

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Association of Businesses Advocating	:	
Tariff Equity, <i>et al.</i> ,	:	
Complainants,	:	
	:	
v.	:	Docket No. EL14-12-016
	:	
Midcontinent Independent System	:	
Operator, Inc., <i>et al.</i> ,	:	
Respondents.	:	
	:	
Arkansas Electric Cooperative	:	
Corporation, <i>et al.</i> ,	:	
Complainants,	:	
	:	
v.	:	Docket No. EL15-45-015
	:	
ALLETE, Inc., <i>et al.</i> ,	:	
Respondents.	:	

**MOTION TO INTERVENE OUT-OF-TIME AND  
LIMITED REQUEST FOR REHEARING OF  
WIRES AND THE EDISON ELECTRIC INSTITUTE**

Pursuant to section 313 of the Federal Power Act (“FPA”)<sup>1</sup> and Rules 212, 214, and 713 of the Rules of Practice and Procedure<sup>2</sup> of the Federal Energy Regulatory Commission

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<sup>1</sup> 16 U.S.C. § 825*l*.

<sup>2</sup> 18 C.F.R. §§ 385.212, .214 and .713 (2024).

(“Commission” or “FERC”), WIRES,<sup>3</sup> and the Edison Electric Institute (“EEI”)<sup>4</sup> (collectively, “Joint Respondents”) hereby move to intervene in the above captioned dockets and request rehearing of the Commission’s October 17, 2024 Order on Remand issued in this proceeding.<sup>5</sup> Specifically, the Joint Respondents seek to intervene in order to request rehearing on a limited, discrete issue regarding refunds, the import of which could not have been known until this late date. Specifically, the refund effective date for a newly fixed return on equity (“ROE”) and the associated refunds set by the Commission in the Order on Remand are in violation of FPA section 206, including the 15-month limitation on the refund period established by Congress, and should be reversed.

## **I. EXECUTIVE SUMMARY**

The need for electric transmission investment in the United States remains critical for ensuring efficient and reliable electric service to meet the growing demand for electricity today and into the future. Numerous studies show that transmission investment provides enormous value and that the need for new transmission has never been greater. FERC understands the need to

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<sup>3</sup> WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and consumer and environmental benefits through development of electric transmission infrastructure. This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the Regional Transmission Organization/Independent System Operator (“RTO/ISO”) members of WIRES. For more information about WIRES, please visit [www.wiresgroup.com](http://www.wiresgroup.com).

<sup>4</sup> EEI is the association that represents all investor-owned electric companies in the United States. EEI members provide electricity for nearly 250 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI’s member companies own and operate generation, transmission, and distribution facilities in regions in all areas of the country. EEI members are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve.

<sup>5</sup> *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 189 FERC ¶ 61,036 (Oct. 17, 2024) (“October 17 Order on Remand” or “Order on Remand”).

adopt policies that promote and encourage transmission investment,<sup>6</sup> and no such policy is of greater importance than the matters setting ROEs on those investments. Constructive ROEs are essential to attracting capital to this challenging business; and building and maintaining electric transmission is a risky, multi-billion dollar, on-going, long-term commitment. It is critical that the Commission's policies provide ROEs necessary to encourage investment in transmission-owning public utilities. This is one of several dockets pending before the Commission challenging transmission-owning public utilities' investment in electric transmission infrastructure.<sup>7</sup>

This proceeding arises from a series of Commission orders regarding the methodology to be used in setting the MISO Transmission Owners' base ROE and the establishment of refunds. The Joint Respondents do not seek rehearing on the ROE methodology adopted by the Commission in the Order on Remand. Instead, the Joint Respondents seek rehearing of the Commission's decision to order refunds from September 28, 2016, to the date of the Order on Remand.

The Order on Remand's directive to require retroactive refunds is contrary to FPA section 206 and violates the statute's prohibition against retroactive ratemaking. No base ROE was "fixed" with respect to the MISO Transmission Owners until the Order on Remand.<sup>8</sup> As such, the newly fixed rate can only be applied prospectively from October 17, 2024. Any attempt to backdate the newly fixed ROE to September 28, 2016, and to set refunds earlier than October 17, 2024, is contrary to the FPA and constitutes reversible error.

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<sup>6</sup> *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 ("Order No. 1920"), *reh'g denied by operation of law*, 188 FERC ¶ 62, 025 (2024), *appeal pending sub nom, Appalachian Voices v. FERC*, Nos. 24-1650 (4th Cir. pet. consolidated Aug. 8, 2024).

<sup>7</sup> *See, e.g., Midcontinent Indep. Sys. Operator, Inc.* 187 FERC ¶ 61,170 (June 13, 2024) (Commission's Order to Show Cause addressing transmission owner's ability to unilaterally elect to initially fund the network upgrade capital costs that it incurs to provide interconnection service to the interconnection customer).

<sup>8</sup> *MISO Transmission Owners v. FERC*, 45 F.4th 248, 265 (D.C. Cir. 2022) ("*MISO TOs v. FERC*") (stating ". . . because we vacate FERC's rehearing order, there is no longer a new rate to base a refund on.").

## II. MOTION TO INTERVENE OUT-OF-TIME

Pursuant to Rule 214, the Joint Respondents move for leave of the Commission to intervene in the captioned proceedings out-of-time and submit the following in support of their Motion to Intervene Out-of-Time. The Joint Respondents previously sought to intervene out-of-time in the above-captioned dockets in 2019.<sup>9</sup> In Opinion No. 569-A, the Commission denied the Joint Respondents' requested late interventions.<sup>10</sup> In Opinion 569-B, the Commission denied EEI's request for rehearing of its late intervention.<sup>11</sup> On August 9, 2022, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "Court") in *MISO TOs v. FERC* vacated the Commission's orders denying the Joint Respondents' late interventions.<sup>12</sup>

The Joint Respondents respect the Commission's procedures with regard to filing motions to intervene out-of-time. However, the Joint Respondents believe that this new motion to intervene out-of-time is warranted and necessary given the potential impacts and consequences of the new determinations made in the Order on Remand. Specifically, the Joint Respondents believe that this Motion to Intervene Out-of-Time is justified because the rehearing request submitted herein deals solely with an issue—the effective date for the Order on Remand's rate and the associated

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<sup>9</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Motion to Intervene Out-of-Time, Motion to Lodge, and Request for Rehearing of the Edison Electric Institute, Docket Nos. EL14-12-003, *et al.* (filed Dec. 23, 2019); *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Motion to Intervene Out-of-Time, Motion to Lodge, and Request for Rehearing of WIRES LLC, Docket Nos. EL14-12-003, *et al.* (filed Dec. 23, 2019).

<sup>10</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154, P 27 (2020) (denying motions filed by the Joint Respondents) ("Opinion No. 569-A").

<sup>11</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-B, 173 FERC ¶ 61,159, PP 33-40 (2020) (rejecting EEI's request for rehearing of the Commission's decision to deny its late intervention in Opinion No. 569-A) ("Opinion No. 569-B").

<sup>12</sup> In *MISO TOs v. FERC*, the Court found that because it vacated the Commission's rehearing order "there is no longer a new rate to base a refund on." See *MISO TOs v. FERC* 45 F.4<sup>th</sup> at 265. Given the Court's holding, it was reasonable for Joint Respondents to believe that refunds would be set as of the date of the Commission's subsequent order on remand, not September 2016. Consequently, Joint Respondents could not have reasonably anticipated the need to take this unusual step to submit this late intervention at this juncture but for the Commission's issuance of a new base ROE in its Order on Remand and its insistence to continue to order refunds back to September 2016.

refunds. This issue was created by the Commission's disregard of the Court's holding that the Commission must set a *new* rate to base a refund on<sup>13</sup> and the Commission's delays in resolving these proceedings. The Commission has now taken a total of eleven years to resolve this matter since the filing of the First Complaint and waited more than two years following the issuance of *MISO TOs v. FERC* before issuing the Order on Remand.<sup>14</sup>

Additionally, as stated above, Joint Respondents tried to intervene when the issue of refunds was raised in Opinion No. 569. Although the Commission denied Joint Respondents' requests to intervene out-of-time in Opinion Nos. 569-A and 569-B, those orders were vacated by the Court in *MISO TOs v. FERC*. Thus, this renewed request is specific to one issue, *i.e.*, the Commission's determination to set a new rate in its Order on Remand and to require refunds retroactively to September 2016. It was not until the Commission issued its Order on Remand that Joint Respondents could have known that the Commission would continue to apply the September 28, 2016, effective date, especially after the Court *vacated* the Commission orders (Opinion Nos. 551, 569, 569-A and 569-B) proposing retroactive refund dates.<sup>15</sup>

Thus, the Joint Respondents are seeking to intervene in these dockets in order to request rehearing of the Commission's determination to require refunds back to September 28, 2016, for a *new* ROE not identified until October 17, 2024. Given the magnitude of the refund period, which was exacerbated by the Commission's delay in acting on the U.S. Court of Appeals *MISO TOs v. FERC* decision (which added an additional two years to the refund period) and the Commission's persistence in continuing to require a 2016 refund effective date, the Joint Respondents are concerned that this ruling will have significant adverse impacts on transmission owners if this

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

<sup>14</sup> *See supra* n. 5.

<sup>15</sup> *MISO TOs v. FERC*, 45 F.4<sup>th</sup> at 265.

decision becomes precedential, thereby undermining efforts to promote investment in needed transmission infrastructure.<sup>16</sup> For this reason, the Joint Respondents respectfully ask the Commission to consider this Motion to Intervene Out-of-Time on the discrete issue of refunds.

In deciding whether to grant a late intervention, the Commission considers whether (i) the movant had good cause for failing to file a motion to intervene within the time prescribed; (ii) any disruption of the proceeding might result from permitting intervention; (iii) the movant's interest is not adequately represented by other parties in the proceeding; and (iv) any prejudice to, or additional burdens upon, the existing parties might result from permitting intervention.<sup>17</sup> As described below, the Joint Respondents satisfy these criteria for late intervention.

***A. Good Cause Exists for the Joint Respondents Not Intervening Within the Prescribed Period***

The Joint Respondents have good cause for filing a motion to intervene following the issuance of the Order on Remand. As noted above, the discrete issue raised herein by the Joint Respondents was the result of the Commission's delay to act following the D.C. Circuit's decision in *MISO TOs v. FERC*, which added to the breadth of the refund period. As a result, the Commission's decision to set a *new* rate and to backdate the effective date more than eight years from the date of the Order on Remand is a new issue that could not have been known or raised earlier in the above-captioned proceedings.

As discussed below, Joint Respondents' interest in intervening in these proceedings is based on their ability to represent the views of a significantly broader group of transmission owners. Importantly, Joint Respondents represent two national, non-profit trade associations of transmission owners that have a direct and substantial interest in these proceedings.

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<sup>16</sup> See 16 U.S.C. § 824e(b) (FERC must "act as speedily as possible" to resolve FPA section 206 complaints).

<sup>17</sup> 18 C.F.R. § 385.214(d)(1).

The Commission's Order on Remand established a refund effective date that could govern refunds in future rate matters affecting other transmission owners. Although such precedent may be unintentional, it would add risk and uncertainty in future rate matters that the Commission must avoid. By permitting the requested intervention, Joint Respondents would be able to ensure that the broader industry implications of the Order on Remand are addressed.

Were the Commission to deny Joint Respondents' motion to intervene at this stage, it would in effect require industry groups and trade associations, like EEI and WIREs, to intervene in all future company-specific rate filings to preserve their right to participate and review Commission orders in the event the Commission adopts new policies and practices with industry-wide impacts.

Such an outcome would be inefficient; unnecessarily burdensome for market participants, stakeholders, and the Commission; and inconsistent with the Commission's rules, which provide for late interventions for good cause shown as presented here. Accordingly, the Commission should find that good cause exists for the Joint Respondents to intervene at this time and accept Joint Respondents' motion to intervene out-of-time to address the industry-wide refund implications of the Order on Remand that were not reasonably foreseeable before the issuance of that order.<sup>18</sup>

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<sup>18</sup> Unlike the movants in the *Greenhat* proceeding, Joint Respondents have demonstrated good cause for the Commission to grant Joint Respondent's late intervention, despite the fact that the Commission has issued a dispositive order in these proceedings. See *PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,209, *reh'g denied*, 168 FERC ¶ 61,104 (2019). Unlike the Commission's denial of PJM Interconnection, L.L.C.'s waiver request in the *Greenhat* proceeding, which was reasonably foreseeable and addressed only a discrete tariff provision in a single RTO's tariff, the October 17 Order on Remand's refund period for the new base ROE was not foreseeable given the Court's holding in *MISO TOs v. FERC* and will have broad industry-wide implications that could directly impact all Commission-jurisdictional transmission owners.

***B. Joint Respondents' Intervention Will Not Disrupt the Proceeding, Prejudice Existing Parties, or Create Additional Burden for Existing Parties***

Granting the Joint Respondents' Motion to Intervene Out-of-Time will not disrupt the proceeding, prejudice existing parties, or create additional burdens for existing parties. 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.<sup>19</sup> Granting the Joint Respondents' late intervention will not prejudice or create additional burdens for existing parties because the Joint Respondents are intervening to provide additional industry-wide perspective on the consequences of the Commission's refund determination. Because Joint Respondents seek to intervene for the sole purpose of presenting their view on the discrete legal issue related to refunds from September 28, 2016, forward and because that issue does not depend on any factual development or other procedures, Joint Respondents' intervention would not delay or disrupt this proceeding. Moreover, Joint Respondents proffered rehearing arguments, which are being filed with this motion, can be considered by the Commission at the same time it considers the arguments of other parties who may seek rehearing on all other issues related to the Order on Remand.

In short, the Joint Respondents submit that their intervention for the purpose of presenting the views of their transmission-owning members on this important legal issue is in the public interest.

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<sup>19</sup> See, e.g., *Pub. Serv. Comm'n of Wisc. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104, P 69 (2015) (granting late-filed motion to intervene of the City of Escanaba, which sought rehearing of a Commission order that raised issues with implications beyond the current proceeding); *S. Nat. Gas Co.*, 130 FERC ¶ 61,193, at PP 5-7 (2010) (granting trade association's late-filed motion to intervene for the purpose of seeking rehearing of an issue with broad industry implications). See also *Paiute Pipeline Co.*, 70 FERC ¶ 61,227, at 3 (1995) (stating that trade association's motion to intervene out-of-time is granted and that the Commission will address the simultaneously filed request for rehearing).



Accordingly, the Commission should grant Joint Respondents' motion to intervene because it will provide the Commission with additional industry perspective to aid in its decision-making and will not prejudice or burden any existing party.

***C. The Joint Respondents' Interests Are Not Adequately Represented***

As stated above, the Joint Respondents have a direct and substantial interest in these proceedings and this interest cannot be adequately represented by any other party in this proceeding. The Joint Respondents represent the interests of their member companies that have a base ROE component of their Commission-jurisdictional rates.

The Commission has long recognized the value of perspectives from industry organizations such as the Joint Respondents in considering matters with broad policy implications, noting previously that "[w]here membership associations meet the standard of Rule 214, [the Commission] should encourage informed pleadings . . . ." <sup>20</sup> Accordingly, the Joint Respondents have come together to provide a unique industry perspective on this important issue decided in the Order on Remand and their interests cannot be adequately represented by any other existing party to this proceeding.

**III. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES**

In accordance with Rules 713(c)(1) and (c)(2) <sup>21</sup> of the Commission's Rules of Practice and Procedure, Joint Respondents provide the following specifications of error and statement of issues in the Commission's Order on Remand:

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<sup>20</sup> *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,265, P 9 (2007) (agreeing with "the Membership Organizations that '[w]here membership associations meet the standard of Rule 214, [the Commission] should encourage informed pleadings . . . .'" ). *See also S. Nat. Gas Co.*, 130 FERC ¶ 61,193 at PP 5-7 (granting trade association's late-filed motion to intervene and noting that the trade association "is able in this proceeding to present [its members'] common views regarding an issue of continued significance for the industry." ).

<sup>21</sup> 18 C.F.R. § 385.713(c)(1) – (2).

First, the Order on Remand directing retroactive refunds, with interest, back to the date of Opinion No. 551 (September 28, 2016) violates FPA section 206's prohibition against retroactive ratemaking. FPA section 206 requires that new rates may be implemented only prospectively. Courts have determined that the new rate is not "fixed" under FPA 206 until the Commission has definitively established the just and reasonable rate. Notwithstanding this precedent, the Order on Remand issued on October 17, 2024, fixed the base ROE and retroactively established a refund period back to September 28, 2016.

The Commission's statutory authority under FPA section 206 is limited to replacing a challenged rate with a new just and reasonable rate, but only prospectively. By ordering that the new base ROE set in the Order on Remand be backdated effective as of the date of Opinion No. 551, the Commission acted arbitrarily and capriciously and in violation of FPA section 206. *See* FPA section 206(a);<sup>22</sup> *Elec. District No. 1 v. FERC*, 774 F.2d 490, 492 (D.C. Cir. 1985) ("*Electrical District No. 1*"); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 572 (1981) ("Congress granted exclusive authority over rate regulation to the Commission, and, in so doing, withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file."); *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (citing to precedent in *Electrical District No. 1*, which held that "FERC does not 'fix' a rate until the rate is numerically 'specified.'"); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'").

Second, the Commission's claim of "legal error" is unsupported by the record and, therefore, its reliance on unrevealed "*broad remedial authority*," i.e., lack of specificity as to the actual error and the failure to cite to the specific statutory authority relied upon by the Commission, is arbitrary and capricious.

*See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 at 43 (an "agency must examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) ("*Burlington Truck Lines*"); *Burlington Truck Lines*, 371 U.S. 168 (stating that "[t]he agency must make findings that support its decision, and those findings must be supported by substantial evidence."); *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197 (1941) (the agency must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it.").

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<sup>22</sup> 16 U.S.C. § 824e(a).

#### IV. BACKGROUND

This matter stems from two separate FPA section 206 complaints filed on November 12, 2013<sup>23</sup> and February 12, 2015,<sup>24</sup> respectively, by different complainants alleging, among other things, that the MISO Transmission Owners' base ROE of 12.38 percent was unjust and unreasonable.

On October 16, 2014, the Commission issued an order setting the First Complaint for hearing and establishing a refund effective date of November 12, 2013, thereby setting a fifteen-month refund period beginning on that date and expiring February 11, 2015.<sup>25</sup>

On February 12, 2015 – one day after expiration of the fifteen-month refund period established in the First Complaint proceeding – a second set of complainants filed the Second Complaint also challenging the base ROE of 12.38 percent. On June 18, 2015, the Commission issued the Second Complaint hearing order and set a refund effective date of February 12, 2015, with a fifteen-month refund period to expire on May 11, 2016.

On September 28, 2016, the Commission issued Opinion No. 551,<sup>26</sup> affirming application of the two-step discounted cash flow (“DCF”) methodology adopted by the Commission in Opinion No. 531<sup>27</sup> to grant the First Complaint and set the base ROE for MISO Transmission

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<sup>23</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Complaint of Joint Complainants, Docket No. EL14-12-000 (Nov. 12, 2013) (“First Complaint”).

<sup>24</sup> *Arkansas Elec. Coop. Corp., v. ALLETE, Inc.*, Complaint of Joint Customer Complainants, Docket No. EL15-45-000 (Feb. 12, 2015) (“Second Complaint”).

<sup>25</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,049, at P 188 (2014), *order on reh'g*, 156 FERC ¶ 61,060 (2016).

<sup>26</sup> Opinion No. 551, 156 FERC ¶ 61,234 (Sept. 28, 2016).

<sup>27</sup> *Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), *rev'd, Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (“*Emera Maine*”).

Owners at 10.32 percent.<sup>28</sup> The Commission directed the MISO Transmission Owners to submit a compliance filing to implement their new ROE effective September 28, 2016, and to provide refunds for the period November 12, 2013 – February 11, 2015 (“First Refund Period”). The Commission relied extensively on its determinations in Opinion No. 531 in adopting Opinion No. 551.

On November 15, 2018, following the D.C. Circuit’s April 14, 2017 *Emera Maine* decision vacating and remanding Opinion No. 531, the Commission issued a Briefing Order in the First and Second Complaint dockets seeking additional briefing and new evidence concerning an entirely new proposed ROE methodology.<sup>29</sup> In its Briefing Order, the Commission calculated that its newly proposed methodology would result in a base ROE of 10.28 percent if adopted for the MISO Transmission Owners.<sup>30</sup>

On November 21, 2019, the Commission issued Opinion No. 569 granting rehearing of Opinion No. 551, in part, in order to propose an entirely new methodology for calculating a just and reasonable ROE. Additionally, the Commission set a new just and reasonable base ROE at 9.88 percent, effective September 28, 2016, (the date Opinion No. 551 required the MISO

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<sup>28</sup> *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 (2015) (“Initial Decision – First Complaint”). In addition, the Commission found the Presiding Judge reasonably considered evidence of alternative methodologies for determining the ROE and the ROEs approved by state regulatory commission, *i.e.*, three financial models: Risk Premium model, the capital asset pricing model (CAPM), and expected earnings model, as well as a comparison with the CAPM.

<sup>29</sup> *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118, at P 11 (Nov. 15, 2018) (“Briefing Order”) (noting that, because Opinion No. 531 is no longer precedential, the Commission is free to “re-adopt” its Opinion No. 551 determinations on remand “as long as it provides a reasoned basis for doing so.”).

<sup>30</sup> *Id.* at P 19.

Transmission Owners to adopt a new 10.32 percent ROE).<sup>31</sup> The Commission required the MISO Transmission Owners to submit a compliance filing to implement their new ROEs effective September 28, 2016 and to provide refunds, with interest, for two time periods: (i) the fifteen-month period commencing on the date of the First Complaint (November 12, 2013) to February 11, 2015; and (ii) from September 28, 2016 (the date of Opinion No. 551) to November 25, 2019 (the date of Opinion No. 569).<sup>32</sup>

Opinion No. 569 dismissed the Second Complaint with no refunds, finding that the 9.88 percent ROE was not unjust and unreasonable and, therefore, the Commission cannot order refunds in that proceeding.<sup>33</sup> Multiple parties sought rehearing of Opinion No. 569.

On May 21, 2020, the Commission addressed these rehearing requests in Opinion No. 569-A.<sup>34</sup> Once again, FERC changed its ROE methodology. Such changes increased the MISO Transmission Owners' base ROE from 9.88 percent to 10.02 percent.<sup>35</sup> Under Opinion No. 569-A, the Commission backdated the effective date of the newly established base ROE of 10.02 percent to September 28, 2016 (the date of Opinion No. 551) and required the MISO Transmission Owners to re-calculate and provide refunds for not only the fifteen-month refund period for the First Complaint, but also from September 28, 2016 to May 21, 2020, the date of

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<sup>31</sup> It is noteworthy that none of the requests for rehearing of Opinion No. 551 asked the Commission to adopt a new ROE methodology. Nor did the *Emera Maine* decision require the Commission to adopt a wholly new methodology for setting base ROEs. Rather, the Commission stated that, if it adopts the findings in its Briefing Order following the briefing directed by the order, the Commission will “exercise its ‘broad remedial authority’ to correct its legal error in order to make the 10.28 percent ROE . . . effective as of the September 28, 2016 date of Opinion No. 551, and the Commission will order refunds of amounts collected in excess of 10.28 percent pursuant to the 10.32 percent ROE established by [Opinion No. 551].” Briefing Order at P 61.

<sup>32</sup> Opinion No. 569, at ordering paragraph (C).

<sup>33</sup> *Id.* at PP 572 – 573 and 575.

<sup>34</sup> *See supra* n. 10.

<sup>35</sup> Opinion No. 569-A at P 206.

Opinion No. 569-A, expanding the refund period by nearly four years.<sup>36</sup> The Commission claimed that by granting rehearing of Opinion No. 551 to make 10.32 percent the new just and reasonable base ROE, and by acting to correct what the Commission characterized as a “legal error,” it was appropriate to direct refunds with interest, for the period from the effective date of the just and reasonable ROE that was set in Opinion No. 551.<sup>37</sup> Thus, according to the Commission, the new ROEs set in Opinion No. 569 and 569-A, respectively, are effective as of the date of the “original decision,” *i.e.*, Opinion No. 551.<sup>38</sup>

The Commission issued an order on rehearing, Opinion No. 569-B, on November 19, 2020.<sup>39</sup> Although the Commission further modified its new approach, the Commission continued to reach the same base ROE of 10.02 percent.<sup>40</sup>

On August 9, 2022, the D.C. Circuit vacated and remanded Opinion Nos. 551, 569, 569-A and 569-B.<sup>41</sup> In that order, the Court declined to address the challenges on the refund issue.<sup>42</sup> On October 17, 2024, the Commission issued its Order on Remand acknowledging that in Opinion Nos. 569, 569-A and 569-B the Commission made “multiple revisions” to its methodology for analyzing the base ROE under FPA section 206. Nonetheless, the Commission required the MISO Transmission Owners to provide refunds based on a new 9.98 percent base ROE, with interest, for

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<sup>36</sup> *Id.* at P 268. The Commission denied certain parties requests for rehearing of the Opinion No. 569 refund period. *See e.g., Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Request for Rehearing of The MISO Transmission Owners, Docket Nos. EL14-12-004, *et al.* (Dec. 23, 2019); *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Request for Rehearing of The Ameren Companies, Docket Nos. EL14-12-004, *et al.* (Dec. 23, 2019).

<sup>37</sup> Opinion No. 569-A at PP 245-249.

<sup>38</sup> *Id.* at P 241.

<sup>39</sup> *See supra* n. 11.

<sup>40</sup> Opinion No. 569-B at P 183.

<sup>41</sup> *See supra* n. 5 & n. 12.

<sup>42</sup> *MISO TOs v. FERC*, 45 F4th at 265.

a two phase-refund period: (i) for the First Complaint’s 15-month period from November 12, 2013 through February 11, 2015; and (ii) for the second period from September 28, 2016 to October 17, 2024, the date of the Remand Order.<sup>43</sup>

The following chart (taken from the *MISO TOs v. FERC* Order and updated for the Order on Remand) summarizes the timeline associated with the multiple FERC orders issued in this proceeding.

First Section 206 Complaint: <b>November 12, 2013</b> (First Complaint Refund period: November 12, 2013 – February 11, 2015)	
Second Section 206 Complaint: February 12, 2015 (Refund period: February 12, 2015 – May 11, 2016)	
<b>September 28, 2016</b> FERC Opinion No. 551 Addresses First Complaint	New ROE: 10.32 percent  First Complaint: November 12, 2013 – February 11, 2015  ROE methodology: applies methodology from the New England Transmission Owners proceeding
<b>April 14, 2017:</b> The D.C. Circuit Court issued <i>Emera Maine</i> , vacating and remanding Opinion No. 531 on which Opinion No. 551 was based.	
<b>November 21, 2019</b> FERC Opinion No. 569 Addresses the First and Second Complaints	New ROE: 9.88 percent  Refund Periods: First Complaint: November 12, 2013 – February 11, 2015, and New rate: <b>September 28, 2016</b> (Opinion No. 551 effective date) to November 21, 2019.  Dismisses Second Complaint  ROE methodology: rejects the expected-earnings and risk premium models; will use only the DCF and CAPM models.
<b>May 21, 2020</b> FERC Opinion No. 569-A	ROE: 10.02 percent  Refund Periods: First Complaint: November 12, 2013 – February 11, 2015; and

<sup>43</sup> Order on Remand at P 33.

Addresses both complaints	<p>New Rate: September 28, 2016 to May 21, 2020</p> <p>Still dismisses Second Complaint.</p> <p>ROE methodology: will now use the risk-premium model in the Return analysis in addition to the DCF and CAPM models.</p>
<p><b>November 19, 2020</b></p> <p>FERC Opinion No. 569-B</p> <p>Addresses both complaints</p>	<p>ROE still: 10.02 percent</p> <p>Refund Periods: First Complaint: November 12, 2013 – February 11, 2015; and New Rate: September 28, 2016 to November 19, 2020</p> <p>Still dismisses Second Complaint</p> <p>ROE methodology: corrected certain inputs to the risk-premium model but continued to reach the same result it reached in Opinion No. 569-A</p>
<p><b>August 9, 2022:</b> The D.C. Circuit Court vacated and remanded Opinion Nos. 551, 569, 569-A, and 569-B, to the Commission</p>	
<p><b>October 17, 2024</b></p> <p>FERC Order on Remand</p>	<p>New ROE: 9.98 percent</p> <p>Refund Period: First Complaint: November 12, 2013 – February 11, 2015 New rate: September 28, 2016 – October 17, 2024 (the date of the Remand Order).</p> <p>ROE methodology: Retains the DCF and CAPM models; does not adopt the Risk Premium model.</p>



## V. REHEARING REQUEST

### A. *FERC Does Not Have the Statutory Authority to Order Refunds Dating Back to 2016 and, Therefore, Acted Beyond the Bounds of Its Authority Under FPA Section 206*

The Commission's ability to fix a new rate and direct refunds is limited by the plain language set forth in FPA section 206. Under section 206, the Commission has the authority to take two actions to change a transmission owner's base ROE:

- If after hearing held upon the Commission's own motion or upon complaint, the Commission finds a rate is unjust or unreasonable, the Commission shall determine the just and reasonable rate under FPA section 206(a), but only prospectively, and shall fix the same by order; and
- Under FPA section 206(b), the Commission may require refunds for the difference between the challenged rate and the prospective rate fixed by Commission order; however, such refund period is limited by section 206(b) to the fifteen-month period beginning on the refund effective date, even if the litigation lasts longer than fifteen months (barring any "dilatory behavior" by the public utility).

Despite this clear statutory language setting forth the procedures that must be followed for the Commission to adopt a new base ROE and direct refunds, the Order on Remand adopts a base ROE effective retroactive to September 28, 2016 and directs refunds for a period of more than eight years, both of which are in clear violation of FPA section 206, which Congress enacted for the protection of public utilities.

However, this claim of authority is contrary to FERC's statutory authority, as the Commission's remedies in this matter are limited to changing rates prospectively and ordering refunds for the fifteen-month refund period expressly authorized by Congress.<sup>44</sup> Requiring refunds beyond this statutory 15-month period constitutes retroactive ratemaking in clear violation of FPA sections 206(a) and (b).

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<sup>44</sup> See FPA sections 206(a) and (b).

Thus, notwithstanding the fact that the base ROE was changed at least three times since September 28, 2016, the Order on Remand requires the MISO Transmission Owners to issue refunds retroactively back to September 2016. This retroactive application exceeds the Commission's limited statutory authority under FPA section 206.

***B. The Commission's Claim of Legal Error Is Unsupported by the Record and, Therefore, Its Reliance on Any "Broad Remedial Authority" Is Without Merit***

Neither a 9.88 percent ROE set on November 21, 2019 (Opinion No. 569), nor a 10.02 percent ROE set on May 21, 2020 (Opinion No. 569-A), nor a 9.98 percent ROE set on October 17, 2024 can be imposed retroactively to the September 28, 2016 issuance date of Opinion No. 551 that set a 10.32 percent ROE, yet that is exactly what the Commission has done in its Order on Remand. Recognizing the refund limitations of FPA section 206, the Commission attempts to justify its retroactive application of the ROE outside the statutory fifteen-month refund period on *legal error* by citing back to Opinion No. 569-A in footnote 85 of the Order on Remand, stating that by granting rehearing of Opinion No. 551 to establish a new just and reasonable base ROE (*in Opinion No. 569-A*) and "*by acting to correct a legal error*, it is *appropriate* to direct refunds, with interest," from the effective date set in Opinion No. 551 (September 28, 2016), not Opinion No. 569-A. Based on this one footnote, the Commission asserts, without any explanation, that because it acted to "correct legal error" it was *appropriate* to bypass its limitations under FPA section 206.

While the Commission decided not to explain how a legal error theory would apply to the case at this stage (which itself is reversible error), it is important to note here that the Commission originally claimed authority in Opinion No. 569 to retroactively direct refunds back to Opinion No. 551, stating that because the *Emera Maine* Court vacated and remanded Opinion No. 531 and because Opinion No. 551 relied "extensively" on the method set forth in Opinion No. 531, it has

“broad remedial authority to correct its legal error *in order to make whatever ROE it sets on rehearing* effective as of the date of Opinion No. 551.”<sup>45</sup> The Commission’s reliance on legal error is contrary to law; and, therefore, the Order on Remand directing refunds back to 2016 is reversible error.

FPA section 309<sup>46</sup> can only be used to the extent consistent with other operative portions of the statute. Because this matter is brought before the Commission under FPA section 206, the Commission’s remedies are limited to changing rates prospectively, pursuant to section 206(a) and the 15-month refund limit in section 206(b); and the Commission cannot invoke section 309 to override clear statutory limits. Thus, the Commission cannot support its attempt to “fix” a new rate retroactively in violation of section 206 by relying on its “undefined appropriateness” to correct legal errors, particularly where there is no evidence of legal error in the record.<sup>47</sup>

Moreover, given the fact that the Commission has failed to specify or explain the legal error in this proceeding or cite to a relevant statutory provision granting the Commission such “broad remedial authority” to bypass the express prohibition on retroactive ratemaking under FPA section 206, the record is void of any authority under which the Commission may sidestep section 206 and “make whatever ROE its set on rehearing” effective back to 2016.<sup>48</sup>

Thus, a claim of legal error does not justify the Commission’s departure from the unambiguous text of FPA section 206. FERC’s erroneous claim of retroactive refund authority based upon legal error for a period of more than eight years in this proceeding is unsupported by the record and without merit.

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<sup>45</sup> Opinion No. 569 at P 10.

<sup>46</sup> 16 U.S.C. § 825h.

<sup>47</sup> Order on Remand at P 33, n. 85 (*citing* to Opinion No. 569-A at P 249).

<sup>48</sup> Of course, the Commission had the authority to adopt a new ROE based on the record, however, it is not authorized to apply the new ROE retroactively.

## VI. CONCLUSION

For the foregoing reasons, the Joint Respondents request that the Commission grant (i) their motion to intervene out-of-time; and (ii) this request for rehearing of the Commission's Order on Remand.

Respectfully submitted,

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Dated: November 18, 2024

## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that I have this day had served the foregoing document upon each person designated on the official service compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 18th day of November 2024.

/s/ *Larry Gasteiger*

Larry Gasteiger

Executive Director

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