percent,<sup>42</sup> that the existing 12.38 percent ROE received by MISO transmission owners falls *outside* of the zone of reasonableness. The Commission found such evidence substantive enough to merit examination through hearing procedures.

## 2. Successive Complaints

### a. Rehearing Requests

25. MISO TOs argue that the Commission should grant rehearing and deny the relief requested by the 2015 Complainants because the effect of the 2015 Complaint is to stack successive complaints effectively extending the refund period in the 2013 Complaint proceeding beyond the statutory limit.<sup>43</sup> Likewise, Xcel argues that the Hearing Order is arbitrary and capricious and the Commission should grant rehearing and dismiss the 2015 Complaint.<sup>44</sup>

26. MISO TOs argue that FPA section 206 expressly restricts the Commission’s refund authority by limiting the refund effective period to fifteen months from the establishment of a refund effective date. MISO TOs argue, however, that the Hearing Order effectively stacks successive complaints — namely, the 2013 Complaint and the 2015 Complaint — to extend the refund period for the same cause of action beyond the 15-month limit. Additionally, MISO TOs and Xcel note that FPA section 206 does not

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<sup>41</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 93 (2006), *order on reh’g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh’g*, 119 FERC ¶ 61,062 (2007) (Order No. 679).

<sup>42</sup> 2015 Complaint at 19.

<sup>43</sup> MISO TOs Rehearing Request at 12; Xcel Rehearing Request at 5.

<sup>44</sup> Xcel Rehearing Request at 9.

contemplate a refund period extension and that the Commission has recognized that Congress intentionally limited refunds to a single 15-month period and has disallowed successive complaints when the sole purpose is to extend the statutorily limited refund period.<sup>45</sup>

27. MISO TOs and Xcel take issue with the Hearing Order's statement that "the Commission has previously allowed successive complaints when presented with a new analysis."<sup>46</sup> MISO TOs argue that this statement "belies the substantial similarity of the facts and analysis in the [2013 Complaint] and this one."<sup>47</sup> While Xcel acknowledges that, in the limited cases where the Commission has permitted a second complaint during the pendency of a first complaint, it contends that the second complaint must include new information or changed circumstances that could result in a different rate or if the record in the first complaint is closed.<sup>48</sup>

28. MISO TOs argue, however, that both complaints seek the same base ROE reduction of the same respondents and based on the same legal and regulatory standards. Similarly, Xcel contends that the hearing as to the 2013 Complaint "presents the same ROE and uses the same DCF analysis that the . . . [2015 Complainants] . . . attached to [the 2015 Complaint]."<sup>49</sup> Xcel also argues that that the two complaints' DCF analyses use the same proxy group, the same data from the same six month period ending January 2015, to reach the same conclusions regarding the upper and lower ends of the DCF range, and recommend the same ROE for MISO TOs.<sup>50</sup>

29. Furthermore, MISO TOs argue that not even the 2015 Complainants claim that the Complaint involves distinct facts or issues and, in fact, proposed that the Commission

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<sup>45</sup> MISO TOs Rehearing Request at 13 (citing, *e.g.*, *Allegheny Elec. Coop. v. Niagara Mohawk Power Corp.*, 58 FERC ¶ 61,096 (1992) (*Niagara Mohawk*)); Xcel Rehearing Request at 8 (citing *Niagara Mohawk*, 58 FERC ¶ 61,096 at 61,349).

<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.* (citing Hearing Order, 151 FERC ¶ 61,219 at P 49).

<sup>48</sup> Xcel Rehearing Request at 6-7 (citing *Consumer Advocate I*, 67 FERC ¶ 61,288 (1994); *Southern Co. Servs., Inc.*, 83 FERC ¶ 61,079 (1998)).

<sup>49</sup> *Id.* at 7.

<sup>50</sup> *Id.*

consolidate the two proceedings.<sup>51</sup> MISO TOs argue that if the Commission condones this tactic, it will invite “a never ending succession of complaints and the Commission’s sanctioning of an open-ended refund liability.”<sup>52</sup>

**b. Commission Determination**

30. With respect to the successive complaints, we deny MISO TOs’ and Xcel’s requests for rehearing. As discussed below, the Commission’s treatment of the 2015 Complaint is consistent with both the FPA and long-standing Commission policy on ROE complaints.

31. FPA section 206 requires that “[w]henver the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint[.]”<sup>53</sup> FPA section 206 also provides that:

[a]t the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force[.]<sup>54</sup>

32. As FPA section 206 makes clear, the Commission “*shall* establish a refund effective date” for each proceeding instituted on complaint,<sup>55</sup> and at the conclusion of such a proceeding “the Commission *may* order refunds” for up to fifteen months after the refund effective date established for that proceeding.<sup>56</sup> In the instant case, different groups of complainants have filed two separate complaints, based on different facts, thereby commencing two separate proceedings. The Commission set the two proceedings for hearing and, as required by FPA section 206, established a refund

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<sup>51</sup> MISO TOs Rehearing Request at 13.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> 16 U.S.C. § 824e(b) (2012).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (emphasis added).

<sup>56</sup> *Id.* (emphasis added).

effective date for each proceeding. Because the 15-month refund limitation in FPA section 206 is linked to the refund effective date *in each proceeding*, the 15-month refund limitation imposed by FPA section 206 separately applies to the 2013 Complaint proceeding and the instant Complaint proceeding.<sup>57</sup>

33. Congress granted the Commission its refund authority under FPA section 206 through the Regulatory Fairness Act.<sup>58</sup> The Commission has consistently interpreted the Regulatory Fairness Act—in the specific context of public utility ROE cases—to allow subsequent complaints in the circumstances of this case.<sup>59</sup> The Regulatory Fairness Act was “intended to add symmetry” between the Commission’s treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases.<sup>60</sup> As the Commission has explained:

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<sup>57</sup> *See id.*

<sup>58</sup> Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

<sup>59</sup> *Consumer Advocate I*, 67 FERC at 62,000, *order on reh’g*, 68 FERC ¶ 61,207 (1994) (*Consumer Advocate II*); *Southern Co. I*, 68 FERC ¶ 61,231, *order on reh’g*, 83 FERC ¶ 61,079; *see also San Diego Gas & Elec.*, 85 FERC ¶ 61,414, *reh’g denied*, 86 FERC ¶ 61,253, *reh’g denied*, 95 FERC ¶ 61,073. *But see EPIC Merchant*, 131 FERC ¶ 61,130 (2010), *reh’g denied*, 136 FERC ¶ 61,041 at PP 15-18 (rejecting the “pancaked” complaint, by distinguishing it from the complaints in *Consumer Advocate I*, *Southern Co. II*, and *San Diego Gas & Elec.*).

<sup>60</sup> *Consumer Advocate I*, 67 FERC at 62,000, *order on reh’g*, *Consumer Advocate II*, 68 FERC at 61,997 (citing 133 Cong. Rec. S10925 (daily ed. July 30, 1987) (statement of Sen. Chafee) (“[u]nder the current law, . . . section 205 and section 206 filings are not treated in the same manner, and this inequality serves to favor the wholesale supplier over the wholesale customers and their residential and commercial customers”); 134 Cong. Rec. H9030 (daily ed. Oct. 27, 1987) (statement of Rep. Bruce) (the Regulatory Fairness Act, in setting a “refund effective date for consumers . . . [uses] essentially the same system used to grant rate increases”); 134 Cong. Rec. H8095 (daily ed. Sept. 23, 1988) (statement of Rep. Gejdenson) (“[t]his legislation represents an attempt to make the current regulatory process more equitable, giving electric consumers the same protections and considerations that supplying utilities currently receive”)); *see also E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 945 n.21 (D.C. Cir. 1988) (characterizing the Regulatory Fairness Act as “designed to overcome the disincentive facing electric utilities to speed and settle § 206 cases”).

[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.<sup>61</sup>

Accordingly, the Commission has allowed multiple complaints regarding the same ROE, where the subsequent complaints are based on “new, more current data,” explaining that “[t]his 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.”<sup>62</sup> The Commission has also explained that, in such cases, it is not “instituting a duplicative proceeding intended solely to expand the amount of refund protection beyond 15 months, but rather [is] initiating an entirely new proceeding, based on an entirely separate factual record, that may or may not reach the same conclusions as those reached in the earlier ROE proceeding.”<sup>63</sup>

34. In the instant proceedings, the DCF analysis set forth in the 2015 Complaint was based on financial data from a different time period, and produced a different proxy group, than the DCF analysis set forth in the 2013 Complaint. The DCF analysis set forth in the 2013 Complaint was based on financial data from a 6-month period ending October 2013 and produced a proxy group of 20 companies, with a range of returns between 7.97 percent and 10.33 percent.<sup>64</sup> By comparison, the DCF analysis in the 2015 Complaint was based on financial data from a 6-month period ending January 2015 and produced a proxy group of 34 companies, with a range of returns between 5.81 percent and 11.40 percent.<sup>65</sup> The differences in the proxy groups produced by the two DCF analyses and the ROEs of the proxy group companies are the result of changes in, *inter alia*, the dividend yields and growth rates for each proxy group company.<sup>66</sup> The differences in those data constitute different factual circumstances. Thus, because the

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<sup>61</sup> *Consumer Advocate I*, 67 FERC at 62,000.

<sup>62</sup> *Consumer Advocate II*, 68 FERC at 61,998; *see also Southern Co. II*, 83 FERC at 61,385-86.

<sup>63</sup> *Southern Co. II*, 83 FERC at 61,386.

<sup>64</sup> 2013 Complaint at Ex. MPG-10.

<sup>65</sup> Complaint at Ex. JCC-2.

<sup>66</sup> *Compare* 2013 Complaint at Ex. MPG-10 *with* Complaint at Ex. JCC-2.

2015 Complaint is based on newer, more current data than the 2013 Complaint, the Commission properly allowed the 2015 Complaint.<sup>67</sup>

35. We recognize that the DCF analysis that the 2015 Complainants submitted with the 2015 Complaint is the same DCF analysis that the 2013 Complainants filed at the Commission two weeks later in the then ongoing hearing on the 2013 Complaint.<sup>68</sup> However, when the 2015 Complainants filed the 2015 Complaint on February 12, 2015, they reasonably based the 2015 Complaint on a DCF analysis using the most recent financial data available at that time, i.e., financial data for the six months ending January 2015. That the 2013 Complainants chose to use the same, most recent financial data when they submitted their updated DCF analysis two weeks later on February 27, 2015 in the hearing on the 2013 Complaint does not justify treating the two complaints against MISO TOs differently than the Commission has consistently treated other successive ROE complaints.<sup>69</sup> The fact that the 2013 Complainants submitted the same evidence in the hearing in the 2013 Complaint proceeding as the 2015 Complainants submitted in the 2015 Complaint does not change the fact that the 2015 Complaint contained new evidence based on later financial data than the evidence included in the 2013 Complaint itself. That the same information was submitted in the 2013 Complaint hearing is immaterial to our determination regarding the permissibility of the 2015 Complaint. Moreover, the Commission's final determination of MISO TOs' ROE in the 2015 Complaint proceeding will be based on later financial data than the financial data underlying the Commission's final ROE determination in the 2013 Complaint proceeding. In Opinion No. 531, the Commission modified its policy to require that public utility ROEs be determined based upon the most recent financial data available at

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<sup>67</sup> The facts in the instant case are thus distinguishable from the facts presented in *Niagara Mohawk*, 58 FERC ¶ 61,096, and *EPIC I*, 131 FERC ¶ 61,130, in both of which the Commission dismissed a second complaint against the same rate that was challenged by an earlier complaint. Here, as described above, the 2015 Complaint presented new factual allegations, based on a different time period. In both *Niagara Mohawk* and *EPIC I*, the second complaint was identical to the first complaint and presented no different factual or legal allegations, and so in both cases the Commission properly dismissed the second complaint. See *Consumer Advocate II*, 68 FERC at 61,999 n.11.

<sup>68</sup> The hearing on the 2013 Complaint commenced on August 17, 2015.

<sup>69</sup> See *ENE (Environmental Northeast) v. Bangor Hydro-Electric Company*, 151 FERC ¶ 61,125, at PP 25-33 (2015), and *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 151 FERC ¶ 61,126, at PP 18-25 (2015).

the time of the hearing.<sup>70</sup> Accordingly, because the hearing on the 2015 Complaint took place roughly six months after the hearing on the 2013 Complaint,<sup>71</sup> the just and reasonable ROE ultimately determined in the 2015 Complaint proceeding will be based on updated financial data not available at the time of the hearing in the 2013 Complaint proceeding.

36. Although the Commission may have noted previously, in accepting previous successive complaints, that the record in the first had expired, this factor is not a prerequisite for allowing a successive complaint.<sup>72</sup> That 2015 Complainants provided factual analysis that was updated and distinct from that provided in the 2013 Complaint is sufficient to allow a successive rate case, even if such information was presented in the later stages of the 2013 Complaint proceeding.

37. In any event, the arguments of MISO TOs and Xcel that the Commission violated the 15-month refund limitation are premature. The decision to order refunds, or not order refunds, in a section 206 proceeding is made “at the conclusion of” such a proceeding.<sup>73</sup> Thus, whether the Commission will direct refunds as a result of the instant proceeding will depend on the currently unknown outcome of that proceeding. While Congress’ adopting a 15-month refund limitation in the Regulatory Fairness Act gave public utilities some rate certainty in FPA section 206 proceedings, Xcel misinterprets the level of certainty that Congress provided. To find, as MISO TOs and Xcel argue, that the 15-month refund limitation in FPA section 206 requires the Commission to deny a complaint under these circumstances—i.e., deny a complaint that is based on different facts than a prior complaint that is already pending before the Commission—would prohibit any party from challenging a utility’s ROE as long as there is another complaint involving that utility’s ROE pending before the Commission. The language of FPA section 206 does not support such a finding. Limiting refunds in a particular case to 15 months was not intended to shield a utility’s rates from a later complaint, any more than the existence of one pending section 205 rate increase shields the customers of a public utility from a second, pancaked section 205 rate increase filed by that same utility

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<sup>70</sup> Opinion No. 531, 147 FERC ¶ 61,147 at P 160.

<sup>71</sup> The hearing on the 2015 Complaint commenced on February 17, 2016.

<sup>72</sup> *ENE (Environmental Northeast) v. Bangor Hydro-Electric Company*, 151 FERC ¶ 61,125 at P 31.

<sup>73</sup> 16 U.S.C. § 824e(b) (2012); *see also, e.g., Southern Co. Servs. Inc.*, 46 FERC ¶ 61,381, at 62,191-192 (1989).

later in that same year or in the next.<sup>74</sup> Rather, the 15-month refund limitation in FPA section 206 affects only the Commission's refund authority in a particular proceeding at the conclusion of that proceeding; it does not limit either a party's right to file a new complaint under FPA section 206 (provided that a successive complaint is based on new facts and circumstances),<sup>75</sup> the Commission's authority to set such a new complaint for hearing, or the Commission's obligation to establish a new refund effective date (and thus establish a 15-month refund period) for that new proceeding. A contrary determination would be inconsistent with the purpose of the Regulatory Fairness Act.

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

#### **a. Rehearing Request**

38. Xcel also argues that the Commission erred in determining that the non-jurisdictional MISO transmission owners' use of the MISO-wide base ROE is not within the scope of this proceeding. It states that if the Commission does not grant rehearing and dismiss the 2015 Complaint, the Commission should initiate a complaint against MISO and require MISO to make a compliance filing that either:

(i) includes a voluntary commitment to refunds by all non-jurisdictional MISO TOs in the event the Commission orders a reduction in the base ROE applicable to jurisdictional MISO TOs, with refund for the difference between the current ROE and the ROE ultimately determined by the Commission to be just and reasonable after the hearing procedures, effective as of the refund effective date (February 12, 2015); or (ii) removes from the MISO Tariff the tariff sheets of non-jurisdictional transmission owners using the 12.38% base ROE who refuse to agree to voluntary refunds, effective February 12, 2015.<sup>76</sup>

39. To support its position, Xcel states that the FPA's primary objective is to protect customers from excessive rates and charges. It argues that, if the Commission eventually finds the MISO-wide base ROE unjust and unreasonable, MISO customers will not

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<sup>74</sup> See *supra* P 33. Just as Congress did not bar, in FPA section 205, the filing of a successive rate increase while an earlier rate increase was still pending, Congress equally did not bar, in FPA section 206, the filing of a successive complaint while an earlier complaint was still pending.

<sup>75</sup> See *supra* n. 67.

<sup>76</sup> Xcel Rehearing Request at 15.

otherwise be afforded any relief associated with use of the same MISO-wide base ROE applied to the more than \$2 billion in net plant owned by non-jurisdictional entities and included in MISO rates.<sup>77</sup> Xcel argues that “[t]here is no independent basis for the non-jurisdictional MISO TOs to receive the 12.38% base ROE if that ROE is reduced . . . for jurisdictional MISO TOs.”<sup>78</sup> It further argues that, in this proceeding, the issue that the Commission set for hearing is a MISO-wide base ROE that would be just and reasonable for non-jurisdictional MISO TOs as well as jurisdictional MISO TOs.<sup>79</sup>

40. Because Xcel contends that the eventual just and reasonable MISO base ROE should apply to non-jurisdictional transmission owners, it further asks the Commission to apply its precedent in *Southwest Power Pool, Inc.*<sup>80</sup> According to Xcel, in that decision, the Commission determined that it made a legal error in previously accepting Southwest Power Pool’s (SPP) rates that included the costs of a non-jurisdictional utility without requiring a voluntary refund commitment from that utility. Xcel states that, on rehearing, the Commission instituted an FPA section 206 proceeding against SPP and required it to make a compliance filing that either removed tariff sheets containing the non-jurisdictional utility’s [transmission revenue requirement] from SPP’s tariff or include a voluntary commitment of refunds by the utility to refund the difference between the proposed rate and the rate eventually established by the Commission.<sup>81</sup> Xcel argues that the Commission’s failure to apply the precedent in *SPP* in the Hearing Order is arbitrary and capricious. For this reason, if the Commission does not dismiss the 2015 Complaint on rehearing, it should either include such a voluntary commitment of refunds by all non-jurisdictional MISO TOs if the Commission orders a MISO base ROE reduction or remove the tariff sheets of non-jurisdictional transmission owners using the base ROE who refuse to agree to refunds.<sup>82</sup>

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<sup>77</sup> *Id.* at 11.

<sup>78</sup> *Id.* at 11-12.

<sup>79</sup> *Id.* at 13.

<sup>80</sup> *Id.* at 14 (citing 142 FERC ¶ 61,135 (2013) (*SPP*)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 15.

**b. Commission Determination**

41. We grant, in part, Xcel's request for rehearing with respect to refunds for non-public utility transmission owners. As an initial matter, we note that the Commission has jurisdiction under the FPA to "analyze and consider the rates of [non-public] utilities to the extent that those rates affect jurisdictional transactions," such as the rates charged by an RTO.<sup>83</sup> The Commission's authority in this regard extends to the review of non-public utilities' rates if they are a component of an RTO's rate design. The Commission reviews such non-public utility rates under the statutory just and reasonable standard.<sup>84</sup> The reason for applying this standard is that "it is impossible to ensure that [an RTO's] rates are just and reasonable without reviewing [a member non-public utility transmission owner's] rates under the same standard."<sup>85</sup>

42. Still, the Commission's rate jurisdiction under FPA section 205 and its refund jurisdiction under FPA section 206 "expressly apply only to public utilities."<sup>86</sup> Thus, the Commission does not "have refund authority over . . . governmental entities and non-public utilities."<sup>87</sup>

43. While the Commission cannot directly order refunds from non-public utility transmission owners that have joined RTOs, where the Commission has set for hearing an RTO's FPA section 205 filing proposing to include a non-public utility's transmission revenue requirement in its tariff, the Commission has conditioned implementation of the

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<sup>83</sup> *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002).

<sup>84</sup> *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 671-72 (D.C. Cir. 2007) (*TANC v. FERC*) (finding that once a municipality becomes a participating transmission owner, its transmission revenue requirement becomes a component of the rate design under which an RTO operates).

<sup>85</sup> *Id.* at 672.

<sup>86</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005) (*Bonneville v. FERC*); *see also TANC v. FERC*, 495 F.3d at 673 (D.C. Cir. 2007).

<sup>87</sup> *Id.* at 911.

proposal pending completion of the proceeding upon that non-public utility's agreement to make refunds if the rate, as filed, is later found to be not just and reasonable.<sup>88</sup> However, until recently, the Commission has only required the non-public utility to agree to make refunds in the specific FPA section 205 proceeding where the RTO has proposed to include its transmission revenue requirement in its jurisdictional tariff.<sup>89</sup> Thus, the refund commitment has not extended to future FPA section 205 and 206 proceedings where the justness and reasonableness of the RTO's tariff and rates are at issue.

44. To reduce this regulatory gap in MISO, the Commission has, upon receiving FPA section 205 tariff filings by MISO and non-public utility transmission owners to increase the transmission revenue requirement of the non-public utility transmission owners by adding an RTO adder to their base ROEs, conditioned approval on commitments to provide refunds: (1) in the 2013 Complaint proceeding as of the effective date of their RTO adder; and (2) consistent with any refund effective date in any other proceedings resulting in a new base ROE for MISO TOs, including this Complaint proceeding.<sup>90</sup> For this reason, our understanding is that only a minority of non-public utility transmission owners that use the base ROE are now exempt from providing refunds if the Commission establishes a lower base ROE in this Complaint proceeding.

45. Despite these decisions, it is still of concern that the refund commitments provided by the non-public utility transmission owners thus far do not apply to the full range of situations in which they may receive revenues associated with service provided due to their status as transmission-owning RTO members based on RTO rates, terms, or conditions that are found to be unjust and unreasonable, in the same manner that public utility transmission owners could be required to provide refunds of such revenues under FPA sections 205 or 206. For example, the Commission could require MISO to correct errors in the application of an entity's formula rates, or to remedy any other elements of, or costs passed through, the transmission owners' formula rates that are found to be

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<sup>88</sup> See *Xcel Energy Serv. Inc. v. FERC*, 815 F.3d 947, 950 (D.C. Cir. 2016) (citing, *inter alia*, *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, at P 47 & n.59 (2012)).

<sup>89</sup> *Sw. Power Pool*, 138 FERC ¶ 61,231, at PP 1, 14, 15 (2012).

<sup>90</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,053, at P 11 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,240, at P 16 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,166, at P 12 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,137, at P 13 (2015); *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,104, at P 27 (2015) (collectively, MISO RTO Incentive Adder Orders).

unjust and unreasonable. The Commission could also order refunds with respect to rules governing allocation of MISO Tariff revenues among transmission owners that are found to be unjust and unreasonable. The non-public utility transmission owners are currently under no obligation to provide refunds in these other situations because these situations are not covered by the limited refund commitments provided by the non-public utility transmission owners thus far. This is the case even though the inclusion of their transmission revenue requirements in MISO's jurisdictional rates could be causing those jurisdictional rates to be unlawfully inflated, or they may be otherwise receiving unjust and unreasonable revenues, contrary to the consumer protection purpose of the FPA.<sup>91</sup> The refund commitments obtained in the MISO RTO Incentive Adder Orders are instead limited to refunds related to revisions in MISO's RTO-wide base ROE in this and future proceedings. Moreover, the ROE refund requirements required in the MISO RTO Incentive Adder Orders do not apply to all non-public utility transmission owners in MISO.

46. It thus appears that the lack of a refund commitment in the MISO Tariff requiring non-public utility transmission owners to refund revenues that they may receive associated with service provided due to their status as transmission-owning RTO members, in the same manner that public utility transmission owners could be required to provide refunds of such revenues under FPA section 205 or 206, may be unjust, unreasonable, or unduly discriminatory or preferential. That is because, absent such a commitment, MISO's resulting jurisdictional rates may not be just and reasonable.

47. Accordingly, we institute a proceeding in Docket No. EL16-99-000, pursuant to FPA section 206, to examine the MISO Tariff. Upon initial review, the concerns identified by the Commission might be addressed by revising the MISO Tariff to require a prospective refund commitment from non-public utility transmission owners for all manner of refunds that may be ordered in FPA section 205 and 206 proceedings related to revenues that they may receive associated with service provided due to their status as transmission-owning RTO members.<sup>92</sup> Under such a tariff revision, if a non-public utility

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<sup>91</sup> See *Xcel Energy Serv. Inc. v. FERC*, 815 F.3d at 952 (citing *Mun. Light Bds. of Reading and Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

<sup>92</sup> This refund commitment would not relate to revenues or credits that a non-public utility transmission owner may receive as a market participant for sales into the MISO market or as a transmission customer (i.e., revenues or credits that other non-public utility market participants and transmission customers also receive). We seek comment, in the paper hearing established below, on how to most appropriately define revenues that non-public utility transmission owners may receive associated with service provided due to their status as transmission-owning RTO members.

transmission owner chooses not to make such a refund commitment, then MISO would remove its transmission revenue requirement(s) from the MISO Tariff as of a prospective date to be determined by the Commission. Under the refund commitment, non-public utility transmission owners would be subject to the same refund obligations as public utility transmission owners on all matters involving the justness and reasonableness of revenues that they may receive associated with service provided due to their status as transmission-owning RTO members based on RTO rates, including, but not limited to, refunds (1) to correct any errors in the application of their formula rates, (2) to remedy any other elements of, or costs passed through, their formula rates that are found to be unjust and unreasonable, or (3) to remedy any rules governing allocation of MISO Tariff revenues among transmission owners that are found to be unjust and unreasonable. Additionally, MISO would revise the MISO Tariff such that any new non-public utility transmission owners must also commit to providing refunds consistent with the terms of this commitment before they may recover their transmission revenue requirement(s) through MISO Tariff rates.

48. While Xcel's request for rehearing of the Hearing Order asked the Commission to require MISO to obtain ROE refund commitments from the non-public utility transmission owners as of the February 12, 2015 refund effective date, the Commission finds that any additional refund commitment required of those owners as a result of the section 206 proceeding established by this order should be prospective only. We note that the 2015 Complainants did not seek to require refund commitments by non-public utility transmission owners. Additionally, we have previously only required refund commitments from non-public utility transmission owners in the context of FPA section 205 proceedings, where the non-public utility transmission owner was required to provide the refund commitment as a condition of receiving the benefit of having its revenue requirement included in the RTO's jurisdictional tariff. Nor have we previously required refund commitments applicable to all future proceedings. Accordingly, in the FPA section 206 proceeding established by this order, we will be considering a significant change in Commission policy, both in terms of requiring a refund commitment outside the context of an FPA section 205 proceeding and in terms of the scope of the proposed refund commitment. Therefore, this proceeding is unlike the situation addressed by the court in *Xcel Energy Serv. Inc. v. FERC*, where the Commission's failure to require a refund commitment in a section 205 proceeding was contrary to the Commission's then existing policy.

49. We find that a paper hearing, as ordered below, is the appropriate procedure to resolve this matter. As ordered below, any person desiring to participate in the paper hearing must file a notice of intervention or timely motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015).

50. We will require MISO and other interested parties to file initial briefs no later than 30 days after the publication of notice in the *Federal Register* of the Commission's initiation of this section 206 proceeding in Docket No. EL16-99-000. Parties also may file reply briefs in response to parties' initial briefs due within 21 days after the due date of initial briefs.

51. In cases where, as here, the Commission institutes a proceeding under FPA section 206, the Commission must establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of the proceeding in the *Federal Register*, and no later than five months subsequent to that date.<sup>93</sup> Consistent with Commission precedent,<sup>94</sup> we will establish a refund effective date at the earliest date allowed, i.e., the date the notice of the initiation of the proceeding in Docket No. EL16-99-000 is published in the *Federal Register*. The Commission is also required by section 206 to indicate when it expects to issue a final order. We expect to issue a final order in this proceeding within six months of receiving reply briefs, or March 31, 2017.

The Commission orders:

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

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL16-99-000, as discussed in the body of this order.

(C) MISO and other interested parties may file initial briefs no later than 30 days after the publication of notice in the *Federal Register* of the Commission's initiation of the section 206 proceeding in Docket No. EL16-99-000. Reply briefs may be filed no later than 21 days thereafter.

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<sup>93</sup> 16 U.S.C. § 824e(b) (2012).

<sup>94</sup> See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Elec. Light Co.*, 75 FERC ¶ 61,1777, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

(D) Any interested person desiring to be heard in Docket No. EL16-99-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2015)) within 21 days of the date of issuance of this order.

(E) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation under FPA section 206 of the proceeding in Docket No. EL16-99-000.

(F) The refund effective date in Docket No. EL16-99-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (E) above.

By the Commission. Commissioner Honorable is recused.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.