

**Énergir, s.e.c**  
**Gazifère Inc.**  
**Intragaz, s.e.c.**

***Demande conjointe relative à la fixation de taux de rendement  
et de structures de capital, R-4156-2021***

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**FERC 569-A**

171 FERC ¶ 61,154  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Association of Businesses Advocating Tariff Equity  
Coalition of MISO Transmission Customers  
Illinois Industrial Energy Consumers  
Indiana Industrial Energy Consumers, Inc.  
Minnesota Large Industrial Group  
Wisconsin Industrial Energy Group

Docket No. EL14-12-004

v.

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

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

Docket No. EL15-45-013

v.

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

OPINION NO. 569-A

ORDER ON REHEARING

(Issued May 21, 2020)

1. On November 21, 2019, the Commission issued Opinion No. 569.<sup>1</sup> In that order, the Commission acted on the then-pending rehearing requests and the Initial Decision, as well the Order Directing Briefs,<sup>2</sup> in the above-captioned proceedings. In brief, Opinion No. 569 applied a revised methodology for analyzing the base return on equity (ROE) component of public utility rates under section 206 of the Federal Power Act (FPA) that used the discounted cash flow (DCF) model and capital-asset pricing model (CAPM), instead of only the DCF model, and established a range of presumptively just and reasonable ROEs based on the quartiles of the zone of reasonableness. Multiple parties request rehearing of Opinion No. 569.<sup>3</sup> In this order, we grant in part and deny in part the requests for rehearing.

2. In particular, in Opinion No. 569, the Commission used the DCF model and CAPM in its determinations under the first and second prongs of section 206, giving each model equal weight under both prongs, and did not use the expected earnings (Expected Earnings) or risk premium (Risk Premium) models, as proposed in the Briefing Order. In addition, the Commission used the ranges of presumptively just and reasonable ROEs in its analysis under the first prong of section 206, as the Commission proposed in the Briefing Order, used the high-end outlier test as proposed in the Briefing Order, used the Institutional Brokers' Estimate System (IBES) as the source of short-term earnings growth estimates in the DCF and CAPM, and used a revised low-end outlier test that eliminates DCF and CAPM proxy group ROE results that are less than the yields of generic corporate Baa bonds plus 20% of the CAPM risk premium. In this order, we are granting rehearing of Opinion No. 569 to use the Risk Premium model under both prongs of our section 206 analysis, to give the short-term growth rate 80% weighting and the long-term growth rate 20% weighting in the two-step DCF model, to modify the high-end outlier test to treat any proxy company as high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median result of all of the potential proxy group members in that model<sup>4</sup> before any high or low-end outlier test is applied, subject to a "natural break" analysis, to consider the use of *Value Line* short-term earnings growth estimates in the CAPM in future proceedings, and to calculate the ranges

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

<sup>2</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018) (Briefing Order).

<sup>3</sup> See *infra* PP 23-24.

<sup>4</sup> As noted below, the high-end outlier test only applies to the DCF model and CAPM because they utilize results of the relevant analysis applied to a proxy group, while the Risk Premium model is derived from actual ROEs.

of presumptively just and reasonable base ROEs by dividing the overall composite zone of reasonableness into equal thirds.

3. Applying this revised methodology to the facts of the November 12, 2013, complaint filed in Docket No. EL14-12-000 pursuant to section 206 (First Complaint), we review the Midcontinent Independent System Operator, Inc. (MISO) transmission-owning members' (MISO TOs) 12.38% base ROE that was the existing ROE reviewed in Opinion No. 551, which was pending on rehearing before the Commission when it issued Opinion No. 569, and continue to find that this base ROE is unjust and unreasonable. Having found that MISO TOs' 12.38% ROE is unjust and unreasonable, we then find that a just and reasonable replacement ROE for the MISO TOs in the First Complaint proceeding is 10.02%. As discussed further below, in the second section 206 complaint (Second Complaint) proceeding in Docket No. EL15-45-000, the ROE to be reviewed is the 10.02% base ROE established in the First Complaint proceeding that is effective prospectively from September 28, 2016—the date of the issuance of Opinion No. 551. Under the revised base ROE methodology applied in this order, the 10.02% base ROE that the Commission is reviewing for purposes of the Second Complaint proceeding falls within the applicable range of presumptively just and reasonable base ROEs, therefore, the Commission presumes it to be just and reasonable. As discussed below, we find that this presumption has not been rebutted by the evidence in the Second Complaint proceeding. Accordingly, we affirm the Commission's decision in Opinion No. 569 to dismiss the Second Complaint, and its finding that no refunds should be issued as a result of the resolution of that complaint.

## **I. Background**

### **A. Opinion No. 531 et seq.**

4. In Opinion No. 531, the Commission adopted certain changes to its use of the DCF methodology for evaluating and setting the Commission-allowed ROE for the New England transmission owners (New England TOs). In particular, the Commission elected to replace the “one-step” DCF model, which considers only short-term growth projections for a public utility, with a “two-step” model that considers both short- and long-term growth projections.<sup>5</sup> The Commission also departed from its typical practice of setting the just and reasonable ROE of a group of utilities at the midpoint of the zone of reasonableness. The Commission explained that evidence of “anomalous” capital

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<sup>5</sup> See generally *Coakley Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at PP 8, 32-41, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), *rev'd*, *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (*Emera Maine*).

market conditions, including “bond yields [that were] at historic lows,” made the Commission “less confiden[t] that the midpoint of the zone of reasonableness . . . accurately reflects the [ROE] necessary to meet the *Hope* and *Bluefield* capital attraction standards.”<sup>6</sup> The Commission therefore looked to four alternative benchmark models: three financial models—the Risk Premium model, CAPM, and Expected Earnings model<sup>7</sup>—as well as a comparison with the ROEs approved by state public utility commissions.<sup>8</sup> In considering those models, the Commission emphasized that it was not departing from its long-standing reliance on the DCF model, but rather relying on those models only to “inform the just and reasonable placement of the ROE within the zone of reasonableness established . . . by the DCF methodology.”<sup>9</sup> Based on these alternative models, the Commission determined that an ROE of 10.57%, the midpoint of the upper half of the zone of reasonableness produced by the two-step DCF model, would be just and reasonable. Because that figure differed from New England TOs’ existing 11.14% ROE, the Commission concluded that the existing base ROE had become unjust and unreasonable and it therefore set New England TOs’ base ROE at 10.57%, pending a paper hearing concerning the long-term growth projection to use in the DCF analysis. Following that hearing, in Opinion No. 531-A the Commission reaffirmed its conclusion that New England TOs’ existing ROE was unjust and unreasonable and that 10.57% was the just and reasonable ROE. The Commission required New England TOs to submit a compliance filing to implement their new ROEs effective October 16, 2014—the date of issuance of Opinion No. 531-A.

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<sup>6</sup> Opinion No. 531, 147 FERC ¶ 61,234 at PP 144-145 & n.285. “*Hope*” and “*Bluefield*” refer to a pair of U.S. Supreme Court cases that require the Commission “to set a rate of return commensurate with other enterprises of comparable risk and sufficient to assure that enough capital is attracted to the utility to enable it to meet the public's needs.” *Boroughs of Ellwood City, Grove City, New Wilmington, Wampum, & Zelienople, Pa. v. FERC*, 731 F.2d 959, 967 (D.C. Cir. 1984) (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (*Hope*) and *Bluefield Waterworks Improvement Co. v. Pub. Serv. Comm’n of W.V.*, 262 U.S. 679 (1923) (*Bluefield*)).

<sup>7</sup> As discussed further below, the Risk Premium model estimates cost of equity using the implied premium that provided over Baa-rated utility bonds by regulatory decisions and settlements. The CAPM derives the ROE through the risk premium observed from the risk premium of a DCF analysis of S&P 500 dividend-paying companies. The Expected Earnings model is a method of calculating the earnings that an investor expects to receive on the book value of a particular stock.

<sup>8</sup> Opinion No. 531, 147 FERC ¶ 61,234 at PP 147-149.

<sup>9</sup> *Id.* P 146.

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

5. On November 12, 2013, multiple complainants<sup>10</sup> filed the First Complaint in Docket No. EL14-12-000 pursuant to section 206 of the FPA, alleging, among other things, that the MISO TOs' base ROE reflected in MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff was unjust and unreasonable.<sup>11</sup> At the time of the First Complaint, MISO TOs had a base ROE of 12.38% (except for the ATCLLC zone which had a 12.20% ROE),<sup>12</sup> and their total ROE (i.e., the base ROE plus any ROE adders approved by the Commission) was not permitted to exceed 15.96%. The Commission established the MISO TOs' preexisting 12.38% ROE in a 2002 decision.<sup>13</sup> That ROE was based on a DCF analysis using financial data for the

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<sup>10</sup> The complainants consist of a group of large industrial customers: Association of Businesses Advocating Tariff Equity (ABATE); Coalition of MISO Transmission Customers (Coalition of MISO Customers); Illinois Industrial Energy Consumers (IIEC); Indiana Industrial Energy Consumers, Inc. (INDIEC); Minnesota Large Industrial Group (MLIG); and Wisconsin Industrial Energy Group.

<sup>11</sup> The following MISO transmission owners were named in the First Complaint: ALLETE, Inc. for its operating division Minnesota Power (and its subsidiary Superior Water, L&P); Ameren Services Company, as agent for Union Electric Company, Ameren Illinois Company, and Ameren Transmission Company of Illinois; American Transmission Company LLC (ATC); Cleco Power LLC; Duke Energy Corporation for Duke Energy Indiana, Inc.; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Gulf States Louisiana, L.L.C.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company; ITC Midwest LLC; METC; MidAmerican Energy Company; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Indiana Gas & Electric Company; and Wolverine Power Supply Cooperative, Inc. Intervenor Xcel Energy Services Inc. did not join certain of the MISO TOs' pleadings in this proceeding, but generally supported the brief on behalf of respondents Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation.

<sup>12</sup> For the sake of clarity, we refer to this ROE of the MISO TOs as 12.38% in this order, without separately identifying that the ATCLLC zone had a 12.20% ROE. Our discussion and decisions with respect to the MISO TOs' 12.38% ROE also apply to the 12.20% ATCLLC ROE.

<sup>13</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 99 FERC ¶ 63,011, *initial decision affirmed as to base ROE*, 100 FERC ¶ 61,292 (2002), *reh'g denied*, 102 FERC

six-month period ending February 2002.<sup>14</sup> On October 16, 2014, the same date that the Commission issued Opinion No. 531-A, it set the First Complaint for hearing before an Administrative Law Judge and established a refund effective date of November 12, 2013.<sup>15</sup>

6. Following the hearing, the Presiding Judge issued an Initial Decision,<sup>16</sup> and the Commission subsequently issued Opinion No. 551.<sup>17</sup> In Opinion No. 551, the Commission calculated the just and reasonable ROE using the two-step DCF methodology from Opinion No. 531 and financial data for the period January 1 through June 30, 2015. The Commission affirmed the conclusions of Initial Decision (I), finding that the Presiding Judge correctly applied the two-step DCF analysis required by Opinion No. 531.<sup>18</sup> The Commission also affirmed the Presiding Judge's determination that, as in Opinion No. 531, there were anomalous capital market conditions such that the Commission had less confidence that the midpoint of the zone of reasonableness produced by a mechanical application of the DCF methodology satisfied the capital attraction standards of *Hope* and *Bluefield*.<sup>19</sup> The Commission found that the Presiding Judge reasonably considered evidence of alternative methodologies for determining the

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¶ 61,143 (2003), *order on remand*, 106 FERC ¶ 61,302 (2004). The ATCLLC zone base ROE of 12.20% was established as part of a settlement agreement that was filed with the Commission on March 26, 2004. In Docket No. ER04-108-000, the Commission approved the uncontested settlement. *Am. Transmission Co. LLC*, 107 FERC ¶ 61,117 (2004).

<sup>14</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 99 FERC ¶ 63,011, app. A.

<sup>15</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 188 (2014) (MISO I Hearing Order), *order on reh'g*, 156 FERC ¶ 61,060 (2016) (MISO I Rehearing Order). In the MISO I Rehearing Order, the Commission denied requests for rehearing and clarification of the MISO I Hearing Order and clarified that non-public utility transmission owners are subject to the outcome of that proceeding. MISO I Rehearing Order, 156 FERC ¶ 61,060 at PP 47-48.

<sup>16</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 (2015) (Initial Decision (I)).

<sup>17</sup> *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016) (affirming Initial Decision (I), 153 FERC ¶ 63,027).

<sup>18</sup> *See generally* Opinion No. 551, 156 FERC ¶ 61,234 at P 9.

<sup>19</sup> *Id.*



ROE and the ROEs approved by state regulatory commissions, for purposes of deciding to set the ROE at the central tendency of the upper half of the zone of reasonableness, setting the base ROE for MISO TOs at 10.32%.<sup>20</sup> The Commission required MISO TOs to submit a compliance filing to implement their new ROEs effective September 28, 2016, the date of Opinion No. 551, and to provide refunds for the November 12, 2013-February 11, 2015 refund period. Following the issuance of Opinion No. 551, numerous parties submitted requests for rehearing.

**C. Second Complaint Against MISO TOs' ROE**

7. On February 12, 2015, a new set of complainants<sup>21</sup> filed the Second Complaint in Docket No. EL15-45-000 also alleging that the MISO TOs' base ROE of 12.38% was unjust and unreasonable.<sup>22</sup> Relying on an updated two-step DCF analysis, the Second Complaint complainants argued that the base ROE should be no higher than 8.67%.<sup>23</sup> On

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

<sup>21</sup> Complainants for the Second Complaint consist of: Arkansas Electric Cooperative Corporation (Arkansas Electric Cooperative); Mississippi Delta Energy Agency and its two members, Clarksdale Public Utilities Commission of the City of Clarksdale, Mississippi and Public Service Commission of Yazoo City of the City of Yazoo City, Mississippi; and Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier Cooperative).

<sup>22</sup> The following MISO transmission owners were named in the Second Complaint: ALLETE, Inc. (for its operating division Minnesota Power, Inc. and its wholly-owned subsidiary Superior Water Light, & Power Company); Ameren Illinois Company; Union Electric Company (identified as Ameren Missouri); Ameren Transmission Company of Illinois; ATC; Cleco Power LLC; Duke Energy Business Services, LLC; Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company, ITC Midwest LLC, and Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company-Minnesota; Northern States Power Company-Wisconsin; Otter Tail Power Company; and Southern Indiana Gas & Electric Company.

<sup>23</sup> *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, at P 1 (2015) (MISO II Hearing Order), *order on reh'g*, 156 FERC ¶ 61,061 (2016) (MISO II Rehearing Order).

June 18, 2015, the Commission established hearing procedures and set a refund effective date of February 12, 2015.<sup>24</sup>

8. Parties filed requests for rehearing of the MISO II Hearing Order, and on July 21, 2016, the Commission generally denied these rehearing requests.<sup>25</sup> Following the MISO II Hearing Order, the Presiding Judge issued the Initial Decision on June 30, 2016.<sup>26</sup> The Presiding Judge adopted a zone of reasonableness of 6.75% to 10.68% based on financial data for the period July 1, 2015 through December 31, 2015. The Presiding Judge also determined that the anomalous capital market conditions identified in Opinion No. 531 persisted and, after considering the alternative benchmark methodologies, that the just and reasonable ROE was 9.70%—halfway between the midpoint and the upper bound of the zone of reasonableness. The participants filed briefs on and opposing exception.

**D. Emera Maine**

9. On April 14, 2017, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its *Emera Maine* decision, vacating and remanding Opinion No. 531 *et seq.* As an initial matter, the D.C. Circuit was not persuaded by New England TOs' argument that an ROE within the DCF-produced zone of reasonableness could not be deemed unjust and unreasonable. The D.C. Circuit explained that the zone of reasonableness established by the DCF is not “coextensive” with the “statutory” zone of reasonableness envisioned by the FPA.<sup>27</sup> Accordingly, the D.C. Circuit concluded that the fact that New England TOs' existing ROE fell within the zone of reasonableness produced by the DCF did not necessarily indicate that it was just and reasonable for the purposes of the FPA.<sup>28</sup>

10. Nevertheless, the D.C. Circuit found that the Commission had not adequately shown that New England TOs' existing ROE was unjust and unreasonable. The D.C. Circuit explained that the FPA's statutory “zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE” and that whether a particular ROE is unjust and unreasonable depends on the “particular

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<sup>24</sup> MISO II Hearing Order, 151 FERC ¶ 61,219 at P 1.

<sup>25</sup> *See* MISO II Rehearing Order, 156 FERC ¶ 61,061.

<sup>26</sup> *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 (2016) (Initial Decision (II)).

<sup>27</sup> *Emera Maine*, 854 F.3d at 22-23.

<sup>28</sup> *Id.* at 23.

circumstances of the case.”<sup>29</sup> Thus, the fact that New England TOs’ existing ROE did not equal the just and reasonable ROE that the Commission would have set using the current DCF inputs did not necessarily indicate that New England TOs’ existing ROE fell outside the statutory zone of reasonableness.<sup>30</sup> As such, the D.C. Circuit concluded that Opinion No. 531 “failed to include an actual finding as to the lawfulness of [New England TOs’] existing base ROE” and that its conclusion that their existing ROE was unjust and unreasonable was itself arbitrary and capricious.<sup>31</sup>

11. The D.C. Circuit also found that the Commission had not adequately shown that the 10.57% ROE that it set was just and reasonable. Although recognizing that the Commission has the authority “to make ‘pragmatic adjustments’ to a utility’s ROE based on the ‘particular circumstances’ of a case,” the D.C. Circuit nevertheless concluded that the Commission had not explained why setting the ROE at the upper midpoint was just and reasonable.<sup>32</sup> The D.C. Circuit noted, in particular, that the Commission relied on the alternative models and state-regulated ROEs to support a base ROE above the midpoint, but that it did not rely on that evidence to support an ROE at the upper midpoint.<sup>33</sup> Similarly, the D.C. Circuit noted that the Commission had concluded that a base ROE of 9.39%—the midpoint of the zone of reasonableness—might not be sufficient to satisfy *Hope* and *Bluefield* or to allow the utility to attract capital, but that the Commission had not similarly explained how a 10.57% base ROE was sufficient to meet either of those conditions. Because the D.C. Circuit found that the Commission had not pointed to record evidence supporting the specific point at which it set New England TOs’ ROE, the

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<sup>29</sup> *Id.* at 23, 26.

<sup>30</sup> *Id.* at 27 (“To satisfy its dual burden under section 206, FERC was required to do more than show that its single ROE analysis generated a new just and reasonable ROE and conclusively declare that, consequently, the existing ROE was per se unjust and unreasonable.”).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (quoting *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575, 586 (1942)).

<sup>33</sup> *Id.* at 29 (“FERC’s reasoning is unclear. On the one hand, it argued that the alternative analyses supported its decision to place the base ROE above the midpoint, but on the other hand, it stressed that none of these analyses were used to select the 10.57% base ROE.”).

D.C. Circuit held that the Commission had not articulated the “rational connection” between the evidence and the rate that the FPA demands.<sup>34</sup>

12. Based on the D.C. Circuit’s conclusion that the Commission had not met its burden either under the first or the second prong of section 206 of the FPA, it vacated and remanded Opinion No. 531 *et seq.*,<sup>35</sup> meaning that Opinion No. 531 is no longer precedential,<sup>36</sup> even though the Commission remained free to re-adopt those determinations on remand as long as it provided a reasoned basis for doing so.<sup>37</sup> The Commission relied extensively on its determinations in Opinion No. 531 in its order on the First Complaint (i.e., Opinion No. 551).

### **E. Briefing Orders**

13. On October 16, 2018, the Commission issued an order proposing a methodology for addressing the issues that were remanded to the Commission in *Emera Maine* and established a paper hearing on whether and how this methodology should apply to the four complaint proceedings concerning New England TOs’ ROE.<sup>38</sup> In the *Coakley* Briefing Order, the Commission proposed to change its approach to determining base ROE by giving equal weight to four financial models, instead of primarily relying on the DCF methodology. The Commission stated that evidence indicates that investors do not rely on any one model to the exclusion of others. Therefore, relying on multiple financial models made it more likely that the Commission’s ROE determination would accurately reflect how investors make their investment decisions.

14. Specifically, the Commission proposed to rely on three financial models that produce zones of reasonableness—the DCF model, CAPM, and Expected Earnings model—to establish a composite zone of reasonableness. The zone of reasonableness produced by each model would be given equal weight and averaged to determine the composite zone of reasonableness.<sup>39</sup>

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<sup>34</sup> *Id.* at 28-30.

<sup>35</sup> *Id.* at 30.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) (*Coakley* Briefing Order).

<sup>39</sup> *See id.* PP 16, 30.

15. The Commission also proposed a framework for using the composite zone of reasonableness in evaluating whether an existing base ROE remains just and reasonable. The Commission proposed that, in order to find a utility's existing ROE unjust and unreasonable under the first prong of section 206 of the FPA, its ROE must be outside a range of presumptively just and reasonable ROEs for a utility of its risk profile, absent additional evidence to the contrary. In other words, the Commission would dismiss an ROE complaint if the targeted utility's existing ROE falls within the range of presumptively just and reasonable ROEs for a utility of its risk profile unless that presumption is sufficiently rebutted. The Commission explained that, by the same token, a finding that the existing ROE of a utility falls outside that range would support a holding that the ROE has become unjust and unreasonable, absent additional evidence to the contrary.<sup>40</sup>

16. The Commission explained that it would be appropriate to calculate the applicable ranges of presumptively just and reasonable ROEs based on a utility's risk profile because a utility's risk profile remains the "particular circumstance[]" most relevant to determining whether a point within a zone of reasonableness is a just and reasonable ROE for that utility.<sup>41</sup> The Commission further concluded that the "principal consideration for determining whether an existing ROE within the overall zone of reasonableness has become unjust and unreasonable is the risk profile of the utility or utilities for which the Commission is setting the ROE."<sup>42</sup>

17. The Commission proposed that the applicable range of presumptively just and reasonable ROEs for a utility should correspond to those points that are closer to the ROE that the Commission should set for that utility than to the ROE for a utility of a different risk profile.<sup>43</sup> For example, the Commission explained that it typically would be unjust and unreasonable for an average risk utility to receive an ROE that is closer to the ROE that would be just and reasonable for a utility of above- or below-average risk.<sup>44</sup> In particular, for average risk utilities, the Commission proposed that the presumptively just and reasonable range would be the quartile of the zone of reasonableness centered on the central tendency of the composite zone of reasonableness. For below average risk utilities, the Commission proposed that such range would be the quartile of the zone of reasonableness centered on the central tendency of the lower half of the zone of

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<sup>40</sup> *See id.* PP 16, 28.

<sup>41</sup> *Id.* P 24 (quoting *Emera Maine*, 854 F.3d at 23).

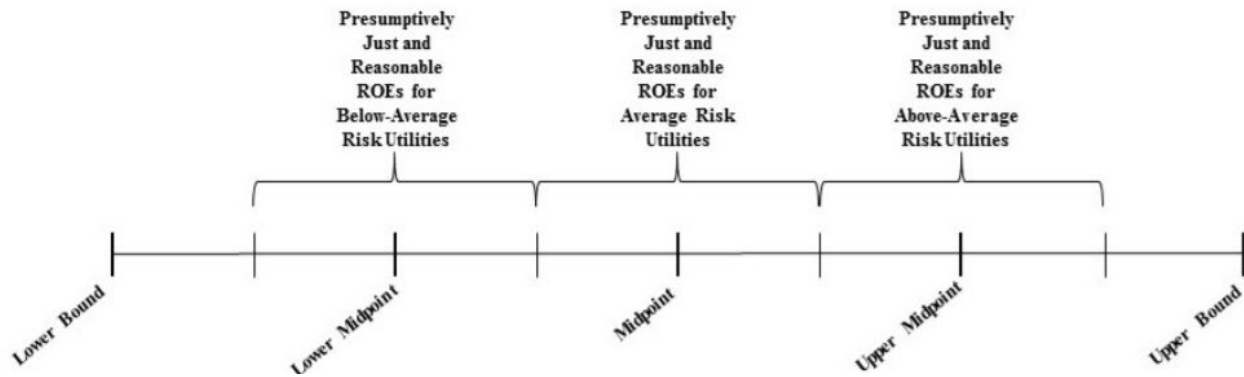
<sup>42</sup> *Id.* P 28.

<sup>43</sup> *Id.* P 27.

<sup>44</sup> *Id.* P 26.

reasonableness. For above average risk utilities, the Commission proposed that such range would be the quartile of the zone of reasonableness centered on the central tendency of the upper half of the zone of reasonableness.<sup>45</sup> The Commission illustrated how these presumptively just and reasonable quartile ranges would be divided as follows:

Figure 1: Zone of Reasonableness Quartiles



18. For purposes of establishing a new just and reasonable base ROE when the existing base ROE has been shown to be unjust and unreasonable, the Commission proposed using the above three models, plus the Risk Premium model. The Risk Premium model produces a single numerical point rather than a range; therefore, the Commission did not propose to use it to establish a composite zone of reasonableness. The Commission proposed to determine a new just and reasonable ROE for average risk utilities by determining the midpoint/medians of each zone of reasonableness produced by the DCF, CAPM, and Expected Earnings models and averaging those ROEs with the Risk Premium ROE, giving equal weight to each of the four figures.<sup>46</sup> The Commission

<sup>45</sup> *Id.*

<sup>46</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 344 (“In determining the central tendency of the zone of reasonableness, the Commission has distinguished between cases involving an RTO-wide ROE and cases involving the ROE of a single utility (or pipeline). In cases involving an RTO-wide ROE, the Commission has held that the midpoint is appropriate. The Commission has reasoned that, because an RTO-wide ROE will apply to a diverse set of companies, the range of results becomes as important as the central value, and the midpoint fully considers that range, because it is derived directly from the endpoints of the range . . . By contrast, in cases involving a single utility, the Commission has held that using the median is appropriate, because the median ‘is the most accurate measure of central tendency for a single utility of average risk.’”) (citing *SoCal Edison*, 131 FERC ¶ 61,020, at P 91 (2010), *remanded on other grounds sub nom. S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 183-87 (D.C. Cir. 2013) (*S. Cal. Edison v. FERC*)); Briefing Order, 165 FERC ¶ 61,118 at n.40: “The Commission will continue to use the midpoint of the zone of reasonableness as the appropriate measure of central

proposed to use the midpoint/medians of the lower and upper halves of the zones of reasonableness to determine ROEs for below average and above average risk utilities, respectively, and average those ROEs with the Risk Premium ROE.<sup>47</sup>

19. On November 15, 2018, the Commission issued the Briefing Order in these proceedings. In that order, the Commission similarly established a paper hearing on whether and how the methodology proposed in the *Coakley* Briefing Order should apply to the two proceedings pending before the Commission involving MISO TOs' ROE.<sup>48</sup>

#### **F. Opinion No. 569**

20. On November 21, 2019, the Commission issued Opinion No. 569 in which it applied a revised methodology for analyzing existing base ROEs under section 206 of the FPA. The revised methodology applied in Opinion No. 569 did not use the Expected Earnings or Risk Premium models as was proposed in the Briefing Order, and instead used only the DCF model and CAPM in the Commission's determinations under the first and second prongs of section 206. The methodology applied in Opinion No. 569 gave equal weight to the DCF model and CAPM by averaging the top and bottom of the DCF and CAPM zones of reasonableness to produce a composite zone of reasonableness.<sup>49</sup> In addition, in Opinion No. 569, the Commission reaffirmed its use of a two-step DCF analysis that gives one-third weight to a long-term growth rate based on projected growth in gross domestic product (GDP).<sup>50</sup> The Commission also held that it would continue to rely exclusively on the IBES as the preferred source for the DCF short-term growth projection, absent compelling reasons otherwise.<sup>51</sup> The Commission further held that only the short-term growth rate should be used to calculate the (1+.5g) adjustment to dividend yield in the DCF analysis for the CAPM.<sup>52</sup>

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tendency for a diverse group of average risk utilities and the median as the measure of central tendency for a single utility.”

<sup>47</sup> *Id.* P 17.

<sup>48</sup> *See* Briefing Order, 165 FERC ¶ 61,118 at P 1.

<sup>49</sup> *See, e.g.*, Opinion No. 569, 169 FERC ¶ 61,129 at PP 37, 276.

<sup>50</sup> *Id.* PP 151-159.

<sup>51</sup> *Id.* P 133.

<sup>52</sup> *Id.* PP 98-100.

21. In Opinion No. 569, the Commission also adopted a specific CAPM methodology. First, the Commission adopted the use of the 30-year U.S. Treasury average historical bond yield over a six-month period as the risk free rate.<sup>53</sup> Second, the Commission held that the CAPM expected market return should be estimated using a forward-looking approach based on applying the DCF model to the dividend paying members of the S&P 500.<sup>54</sup> In addition, the Commission approved the use of a one-step DCF model using only short-term three to five-year growth projections for the DCF analysis of the dividend paying members of the S&P 500. The Commission also held that IBES should be the sole source of the short-term earnings growth estimates used in the DCF analysis that is part of the CAPM analysis<sup>55</sup> and that S&P 500 companies with growth rates that are negative or in excess of 20% should be screened from the DCF analysis.<sup>56</sup> Finally, the Commission held that the CAPM analysis should include a size premium adjustment.<sup>57</sup>

22. In addition to the above holdings concerning the DCF and CAPM models, the Commission also adopted a revised low-end outlier test that eliminates DCF and CAPM proxy group ROE results that are less than the yields of generic corporate Baa bonds plus 20% of the CAPM risk premium.<sup>58</sup> The Commission also adopted the high-end outlier test that was proposed in the *Coakley* Briefing Order and the Briefing Order in these proceedings, which treats as high-end outliers any proxy company whose cost of equity estimated under the model in question is more than 150% of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a “natural break” analysis.<sup>59</sup> The Commission also reaffirmed its use of the midpoint, rather than the median, as the measure of central tendency for ROEs that applied to groups of utilities.<sup>60</sup>

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<sup>53</sup> *Id.* P 238.

<sup>54</sup> *Id.* PP 260-273.

<sup>55</sup> *Id.* PP 274-276.

<sup>56</sup> *Id.* PP 267-268.

<sup>57</sup> *Id.* PP 296-303.

<sup>58</sup> *Id.* PP 19, 387-89.

<sup>59</sup> *See id.* PP 367-68, 375.

<sup>60</sup> *Id.* PP 409-413.



### **G. Requests for Rehearing**

23. On December 23, 2019, the following parties to one or both of these proceedings filed requests for rehearing of Opinion No. 569: MISO TOs, the Complaint-Aligned Parties (CAP);<sup>61</sup> the Resale Power Group of Iowa (RPGI); Louisiana Public Service Commission (LPSC); Exelon Corporation (Exelon); Transource Energy, LLC (Transource Energy); and Ameren Services Company, on behalf of its transmission-owning public utility affiliates Ameren Illinois Company d/b/a Ameren Illinois, Union Electric Company d/b/a Ameren Missouri, and Ameren Transmission Company of Illinois (collectively, Ameren). In addition, on December 20, 2019, DTE Electric Company, Consumers Energy Company and Alliant Energy Corporate Services, Inc. (collectively, DTE), parties to both proceedings, filed a request for rehearing. On December 23, 2019, the Indicated PJM Transmission Owners (PJM TO)<sup>62</sup> filed a motion to lodge and request for rehearing.

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<sup>61</sup> For purposes of their request for rehearing, CAPs include the following entities: American Municipal Power, Inc. (AMP); ABATE, Coalition of MISO Customers, IIEC, INDIEC, MLIG, and Wisconsin Industrial Group (WIEC) (collectively, Joint Complainants); Joint Consumer Advocates, including Indiana Office of Utility Consumer Counselor, Iowa Office of Consumer Advocate, Michigan Citizens Against Rate Excess, Minnesota Department of Commerce, and Citizens Utility Board of Wisconsin; Joint Customers, including Arkansas Electric Cooperative, Cooperative Energy, and Hoosier Cooperative; Organization of MISO States, Inc. (OMS); Mississippi Public Service Commission (MS PSC), Missouri Public Service Commission (MO PSC) and Missouri Joint Municipal Electric Utility Commission (MJMEUC) (collectively, Missouri-Mississippi Parties or MOMs); and Southwest Electric Cooperative, Inc. (SWEC). For purposes of the CAPs briefs in the Second Complaint proceeding, CAPs include Industrial Consumer Groups (ICG), comprising ABATE, Coalition of MISO Customers, IIEC, INDIEC, MLIG, and WIEC; Joint Consumer Advocates, comprising Illinois Citizens Utility Board, Indiana Office of Utility Consumer Counselor, Iowa Office of Consumer Advocate, Michigan Citizens Against Rate Excess, Minnesota Department of Commerce, and Citizens Utility Board of Wisconsin; Joint Complainants and Intervenor (JCI), comprising Arkansas Electric Cooperative, Cooperative Energy, and Hoosier Cooperative; OMS; Missouri-Mississippi Parties; and SWEC.

<sup>62</sup> For purposes of this filing, the PJM TOs are American Electric Power Service Corporation, on behalf of its affiliates, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, AEP Indiana Michigan Transmission Company, AEP Kentucky Transmission Company, AEP Ohio Transmission Company, and AEP West Virginia Transmission Company; Duquesne Light Company; Exelon; PPL Electric Utilities Corporation; and Public

24. In addition, multiple non-parties filed requests for rehearing and other motions. On December 23, 2019, the following entities filed such requests and/or motions: PPL Electric Utilities Corporation (PPL Electric) filed a motion to intervene out-of-time and motion to lodge; Southern California Edison Company (SoCal Edison) filed a motion to comment; American Electric Power Service Corporation<sup>63</sup> (AEP) filed a motion to intervene out-of-time and motion to lodge; San Diego Gas & Electric Company (SDG&E) filed a motion to intervene out-of-time and motion for Clarification, or in the alternative, request for rehearing; FirstEnergy Service Company (FirstEnergy) filed a request for rehearing and motion for late intervention; WIRES LLC filed a motion to intervene out-of-time, motion to lodge, and request for rehearing; Public Service Electric and Gas Company (PSEG) filed a motion to intervene out-of-time; Edison Electric Institute (EEI) filed a motion to intervene out-of-time, motion to lodge, and request for rehearing; AEP Indiana Michigan Transmission Company, Inc. filed a motion to intervene out-of-time; and the Southwest Power Pool, Inc. (SPP) Transmission Group<sup>64</sup> filed public comments concerning Opinion No. 569. On December 23, 2019, New England TOs<sup>65</sup> filed a letter requesting that, if the Commission intends to use the

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Service Electric and Gas Company. Some, but not all, of the PJM TOs have timely intervened in these proceedings.

<sup>63</sup> American Electric Power Service Corporation filed on behalf of Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, AEP Kentucky Transmission Company, AEP Ohio Transmission Company, and AEP West Virginia Transmission Company.

<sup>64</sup> For purposes of this filing, the SPP Transmission Group is Evergy Kansas Central, Inc., Evergy Metro, Inc., Evergy Missouri West, Inc. (subsidiaries of Evergy, Inc. that were formerly known as Westar Energy, Inc., Kansas City Power & Light Company, and KCP&L Greater Missouri Operations Company, respectively), American Electric Power Service Corporation, on behalf of its affiliates, Public Service Company of Oklahoma, Southwestern Electric Power Company, Oklahoma Transmission Company and Southwestern Transmission Company (collectively AEP-West), The Empire District Electric Company (a Liberty Utilities company), Oklahoma Gas & Electric Company, and Southwestern Public Service Company.

<sup>65</sup> For purposes of this letter, the New England TOs are: Emera Maine f/k/a Bangor Hydro-Electric Company, Central Maine Power Company, New England Power Company d/b/a National Grid, New Hampshire Transmission LLC, Eversource Energy Service Company (on behalf of its operating company affiliates: The Connecticut Light and Power Company; NSTAR Electric Company; and Public Service Company of New Hampshire, each of which is doing business as Eversource Energy), The United

outcome of these proceedings to establish any ROE policies or precedent that would apply to the New England TOs, then the Commission consider the arguments that the New England TOs made in their supplemental brief in the complaint proceedings regarding their base ROE in which the *Coakley* Briefing Order was issued. On January 7, 2020, the American Public Power Association (APPA) and Transmission Access Policy Study Group (TAPS) filed a conditional motion to intervene out-of-time and conditional motion to lodge.

#### **H. Subsequent Filings**

25. On January 7, 2020, CAPs filed an answer in opposition to the late motions to intervene and alternative motion for leave to respond to non-party comments. On January 10, 2020, EEI and WIRES LLC filed a motion for leave to answer and answer to CAPs' January 7 answer. On January 13, 2020, FirstEnergy filed a motion for leave to answer and answer to CAPs' January 7 answer. On January 21, 2020, PPL Electric filed a motion for leave to answer and answer to CAPs' January 7 answer. On January 28, 2020, CAPs filed a motion to strike portions of various entities' requests for rehearing and motions. On February 12, 2020, MISO TOs filed a motion for leave to answer and answer to certain portions of entities' requests for rehearing, as well as CAPs' January 7 answer and the APPA and TAPS January 7 conditional motion to intervene out-of-time and conditional motion to lodge. On February 12, 2020, the PJM TOs, MISO TOs and Exelon filed separate answers to CAPs' January 28 motion to strike. On February 13, 2020, Transource Energy also filed an answer to CAPs' January 28 motion to strike. On February 27, 2020, CAPs filed an answer to MISO TOs' February 12 answer.

#### **II. Procedural Matters**

26. We deny the motions to intervene out-of-time and the requests for rehearing and other motions included with those motions to intervene out-of-time. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure.<sup>66</sup> When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.<sup>67</sup> In addition, it is generally Commission policy to deny late intervention at the rehearing

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Illuminating Company, Unitil Energy Systems, Inc., Fitchburg Gas and Electric Light Company, and Vermont Transco, LLC.

<sup>66</sup> 18 C.F.R. § 385.214(d) (2019).

<sup>67</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

stage, including when the petitioner claims that the decision establishes a broad policy of general application.<sup>68</sup>

27. None of the entities that filed motions to intervene out-of-time have met their burden to justify granting late intervention, and we therefore deny their motions to intervene. We find that granting these late interventions at this stage of the proceedings would substantially disrupt the proceedings,<sup>69</sup> as well as prejudice and place significant additional burdens on the existing parties to these proceedings.<sup>70</sup> The entities seeking late intervention have not demonstrated good cause that would justify granting late intervention despite these negative consequences. This is particularly true in light of the fact that, as discussed below, parties will have an opportunity to argue that the base ROE methodology applied in any of these proceedings should be modified or applied differently because of the specific facts and circumstances of the proceeding involving that party.<sup>71</sup> Accordingly, we deny the motions to intervene out-of-time of PPL Electric, AEP, SDG&E, FirstEnergy, WIRES LLC, PSEG, EEI, AEP Indiana Michigan Transmission Company, Inc., and APPA and TAPS. As these entities are not parties to these proceedings, they may not seek rehearing of Opinion No. 569, and we reject their respective pleadings on that basis.<sup>72</sup>

28. SoCal Edison filed a motion to comment and the SPP Transmission Group filed what it styled as “public comments” regarding Opinion No. 569, without motions to intervene out-of-time. We find that these pleadings are effectively requests for rehearing and, because these entities are not parties to these proceedings, they may not seek rehearing of Opinion No. 569, and we reject their respective pleadings on that basis. We note that only some of the PJM TOs have timely intervened in these proceedings—Duquesne Light Company and Exelon—therefore we will address the requests for rehearing that those two parties made as part of the PJM TOs.

29. The motions to lodge filed by PPL Electric, AEP, WIRES LLC, EEI, and APPA and TAPS are essentially components of requests for rehearing of Opinion No. 569, and

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<sup>68</sup> See, e.g., *Seminole Elec. Coop., Inc.*, 153 FERC ¶ 61,037, at P 11 & n.14 (2015) (citing *PáTu Wind Farm LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223, at P 39 & n.85 (2015) (citing *Columbia Gas Transmission Co.*, 113 FERC ¶ 61,066, at 61,243 (2005))).

<sup>69</sup> See 18 C.F.R. § 385.214(d)(1)(ii).

<sup>70</sup> 18 C.F.R. § 385.214(d)(1)(iv).

<sup>71</sup> See *infra* at P 204.

<sup>72</sup> 16 U.S.C. § 825l (2018); 18 C.F.R. § 385.713(b).

we therefore deny those motions because those entities are not parties to these proceedings. Moreover, even if we were to consider those motions to lodge, and the motion to lodge filed by PJM TOs, as not a component of a request for rehearing, we would deny those motions on the merits. Rule 716 provides that a proceeding may be reopened only when reopening is warranted by a change in condition of fact or law, or by public interest.<sup>73</sup> Additionally, a decision to reopen the record is a discretionary one for the Commission, and Commission policy discourages reopening records, except in extraordinary circumstances in order to prevent administrative chaos and provide finality to proceedings.<sup>74</sup> Further, a demonstration of extraordinary circumstances requires a showing of a material change that goes to the very heart of the case.<sup>75</sup> We find that the entities that filed motions to lodge have failed to show any compelling changes in law, fact, or public interest that would necessitate reopening of the record to lodge the materials that they seek to lodge. As discussed further below in section XV, to the extent that these entities are concerned that Commission actions in these proceedings will affect them and they have filed pleadings or materials in other proceedings that they want the Commission to consider before taking action with respect to their base ROEs, such entities will have an opportunity to present those pleadings or materials and argue that any Commission actions in these proceedings should be modified or applied differently because of the specific facts and circumstances of the proceeding involving that entity.

30. Given that we are denying the motions to intervene out-of-time, we find that CAPs' January 7 answer in opposition to the late motions to intervene or, in the alternative, motion for leave to respond to the pleadings, comments and requests for rehearing submitted by those entities, is moot and we reject it. We therefore also reject the answers to CAPs' January 7 answer submitted by EEI, WIRES LLC, FirstEnergy, PPL Electric, and MISO TOs. We also reject CAPs' January 28 motion to strike portions of various entities' requests for rehearing and motions. To the extent that this motion relates to contents of a motion to lodge that has been denied, as discussed above, we find that it is moot. To the extent that this motion relates to requests for rehearing, it is an answer to a request for rehearing and we reject it because it is prohibited by Rule 713(d)(1) of the Commission's Rules of Practice and Procedure.<sup>76</sup> We find that

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<sup>73</sup> 18 C.F.R. § 385.716(c).

<sup>74</sup> See, e.g., *Gas Producing Enterprises, Inc.*, 28 FERC ¶ 61,008 (1984) (citing *Consolidated Gas Supply Corp.*, 24 FERC ¶ 61,283 (1983), *Transcontinental Gas Pipe Line Corp.*, 23 FERC ¶ 61,152 (1983), and *ICC v. Jersey City*, 322 U.S. 503 (1944)).

<sup>75</sup> See, e.g., *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,624 (1991).

<sup>76</sup> 18 C.F.R. § 385.713(d)(1).

CAPs have not shown good cause for us to waive this rule to allow their answer.<sup>77</sup> Because we are rejecting CAPs' January 28 motion to strike, we also reject the answers to that motion filed by PJM TOs, MISO TOs, Exelon, and Transource Energy. We reject MISO TOs' February 12 answer to requests for rehearing for the same reasons, and find that this answer is moot as it relates to the APPA and TAPS January 7 conditional motion to intervene out-of-time because, as discussed above, we are denying that motion to intervene out-of-time. Given that we are rejecting MISO TOs' February 12 answer, we also reject CAPs' February 27 answer to that answer.

### **III. General Model Issues**

31. This section pertains to the Commission's decision in Opinion No. 569 to use two models in its base ROE analysis under section 206 of the FPA, rather than either using only the DCF model or using all four models proposed in the Briefing Order. It does not address the specific merits of the individual models, which are discussed in subsequent sections.

#### **A. Opinion No. 569**

32. The Commission found that averaging of multiple models reflected how investors made investment decisions and reduced model risk to the greatest extent possible. The Commission cited MISO TOs' witness, Mr. McKenzie, who explained that "when conditions associated with a model are outside of the normal range, there is a risk . . . that the theoretical model will fail to predict or represent the real phenomenon that is being modeled."<sup>78</sup> The Commission also cited Dr. Morin, who found that "Reliance on any single method or preset formula is inappropriate when dealing with investor expectations because of possible measurement difficulties and vagaries in individual companies' market data."<sup>79</sup>

33. The Commission, for reasons specific to the Risk Premium and Expected Earnings Models, determined that they were not appropriate to use for determination of ROEs, for either the first or second prong of section 206 analyses. Opinion No. 569, applying the DCF model and CAPM, reduced the MISO TOs' ROE from the 10.32% prescribed in Opinion No. 551, which was itself a reduction from 12.38%, to 9.88%.

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<sup>77</sup> *See id.* § 385.101(e).

<sup>78</sup> Opinion No. 569, 169 FERC ¶ 61,129 at PP 38-39 (citing Docket No. EL14-12-001, Ex. MTO-22, at 18-19).

<sup>79</sup> *Id.* (citing Roger A. Morin, James, *New Regulatory Finance* (Public Utilities Reports, Inc. 2006) (Morin) at 428).

**B. Requests for Rehearing**

34. CAPs contend that the Commission erred by finding that the results of the DCF model alone were not just and reasonable. Specifically, CAPs contend that the Commission did not address the testimony of its expert, Dr. Keith Berry, arguing against the Commission's finding of model risk justifying the use of multiple models.<sup>80</sup>

35. Certain parties argue that the Commission acted arbitrarily and capriciously or otherwise did not engage in reasoned decision-making when it determined that the Risk Premium and Expected Earnings models should not be used for ROE determinations. Parties point out that the Commission endorsed using the Risk Premium and Expected Earnings Models in Opinion Nos. 531, 531-A, and 551, as well as the Briefing Order in these proceedings. Specifically, Exelon states that, in the Briefing Order, the Commission found that "it is clear that investors place greater weight on one or more of the other methods for estimating the expected returns from utility investments, as well as taking other factors into account."<sup>81</sup> Exelon contends that the Commission, in Opinion No. 569, insufficiently justified reversing course on this point. Exelon also argues that the Risk Premium and Expected Earnings Models should not be ignored due to their alleged deficiencies, asserting that the CAPM and DCF also have deficiencies. Ameren similarly contends that the Commission's reversal from the Briefing Order was unsupported and contradictory to its findings that investors rely on a diverse set of data sources.<sup>82</sup>

36. Transource Energy argues that the Commission, in Opinion No. 569, was internally inconsistent by giving no weight to the Expected Earnings and Risk Premium Models despite finding that investors rely on multiple models.<sup>83</sup> Transource Energy contends that four models provide a more complete picture than two models, which themselves share many common inputs. Transource Energy asserts that the Commission in Opinion No. 569 issued findings inconsistent with those in Opinion No. 531, which considered three other models, and notes that the Court did not find fault with this finding.<sup>84</sup> Transource Energy states that the CAPM results indicate that a 9.88% ROE was inadequate. Transource Energy also states that the midpoint of the CAPM was 10.45% and contends that no record evidence suggests that 10.45% is overstated.

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<sup>80</sup> CAPs Rehearing Request at 85-87.

<sup>81</sup> Exelon Rehearing Request (citing Briefing Order, 165 FERC ¶ 61,118 at P 37).

<sup>82</sup> Ameren Rehearing Request at 11-13.

<sup>83</sup> Transource Energy Rehearing Request at 15-16.

<sup>84</sup> *Id.* at 17-18

Transource Energy argues that the Commission has previously determined that the DCF is not reliable and that substantial evidence in the record demonstrates that the cost of capital is more consistent with the CAPM result than the DCF result for the complaint time period.<sup>85</sup>

37. Certain parties also argue that the reduction of MISO TOs' ROE in Opinion No. 569 is unjust and unreasonable on the basis that it reduces MISO TOs' ROE to an unreasonably low level. MISO TOs state that, in Opinion No. 551, "the Commission concluded that a 175-basis point ROE reduction . . . could put transmission investment at risk."<sup>86</sup> MISO TOs also argue that the ROE resulting from Opinion No. 569 could cause capital to be diverted to other purposes. Transource Energy similarly contends that the Commission has not supported a 9.88% ROE, and notes that it is below many of the benchmarks provided by state ROEs and other models.<sup>87</sup> Ameren also contends that this methodology threatens utility credit ratings and thus violates *Hope* and *Bluefield*. Specifically, they cite *Bluefield's* finding that the return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."<sup>88</sup>

38. Ameren and Transource Energy state that the Commission should not have excluded the Expected Earnings and Risk Premium models because they have flaws while keeping the DCF and CAPM models, which the Commission acknowledged also have flaws.<sup>89</sup> As an example of DCF and CAPM flaws, Transource Energy notes the Commission's finding in Opinion No. 551 that the DCF model is distorted by a low-interest rate capital market.<sup>90</sup> Ameren and Transource Energy argue, therefore, that the Commission's assertion that there exist imperfections in the Expected Earnings and Risk Premium models is not a valid justification for excluding those models.<sup>91</sup> According to Transource Energy, excluding the Expected Earnings and Risk Premium models results in twice the weighting for the DCF model, and Transource Energy notes

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<sup>85</sup> *Id.* at 14-15.

<sup>86</sup> MISO TOs Rehearing Request at 19 (citing Opinion No. 551, 156 FERC ¶ 61,234 at P 263).

<sup>87</sup> Transource Energy Rehearing Request at 11.

<sup>88</sup> *See, e.g., id.* at 6 (citing *Bluefield*, 262 U.S. at 693).

<sup>89</sup> Ameren Rehearing Request at 12; Transource Energy Rehearing Request at 23.

<sup>90</sup> Transource Energy Rehearing Request at 21-22.

<sup>91</sup> Ameren Rehearing Request at 12; Transource Energy Rehearing Request at 23.



that only including one other model with inputs which share similar characteristics to the DCF does not obviate the issue of whether the DCF is less reliable due to capital market conditions.<sup>92</sup>

39. Ameren and Transource Energy argue that the Commission should keep the four-model framework proposed in the Briefing Order because the Commission has stated that use of multiple models provides more accuracy, consistency with investor expectations, and robustness.<sup>93</sup> Ameren contends that the addition of the Expected Earnings and Risk Premium models would prevent an unreasonable restriction of the zone of reasonableness, and Transource Energy notes that the DCF and CAPM models provide the least diversification benefits of the four the Commission originally proposed.<sup>94</sup> Ameren argues that, when the Commission moved to a two-model ROE methodology, it failed to explain why it excluded certain models (i.e., the Expected Earnings and Risk Premium models) that are relied upon by investors. Ultimately, the new methodology gives zero weight to the excluded models when they were previously assigned a 25% weight in Opinion No. 569. Ameren asserts that the resulting ROE based on only the CAPM and DCF models is not supported by the record and is therefore arbitrary and capricious.<sup>95</sup> Ameren and Transource Energy state that the Commission's use of only the DCF and CAPM models fails to compensate MISO TOs for the actual risks associated with transmission infrastructure development.<sup>96</sup> Ameren and Transource Energy argue that this inadequacy amounts to failure of the capital attraction standards and threatens utility credit metrics, in violation of *Hope* and *Bluefield*.<sup>97</sup>

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<sup>92</sup> Transource Energy Rehearing Request at 21-22.

<sup>93</sup> Ameren Rehearing Request at 12-13; Transource Energy Rehearing Request at 15, 26.

<sup>94</sup> Ameren Rehearing Request at 12-13; Transource Energy Rehearing Request at 16-17, 19.

<sup>95</sup> SoCal Edison Comment, Docket No. EL14-12, at 11-12; Indicated PJM TOs Rehearing Request, Docket No. EL14-12, at 11; Ameren Rehearing Request, Docket No. EL14-12, at 23-25; Wires Comment Rehearing Request, Docket No. EL15-45, et al., at 17; Wires Comment Rehearing Request, Docket No. EL14-12, et al., at 7, 17; FirstEnergy Hearing Request, Docket No. EL15-45, at 3; Transource Energy Rehearing Request, Docket No. EL14-12, at 18-19.

<sup>96</sup> Ameren Rehearing Request at 6; Transource Energy Rehearing Request at 9-12.

<sup>97</sup> Ameren Rehearing Request at 6-7; Transource Energy Rehearing Request at 9-12.

40. MISO TOs also argue that the court's analysis in *Emera Maine* did not require the Commission to construct a new paradigm to satisfy the second prong of section 206. Instead, they argue, the Commission can remedy its error simply by evaluating "the alternative benchmarks and additional record evidence" that warrant selecting a base ROE greater than the midpoint (of whatever range of estimated returns on which the Commission elects to rely) to determine a new, just and reasonable base ROE.<sup>98</sup>

41. MISO TOs contend that, regardless of whether the base ROE prescribed by Opinion No. 569 is a midpoint value of some range of estimated ROEs, section 206 still requires the Commission to explain why, based on the evidence in the record, the new ROE is just and reasonable. MISO TOs contend that the Commission's new approach still fails to do so. MISO TOs contend that the mere fact that the newly prescribed ROE is the midpoint of the composite DCF-CAPM range of estimates does not make that value a just and reasonable ROE. According to MISO TOs, the Commission's selection of the average of the DCF and CAPM midpoints is no better justified in Opinion No. 569 than was the selection of the upper half midpoint found to be arbitrary and capricious in *Emera Maine*.<sup>99</sup>

42. With regard to the First Complaint, MISO TOs argue that *Emera Maine* does not require, and establishes no reason why, the Commission should fundamentally modify the approach of Opinion Nos. 531 and 551, other than to correct or avoid the specific errors the court pinpointed. They argue that the evidence more than amply supports the Commission's conclusion in Opinion No. 551 that the DCF midpoint of 9.29% (stated as 9.3% in Opinion No. 569) is too low to pass muster under *Hope* and *Bluefield*.<sup>100</sup>

### C. Commission Determination

43. We disagree with CAPs' contention that the record does not support our finding of model risk as justifying no longer relying solely on the DCF model. Model risk includes the broad conceptual issue of models being imperfect and not always working well in all situations. It also entails errors of specific model inputs, such as the error discussed with respect to the Portland General Electric inputs, discussed in paragraph 145 below. We continue to find that ROE determinations should consider multiple models, both to capture the variety of models used by investors and to mitigate model risk. With respect to the former, we reiterate our findings from Opinion No. 569 in support of the finding

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<sup>98</sup> MISO TOs Rehearing Request at 30-31.

<sup>99</sup> *Id.* at 31-32.

<sup>100</sup> *Id.* at 32.

that use of multiple models reduces model risk. Dr. Morin speaks of the type of potential model errors that comprise “model risk” and why use of additional models is warranted:

In the absence of any hard evidence as to which method outdoes the other, all relevant evidence should be used and weighted equally, in order to minimize judgmental error, measurement error, and conceptual infirmities. A regulator should rely on the results of a variety of methods applied to a variety of comparable groups, and not on one particular method. There is no guarantee that a single DCF result is necessarily the ideal predictor of the stock price and of the cost of equity reflected in that price, just as there is no guarantee that a single CAPM or Risk Premium result constitutes the perfect explanation of that stock price.<sup>101</sup>

44. We also disagree with contentions that Opinion No. 569 resulted in rates that fail to meet the *Hope* and *Bluefield* standards for just and reasonable rates because they reduce the ROE. As an initial matter, the ROE resulting from this order will be materially higher than the 9.88% resulting from Opinion No. 569 for the First Complaint, rendering such concerns at least partially addressed. Second, cost-of-service principles dictate that the ROE should increase or decrease with the cost of capital. The Commission employs, and at times modifies, financial models, to determine this cost of capital. Although any rate reduction, by reducing earnings, will necessarily adversely affect certain financial metrics, that does not preclude the Commission from reducing rates. It is not incumbent on the Commission to demonstrate that any rate reduction, if supported by evidence demonstrating reduced cost of capital, would not adversely affect utilities’ financial metrics. By the logic of certain parties, virtually any rate reduction would be unjust and unreasonable simply because it reduces the ROE and thus harms financial metrics for the affected utilities. In this case, the reduction in ROE from 10.32% in Opinion No. 551 to 9.88% in Opinion No. 569 was less than 4% and Opinion No. 569 extensively supported this such reduction.

45. As described below, we now find that the flaws for the Risk Premium model, when mitigated by certain adjustments, do not render use of the model unreasonable, while the flaws of the Expected Earnings model are significant enough to render the model inappropriate for ROE calculations. We are not persuaded by Ameren’s and Transource Energy’s arguments that the Expected Earnings model’s flaws constitute an insufficient reason to exclude the model because the Commission has acknowledged that other models also have flaws. As the Commission explained in Opinion No. 569, the Commission considered the disadvantages and advantages of each model and concluded that, on balance, the disadvantages of the Expected Earnings model outweigh its

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<sup>101</sup> Morin at 429.

advantages.<sup>102</sup> Simply because other models also have disadvantages does not mean that they have the same level of disadvantages or advantages as those of the Expected Earnings model. The Commission may use its discretion to determine which flaws in various models render the models unreasonable, and thus unusable, and which do not.

46. Regarding arguments that the Commission should include all four models because more models provide additional robustness, we agree—if the models are methodologically and legally sound. As described below, we conclude that the Risk Premium model, with adjustments, is sound, while the Expected Earnings model is not. We are not persuaded by arguments that all four models should be included because they broaden the zone of reasonableness. Such assertions, without support, suggest adopting a zone of reasonableness that is far wider than what the Commission has historically determined would be just and reasonable without sufficient justification as to why such a broader zone of reasonableness is appropriate. Nonetheless, our decision to now construct the ranges of presumptively just and reasonable ROEs by dividing the full zone of reasonableness into equal thirds instead of using the quartiles applied in Opinion No. 569, as discussed in section XIV below, at least in part addresses such concerns by widening the range of presumptively just and reasonable existing ROEs.

#### IV. DCF

##### A. Opinion No. 569

##### 1. Short-Term Growth Rate

47. In Opinion No. 569, the Commission found that the DCF and CAPM models should employ IBES short-term growth rates.<sup>103</sup> In the context of the DCF, the Commission explained that IBES was preferable because the IBES growth projections generally represent consensus growth estimates by a number of analysts while *Value Line* growth estimates represent the growth projection of a single analyst.<sup>104</sup> The Commission explained that, while many investors use both IBES and *Value Line* growth rates, only IBES growth rates reflect the analysis of a diverse group of persons in the investment community.<sup>105</sup> The Commission cited academic research that supported the use of IBES

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<sup>102</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 209.

<sup>103</sup> *Id.* P 251.

<sup>104</sup> *Id.* P 125.

<sup>105</sup> *Id.*

because of its use of multiple analysts' growth projections instead of a single analyst.<sup>106</sup> In addition, the Commission noted that IBES growth projections are generally more timely than the *Value Line* projections because IBES updates its data base on a daily basis as participating analysts revise their forecasts, whereas *Value Line* publishes its projections on a rolling quarterly basis.<sup>107</sup>

## 2. Long-Term Growth Rate Weighting

48. In Opinion No. 531, the Commission adopted the same two-step DCF model for electric utilities as it has used for natural gas and oil pipelines since the mid-1990s. That model includes a projection of the long-term growth in dividends based on the growth in GDP, in addition to the short-term three to five-year growth projection. The long-term growth projection is given one-third weight, with a short-term growth projection given two-thirds weight.

49. In the Briefing Order, the Commission proposed no changes to its existing two-step DCF model. In Opinion No. 569, the Commission rejected the MISO TOs' contention that, if the Commission applied a high-end outlier test to the ROE results produced by the two-step DCF analysis, the Commission should eliminate the long-term growth projection.<sup>108</sup> Specifically, the Commission rejected MISO TOs' assertion that, if the Commission applies a high-end outlier test to the DCF model, there will remain no rationale for requiring the long-term growth component of the two-step DCF model.<sup>109</sup> The Commission found that the existence of the high-end outlier test is irrelevant to the question of whether a long-term growth projection should be included in a DCF analysis of public utilities.<sup>110</sup> The Commission stated that the high-end outlier test eliminates outlier proxy group members and that it does not address the fact that, over the long-term, companies cannot maintain their short-term growth rates and must, to some extent, converge on the growth rate of the overall economy.<sup>111</sup> Furthermore, the Commission stated that the high-end outlier test that it adopted in Opinion No. 569 does not screen out any of the ROEs produced by the DCF analysis of the proxy groups in these two cases,

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* P 128.

<sup>108</sup> *Id.* PP 151-159.

<sup>109</sup> *Id.* P 159

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

<sup>111</sup> *Id.*

including the ROE results discussed above that establish the top of the zones of reasonableness in these two cases.<sup>112</sup>

**B. Rehearing Requests**

**1. Short-Term Growth Rate**

50. RPGI states that the Commission correctly used IBES consensus earnings growth estimates rather than *Value Line* earning growth estimates.<sup>113</sup>

51. MISO TOs state that the Commission erred in finding that “IBES is more reliable and robust” than *Value Line* and choosing to use the IBES three to five-year growth projection over *Value Line* growth projections.<sup>114</sup> MISO TOs assert that the Commission erred in finding that there was a general consensus by citing a witness’s belief that IBES growth estimates have a higher potential for representing a broader investor community, and the Commission cannot accurately characterize IBES estimates as consensus estimates.<sup>115</sup>

52. MISO TOs assert that the Commission wrongly attempted to relegate *Value Line*’s estimates as “projections by a single institution.”<sup>116</sup> MISO TOs argue that the Commission’s statement minimizes the fact that *Value Line* estimates are consensus estimates that are the results of a committee composed of peer analysts, and not simply the product of a single analyst.<sup>117</sup> MISO TOs also state that merely averaging analysts’ estimates does not create a consensus, and there is no indication that the analysts behind the IBES estimates agree on the published value.<sup>118</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> RPGI Rehearing Request at 61.

<sup>114</sup> MISO TOs Rehearing Request at 63 (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 133).

<sup>115</sup> *Id.* at 64 (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 127 (quoting Commission Trial Staff witness Mr. Robert J. Keyton)).

<sup>116</sup> *Id.* (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 125 n.278).

<sup>117</sup> *Id.* at 64-65.

<sup>118</sup> *Id.* at 65.

53. MISO TOs assert that the Commission's stated preference for IBES over *Value Line* because it is more current is not supported by the record and is arbitrary and capricious.<sup>119</sup> MISO TOs state that the Commission appears to rely on the misperception that IBES' estimates are more up-to-date than *Value Line* simply because IBES can update its daily estimates on a daily basis.<sup>120</sup>

## 2. Long-Term Growth Rate Weighting

54. MISO TOs request rehearing of the Commission's decision not to adopt any changes to its existing two-step DCF model, averring that, if the Commission adopts a high-end outlier test, it should remove the long-term growth rate portion of the two-step DCF analysis.<sup>121</sup> MISO TOs contend that although no single approach provides a "one-size-fits-all" scenario for estimating the cost of capital, a constant growth DCF better represents investor expectations for the MISO TOs than a two-step DCF model using a long-term growth rate component.<sup>122</sup>

### C. Commission Determinate

#### 1. Short-Term Growth Rate

55. We will maintain the longstanding practice of using IBES short-term growth rates for the DCF model, absent compelling reasons for using an alternative source.<sup>123</sup> The record in this and numerous prior proceedings illustrates that the IBES growth rates appropriately inform the DCF analysis.<sup>124</sup> We continue to find that IBES is a reliable source of short-term growth rate data for the DCF model<sup>125</sup> and find that it is appropriate to continue to rely on IBES short-term growth rates in the DCF model given the

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<sup>119</sup> *Id.* at 66.

<sup>120</sup> *Id.* at 66-67.

<sup>121</sup> *Id.* at 77.

<sup>122</sup> *Id.* at 80 (citing McKenzie Supplemental Initial Brief Affidavit, Docket No. EL14-12, at 51-52).

<sup>123</sup> *See, e.g.*, Opinion No. 569, 169 FERC ¶ 61,129 at P 133 ("absent compelling reasons why, we will continue to rely exclusively on IBES as the preferred source for short-term growth projections for the purpose of performing the DCF analysis.").

<sup>124</sup> *See, e.g., id.* at PP 120-133.

<sup>125</sup> *See id.* PP 125-128.

Commission's longstanding practice of relying on those IBES short-term growth rates in the DCF model<sup>126</sup> and the experience that entities coming before the Commission have gained in using IBES in the DCF model in light of that practice. However, we find that, although IBES short-term growth rates should be used for the DCF model,<sup>127</sup> the Commission will consider use of *Value Line* in future proceedings for the CAPM methodology, as discussed below.

## 2. Long-Term Growth Rate Weighting

56. We disagree with the MISO TOs' request that, if the Commission adopts a high-end outlier test, it should remove the long-term growth rate portion of the two-step DCF analysis and that a constant growth DCF better represents investor expectations for a two-step DCF model using a long-term growth rate component. However, as we note below, we are modifying the high-end outlier test to treat any proxy company as high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a "natural break" analysis. Although we are not adopting MISO TOs' proposed change, upon reconsideration, we agree that changes to the long-term growth rate are warranted.

57. We grant rehearing to give the short-term growth rate 80% weighting and the long-term growth rate 20% weighting. We note that the court in *CAPP v. FERC*<sup>128</sup> held that the Commission has broad discretion in its weighting choice. Since the Commission established its one-third weighting policy of the GDP in the long-term growth rate, short-term growth rate projections for electric utilities have declined and are now closer to the current GDP growth projection than those from the 1990s when the Commission adopted the two-step DCF using one-third weighting for GDP in the long-term growth

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<sup>126</sup> See *id.* PP 121-123.

<sup>127</sup> In addition, with respect to the First Complaint proceeding, IBES short-term growth rates are the only data available in the record for the study period. See, e.g., MISO TOs Initial Br. (I) at 22 ("MISO Transmission Owners do not propose reliance on growth rates from a source other than IBES to resolve the First Complaint."); MISO TOs Rehearing Request, Docket No. EL14-12-000, at 3 ("The MISO Transmission Owners . . . did not take exception to the Presiding Judge's adoption of the June 2015 Update Period as the appropriate study period for this case. Since they did not object to the June 2015 Update Period, and since there was no *Value Line* growth rate evidence related to that period, the MISO Transmission Owners had no quarrel with, and did not take exception to, the ALJ's ruling that his adoption of the June 2015 Study Period "dictate[d] use of IBES growth rates" insofar as Docket No. EL14-12 was concerned.").

<sup>128</sup> 254 F.3d 289 (D.C. Cir. 2001).



rate for natural gas and oil pipelines<sup>129</sup> that was subsequently adopted for public utilities.<sup>130</sup> For example, in Opinion No. 531, which considered market conditions during the time period from October 2012 to March 2013, the IBES growth projections of the proxy group (before the exclusion of low-end outliers) ranged from -1.90% to 8.10% and averaged 4.58%, only 19 basis points above the 4.39% GDP growth projection in that proceeding.<sup>131</sup> In the First Complaint proceeding, which considered market conditions during the time period from January 2015 to June 2015, the IBES growth projections of the proxy group (before the exclusion of low-end outliers) ranged from -0.64% to 11.66% and averaged 5.03%, 64 basis points above the projected growth in GDP in that proceeding of 4.39%.<sup>132</sup> By contrast, when MISO's 12.38% base ROE was established in 2002, the average IBES short-term growth rate estimate for that year was 7.79%,<sup>133</sup> a full 158 basis points above the estimated 6.21% GDP growth rate from a contemporaneous natural gas pipeline filing.<sup>134</sup>

58. Additionally, average electric utility IBES growth projections are only marginally higher than GDP growth projections. Under these circumstances, investors are likely to view electric utility IBES growth projections as more sustainable than the substantially higher natural gas pipeline IBES growth projections when the Commission established its two-thirds/one-third weighting policy. Therefore, it is reasonable to give the IBES growth projection more weight and give the GDP growth projection less weight. This finding is consistent with Opinion No. 414-A's findings that "long-term projections are

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<sup>129</sup> For example, *New York State Electric & Gas Corp.*, 85 FERC ¶ 63,002 (1998). In Footnote 22, the Initial Order references a GDP growth rate of 5.08%, which was an average of three estimates: 5.10% from Data Resources Inc., 4.95% from Wharton Econometric Forecasting Associates, Inc., and 5.20% from the Energy Information Administration.

<sup>130</sup> See Opinion No. 531, 147 FERC ¶ 61,234 at PP 17-23, 32.

<sup>131</sup> See *id.* P 38 and Appendix.

<sup>132</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 135; Appendix A.

<sup>133</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292 at app. A.

<sup>134</sup> See *Trailblazer Pipeline Company*, Testimony of Peter J. Williamson, Docket No. RP03-162-000, at P 19.

inherently more difficult to make, and thus are less reliable than short-term projections.”<sup>135</sup>

59. We still believe that it is appropriate to consider the long-term growth rate to some extent, but now find that it is appropriate to afford less influence to the long-term growth rate. As the Commission held in Opinion No. 531:

The DCF model is based on the premise that an investment in common stock is worth the present value of the infinite stream of future dividends discounted at a market rate commensurate with the investment’s risk.<sup>[136]</sup> Corporations have indefinite lives and therefore will pay dividends for an indefinite period. For that reason, the Commission stated as long ago as 1983, when it first adopted the constant growth DCF model for gas pipeline cases, that ‘projections by investment advisory services of growth for relatively short periods of years into the future’ cannot be relied on ‘without further consideration.’ Thus, as the Commission held in *Ozark*, the constant growth DCF model requires consideration of long-term growth projections.<sup>137</sup>

60. As the Commission found in Opinion No. 531, we continue to recognize the need for a long-term growth projection to “aid in normalizing any distortions that might be reflected in short-term data limited to a narrow segment of the economy.”<sup>138</sup>

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<sup>135</sup> *Transcontinental Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC ¶ 61,084, at 61,423 (1998).

<sup>136</sup> As the Commission explained, “The DCF model assumes growth for an infinite period of time. This can be approximated as 50 years because the present value of a one dollar dividend received 50 years in the future, discounted at 12%, is less than one cent.” *Ozark Gas Transmission Sys.*, 68 FERC at 61,105 n.32 (citing Eugene F. Brigham & Louis C. Gapenski, *Financial Management* 291 (1991)).

<sup>137</sup> Opinion No. 531, 147 FERC ¶ 61,234 at P 33 (quoting *Consol. Gas Supply Corp.*, 24 FERC ¶ 61,046, at 61,105 (1983)) (footnotes omitted).

<sup>138</sup> *Id.* P 38 (quoting Opinion No. 414-A, 84 FERC at 61,423-24).

**V. CAPM****A. Opinion No. 569****1. Use of Betas and Size Adjustments**

61. In Opinion No. 569, the Commission noted that the Commission found in Opinion No. 531-B that the size adjustment was “a generally accepted approach to CAPM analyses” and continued to find this to be the case.<sup>139</sup> The Commission stated that there was substantial evidence in the record that investors rely on *Value Line* betas. While the Commission acknowledged that there is an imperfect correspondence between the size premia being developed with different betas, it concluded that the size adjustments improve the accuracy of the CAPM results and cause it to better correspond to the costs of capital estimates employed by investors.<sup>140</sup>

62. The Commission also found that the application of size adjustments based on the New York Stock Exchange (NYSE) to dividend-paying members of the S&P 500 is acceptable, as the use of the NYSE for the size premium adjustment enabled Ibbotson Associates to develop a rich data set,<sup>141</sup> and found no evidence that companies in the S&P 500 feature different risk premiums than those in the NYSE.<sup>142</sup>

63. The Commission disagreed with intervenors that the utility industry is unique, and that the size premium adjustment would therefore be inapplicable, as the size premium adjustments are supported by a robust data set. The Commission noted that there are variations in the risk profiles of firms of any industry and there was insufficient evidence in the record to conclude that factors specific to the utility industry insulate smaller utilities from risks such that the CAPM betas sufficiently account for any increased risks and corresponding returns demanded by investors.<sup>143</sup>

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<sup>139</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 296 (citing Opinion No. 531-B, 150 FERC ¶ 61,165 at P 117).

<sup>140</sup> *Id.* P 297.

<sup>141</sup> Ibbotson Associates, now under Duff & Phelps, has long published a series quantifying this effect for various sizes of firms, pulling from data going back to 1926.

<sup>142</sup> *Id.* P 298.

<sup>143</sup> *Id.* P 303.

## 2. Exclusion of Growth Rates

64. In Opinion No. 569, the Commission accepted Trial Staff's proposal to screen from the CAPM analysis S&P 500 companies with growth rates that are negative or in excess of 20%. The Commission stated that such a screen is consistent with the elimination of outliers elsewhere in the ROE methodology, as such high or low growth rates are highly unsustainable and non-representative of the growth rates of the electric utilities in the proxy groups.<sup>144</sup>

### B. Rehearing Requests

#### 1. Use of Betas and Size Adjustments

65. CAPs state that the size adjustment is inconsistent with other elements of the adopted CAPM model. CAPs explain that the CAPM analysis incorporating a *Value Line* adjusted beta designed to measure market capitalization and a size premium adjustment based on raw betas is not based on substantial evidence.<sup>145</sup> Additionally, CAPs assert that the academic articles cited in Opinion No. 569 do not support the notion that investors rely on size factors.<sup>146</sup>

66. CAPs also argue that Opinion No. 569 appears to have misunderstood CAPs' concerns about the impact of mismatched betas as being whether the *Value Line* adjusted betas are appropriate for use in the CAPM. RPGI states that the issue before the Commission, however, was whether it is appropriate to combine adjusted and raw betas when performing a base CAPM analysis and applying a size premium adjustment.<sup>147</sup>

67. LPSC contends that the size adjustment is flawed because including such an adjustment conflicts with the Commission's determinations that utility growth rates will, in the long run, grow at the rate of the average firm in the economy.<sup>148</sup> LPSC also states that the Commission failed to address its contention that *Value Line* betas are methodologically mismatched to the S&P 500 because *Value Line* betas are calculated

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<sup>144</sup> *Id.* P 267.

<sup>145</sup> CAPs Rehearing Request at 77.

<sup>146</sup> *Id.* at 80.

<sup>147</sup> RPGI Rehearing Request at 77.

<sup>148</sup> LPSC Rehearing Request at 10.

using the NYSE, a different stock index.<sup>149</sup> LPSC asserts that the Commission incorrectly relies on raw betas in its size adjustment portion of the CAPM, while relying on adjusted betas in the rest of its CAPM analysis.<sup>150</sup>

68. RPGI states that the Commission erred by authorizing a size adjustment to the CAPM methodology that is unsupported by substantial record evidence and which arbitrarily inflated the ROE to an unjust and unreasonable level.<sup>151</sup> RPGI asserts that MISO TOs' comments did not recognize that the size premium adjustment is narrowly tailored to address an inability of beta to fully account for the impact of firm size within the CAPM, but failed to recognize that the size adjustment is of firms across the entire economy.<sup>152</sup> RPGI contends that Mr. Parcell's analysis shows that the size adjustment is inappropriate for regulated monopoly electric utilities. They aver that the Commission's silence on the simplification of Mr. Parcell's analysis is a central issue, and that the evidence contradicts the Commission's analysis.<sup>153</sup>

## 2. Exclusion of Growth Rates

69. MISO TOs argue that the Commission erred in excluding growth rates that are negative or in excess of 20% and argue that this adjustment has no economic justification.<sup>154</sup>

70. Exelon asserts that the Commission discards without justification companies with an IBES growth rate of greater than 20% from the CAPM.<sup>155</sup>

71. CAPs contend that the equity market return estimate, if calculated based on the short-term growth rate, should not exclude S&P 500 companies with negative growth rates. They aver that such exclusions are inappropriate because companies can feature negative growth rates for an extended period. Further, CAPs argue that, for the analysis

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<sup>149</sup> *Id.* at 11.

<sup>150</sup> *Id.* at 14-15.

<sup>151</sup> RPGI Rehearing Request at 31.

<sup>152</sup> *Id.* at 32.

<sup>153</sup> *Id.* at 32-33.

<sup>154</sup> MISO TOs Rehearing Request at 69.

<sup>155</sup> Exelon Rehearing Request at 13.

to be appropriately diverse, these companies should be included, noting that such exclusions include some companies in the electric proxy group.<sup>156</sup>

### 3. Other Issues

72. Transource Energy asserts that the anomalous capital market conditions that called the DCF midpoint into question also suggest that the CAPM result would be too low, as the CAPM is premised in part on long-term Treasury bond yields.<sup>157</sup>

73. CAPs state that Opinion No. 569's specification of the CAPM methodology is erroneous and produces excessive results.<sup>158</sup> CAPs also note that independent estimates of the CAPM equity market return by financial institutions and other regulators are much lower than the Commission's estimates in Opinion No. 569.<sup>159</sup>

74. LPSC argues that the use of a one-step market DCF analysis in the CAPM fails to account for the long-term growth of stocks in the S&P 500, despite that utility stocks are long-term investments.<sup>160</sup> LPSC argues that the dividend-paying firms in the S&P 500 are not representative of the required return of the market as a whole, and solely relying on those firms results in the required market return being overstated. LPSC further argues that the exclusion of long-term GDP growth rates suggests that these high short-term growth rates will continue in perpetuity, which cannot be true.<sup>161</sup> LPSC further argues that the inclusion of mature, large market cap companies is not a remedy, as even these companies have an average growth rate significantly higher than long-term GDP growth.<sup>162</sup>

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<sup>156</sup> CAPs Rehearing Request at 65-68.

<sup>157</sup> Transource Energy Rehearing Request at 14-15.

<sup>158</sup> CAPs Rehearing Request at 59.

<sup>159</sup> *Id.* at 61-65.

<sup>160</sup> LPSC Rehearing Request at 6.

<sup>161</sup> *Id.* at 7-8 (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 264).

<sup>162</sup> *Id.* at 8 (citing Opinion No. 569, 169 FERC ¶ 61,129 at P 265).

## C. Commission Determination

### 1. Use of Betas and Size Adjustments

75. We continue to find reasonable the use of *Value Line* adjusted betas in the CAPM methodology, as well as the use of raw betas based on the NYSE in the size premium adjustment. We also continue to find that the size adjustment is necessary to correct for the CAPM's inability to fully account for the impact of firm size when determining the cost of equity. As we found in Opinion No. 569, there is substantial evidence indicating that investors rely on *Value Line* betas in making investment decisions.<sup>163</sup> Furthermore, we are not persuaded by LPSC's argument that betas calculated based on the NYSE cannot be used with the S&P 500. We continue to find that size adjustments are appropriate for the utility industry and improve the overall accuracy of the CAPM results.<sup>164</sup>

76. We agree with LPSC that there is imperfect correspondence with applying *Value Line* betas derived from the NYSE to risk premiums developed using the S&P 500. However, we find that it is not reasonable to calculate the risk premium using the full 2800 companies in the NYSE. Furthermore, no parties assert that investors do not use *Value Line* betas or that such betas are materially different from betas derived from only the S&P 500. Thus, while not a perfect match, we find that the use of *Value Line* betas is appropriate for the CAPM calculation.

### 2. Exclusion of Growth Rates

77. We are not persuaded by MISO TOs' arguments that the CAPM methodology should consider growth rates that are negative or above 20% and continue to find that such a screen is consistent with the elimination of outliers elsewhere in the ROE methodology. Similarly, we disagree with CAPs that negative growth rates should be included. Negative and very high growth rates are both unsustainable and should thus be excluded from the determination of the CAPM risk premium, even if they enhance the diversity of covered companies.<sup>165</sup>

### 3. Source of Short-Term Growth Rates

78. For the reasons discussed above, we find that IBES is a reliable source of short-term growth rate data and therefore we find it reasonable for IBES growth rates to

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<sup>163</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 297.

<sup>164</sup> See *id.* PP 297-298, 301, 303.

<sup>165</sup> See *id.* PP 267-268.

be used in the CAPM model. However, we clarify here that we will consider the use of *Value Line* short-term growth rates for the CAPM model in future proceedings. Consistent with our finding that it is beneficial to use different models in the ROE methodology, we find that it may be beneficial to diversify the data sources as well. We believe that diversifying data sources may better reflect the data sources that investors consider in making investment decisions and mitigate the effect of any unusual or incorrect data in a given source. Furthermore, as MISO TOs assert, there is substantial evidence that *Value Line* is used by numerous investors.<sup>166</sup> The Commission has, since Opinion No. 531, recognized the merit of *Value Line* data, as illustrated by its support for *Value Line* betas, discussed above.

79. We are purposefully taking different approaches for the sources of short-term growth rate data in the DCF and CAPM. We believe that, in keeping with the Commission's historic use of IBES for the DCF, the DCF should continue to use IBES short-term growth rate data, as discussed above. By contrast, we believe that the CAPM is a better candidate for a new growth rate data source given that the Commission is newly adopting the CAPM as a direct input into its determination of the zone of reasonableness under the first prong of section 206 and its selection of a just and reasonable replacement ROE under the second prong of section 206.

80. While the Commission found in Opinion No. 569 that IBES data is preferable because it represents consensus growth estimates by a number of analysts, upon further consideration, we conclude that, while *Value Line* estimates may come from a single analyst, those estimates are vetted through internal processes, including review by a committee composed of peer analysts, and thus they similarly incorporate the input of multiple analysts.

81. The Commission also found in Opinion No. 569 that IBES data is preferable because IBES projections are updated more often than the *Value Line* projections. However, after further consideration of the record, including broad requests to allow the use *Value Line* projections,<sup>167</sup> we find here that there is also value in including *Value Line* projections because they are updated on a more predictable basis. *Value Line*'s regular updates provide certainty about updates to key model inputs.

82. Therefore, we conclude that IBES and *Value Line* data both have advantages and thus it is appropriate to consider both data sources. As stated above, however, we believe

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<sup>166</sup> See, e.g., MISO TOs Rehearing Request at 63-69.

<sup>167</sup> See, e.g., *id.* at 63-67; MISO TOs Initial Br. (I) at 22-23; MISO TOs Initial Br. (II), App. 2 McKenzie Aff. (II) at 19-20.



it is appropriate to only consider using *Value Line* in the CAPM, which is being newly adopted, while continuing the traditional exclusive use of IBES data in the DCF model.

83. Although we find it appropriate to consider the use of *Value Line* short-term growth rates in the CAPM in future proceedings, we find that the record in these proceedings is insufficient to adopt use of *Value Line* growth rates for the CAPM at this time. Rather, we will evaluate proposals to use *Value Line* short term growth rates in the CAPM based on evidence produced in future proceedings. As we determine here, consistent with Opinion No. 569,<sup>168</sup> the Commission will screen from the CAPM analysis S&P 500 companies with growth rates that are negative or in excess of 20%. The only CAPM analyses in the record here that apply this screen are those provided by Trial Staff, which use only IBES short-term growth rates.<sup>169</sup> Thus, there is no CAPM analysis in the record that applies the growth rate screen to *Value Line* short-term growth rates. Moreover, we note that, even if we could determine a way in which to apply this screen to the data available in the record, no party has provided a CAPM analysis using only *Value Line* short-term growth rates or another analysis that would allow us to reliably derive a CAPM analysis using only *Value Line* short-term growth rates. The CAPM analyses provided by MISO TOs in these proceedings, which average IBES and *Value Line* short-term growth rates, do not contain sufficient information to allow us to reliably produce a CAPM analysis using only *Value Line* short-term growth rates because those analyses do not specify the weighted average earnings growth rates from *Value Line* that were used in arriving at the short-term growth rates which average IBES and *Value Line*.<sup>170</sup> Accordingly, although we believe, as discussed above, that it may be appropriate to use *Value Line* short-term growth rates in the CAPM, we find that we do not have sufficient record evidence to support adopting such use in these proceedings. Therefore, we will continue to use the CAPM analyses provided by Trial Staff here, but we will consider *Value Line* data in future proceedings.<sup>171</sup>

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<sup>168</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at PP 19, 267-268.

<sup>169</sup> See *id.* PP 513 n.1002, 555 n.1048.

<sup>170</sup> See also CAPs Rehearing Request, Docket No. EL14-12-002 at 55-56 n.193 (“The record on this issue . . . does not break out the Ex. MTO-30 growth inputs either by source or by S&P 500 company.”).

<sup>171</sup> These analyses are reflected in page 6 of Attachment A to Trial Staff’s Initial Briefs. See also Trial Staff Initial Br. (I), Attachment A to App. 2 at 6; Trial Staff Initial Br. (II), Attachment A to App. 2 at 6.

#### 4. Other Issues

84. We disagree with Transource Energy's and CAPs' assertions that the Commission's CAPM methodology produces inadequate and excessive results, respectively, and continue to find the Commission's CAPM methodology to be consistent with conventional CAPM methodologies. Regarding assertions that the CAPM results here exceed those used in other contexts, the Commission is not obligated to use the same exact ROE calculations as other regulatory bodies or investment services, and our CAPM calculations are specific to the electric utility industry. Regarding assertions that the results are unreasonably low, as discussed above, the mere decline of the ROE does not demonstrate that results are unreasonable, and, as discussed below, state-jurisdictional retail ROEs do not serve as an explicit floor on Commission-jurisdictional transmission ROEs.

85. We also continue to find that the CAPM should use a one-step DCF for its risk premium. This is because the rationale for using a two-step DCF methodology for a specific group of utilities does not apply when conducting a DCF study of the dividend-paying companies in the S&P 500, as the Commission found in Opinion Nos. 531-B and 569.<sup>172</sup> A long-term component is unnecessary because of the regular updates to the S&P 500, which allows it to continue to grow at a short-term growth rate and because S&P 500 companies include stocks that are both new and mature, the latter of which have a moderating effect on the short-term growth rates.<sup>173</sup>

86. We also find unsupported Transource Energy's assertion that the anomalous capital market conditions the Commission found rendered the DCF results too low also render the CAPM too low. We are no longer relying on such arguments based on the court's remand of Opinion No. 531. Furthermore, Transource Energy offers no evidence that the CAPM results in this proceeding were unreasonably low.

#### VI. Risk Premium

##### A. Opinion No. 569

87. In Opinion No. 569, the Commission determined that it would not use the Risk Premium model for either the first or second prong of the ROE analysis under section 206 of the FPA. It concluded that the Risk Premium model's deficiencies outweigh the additional robustness that it provides. Furthermore, the Commission found that the Risk Premium model requires methodological decisions that would likely

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<sup>172</sup> See Opinion No. 531-B, 150 FERC ¶ 61,165 at P 113; Opinion No. 569, 169 FERC ¶ 61,129 at P 263.

<sup>173</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at PP 264-266.

undermine transparency and predictability in Commission outcomes.<sup>174</sup> The Commission also explained that the Risk Premium model is largely redundant with the CAPM in that both models use indirect measures to ascertain the risk premium.<sup>175</sup>

88. The Commission agreed with CAPs that the Risk Premium model is likely to provide a less accurate current cost of equity estimate than the DCF model or CAPM because it relies on previous ROE determinations. It found that those determinations' ROE results may not necessarily be directly determined by a market-based method, whereas the DCF and CAPM methods apply a market-based method to primary data. The Commission noted that many previous ROE determinations used in the Risk Premium model were from rate case settlements and that such settlements often involve compromises on a variety of non-ROE issues.<sup>176</sup>

89. The Commission also determined that circularity is particularly direct and acute with the Risk Premium model because it relies on past Commission ROE decisions. The Commission found that MISO TOs' regression analysis accentuates such circularity by largely offsetting the effects of changes in interest rates.<sup>177</sup>

90. The Commission also expressed doubt concerning the application of the regression analyses used by MISO TOs in their Risk Premium model. The Commission contrasted the impact of MISO TOs' analysis, which indicated an increase in the risk premium of 75 basis points for every 100 basis point decline in interest rates, with Dr. Morin's analysis, which indicated an adjustment of 48 basis points. The Commission found that, unlike for DCF and CAPM calculations, MISO TOs did not update and add to the data set for ROE proceedings through the end of the test period in June of 2015, further reducing the robustness of the data set. The Commission observed that, due to using the average of ROEs from each year, MISO TOs' regression in the First Complaint proceeding only has nine observations in its regression, which is a low number of observations for a linear regression and could impact the reliability of the results. The Commission found that MISO TOs' regression created a dynamic in which the Risk Premium analysis will keep the ROE essentially stable in contravention of general financial logic that lower interest rates make it easier to raise capital based on both the reduced opportunity cost of investing in bonds and greater availability of revenue to

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<sup>174</sup> *Id.* P 340.

<sup>175</sup> *Id.* P 341.

<sup>176</sup> *Id.* P 342.

<sup>177</sup> *Id.* P 343.

invest due to the opportunity for carry trades where borrowing low-cost debt is used to finance equity purchases.<sup>178</sup>

91. Additionally, the Commission found that there was insufficient record evidence to conclude that investors rely on risk premium analyses utilizing historic Commission ROE determinations or settlement approvals to determine the cost of capital and make investment decisions.<sup>179</sup> The Commission was also unpersuaded by MISO TOs' arguments that the nature of the industry and the resulting risk premiums changed following the Energy Policy Act of 2005 sufficiently to ignore prior data.

92. The Commission also reconsidered its finding in Opinion No. 531-B that “[g]iven the varying duration of regulatory proceedings, it is difficult, if not impossible, to ensure precise contemporaneity between long-term Treasury bond yields and the cost of equity allowed by a regulator.”<sup>180</sup> The Commission found that, although an analysis with such imprecision may have been sufficient for using the Risk Premium model for corroborative purposes, direct use of the model to determine the risk premium would require actual alignment of the test periods and the dates assigned for purposes of comparing the ROE to the risk free rate of return. The Commission stated that, if it were to adopt a precise timing in this proceeding, as a practical matter, such a decision would likely require the Commission to exclude certain proceedings whose test periods predate 2006 and include others, as well as potentially change the dates assigned to yet other proceedings.<sup>181</sup>

93. The Commission also noted that the Risk Premium model entails numerous judgment calls which could be disputed by parties, such as: determining the risk premium resulting from proceedings resolved by settlements with different ROEs for different parties or time periods; whether the ROEs should be assigned to different times for purposes of the Risk Premium analysis; and whether ROEs from settlements resolving multiple proceedings with the same ROE should be counted once or twice. The Commission also noted other methodological decisions, including whether to look at the annual average of ROEs and corresponding risk-free rates of return or look at them individually. Because of this, the Commission found that the Risk Premium model

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<sup>178</sup> *Id.* P 344.

<sup>179</sup> *Id.* P 345.

<sup>180</sup> *Id.* P 348 (citing Opinion No. 531-B, 150 FERC ¶ 61,165 at P 98).

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

features far more ambiguity and potential for dispute than the DCF and CAPM models, which would lead to higher costs for participation and less predictable results.<sup>182</sup>

94. The Commission stated that the output that the Risk Premium model produces is a single numerical point, and therefore, it does not produce a range which can be used to determine a zone of reasonableness. Accordingly, the Commission explained, the Briefing Order proposed to only use the Risk Premium model in the second prong of the section 206 analysis, but not in the first prong. The Commission stated that it preferred to use the same models in the prong one and prong two analyses to ensure that our ROE determinations under each prong are based on the same data and models and that there was no compelling justification to use different models and data sources to apply this same standard under the two prongs.

### **B. Rehearing Requests**

95. Transource Energy argues that the Commission should utilize the Risk Premium model. Transource Energy argues that none of the Commission's justifications for using the DCF model and CAPM but not the Risk Premium model support reversing its prior findings that the imperfections of the Expected Earnings analysis and Risk Premium models do "not undermine" their usefulness.<sup>183</sup> Transource Energy contends that the Risk Premium model adds useful information that does not rely on the same assumptions as the DCF and CAPM models.<sup>184</sup>

96. Transource Energy also avers that the Commission has not shown that investors do not rely on the Risk Premium (or Expected Earnings) model and that, at most, the Commission shows that investors use those approaches differently than the DCF and

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<sup>182</sup> *Id.* PP 346-350.

<sup>183</sup> Transource Energy Rehearing Request at 23 (citing Opinion No. 531-B, 150 FERC ¶ 61,165 at P 98).

<sup>184</sup> *Id.* (citing Avera Test., Ex. MTO-1, Docket No. EL14-12, at 94 (explaining that unlike DCF models, which indirectly impute the cost of equity, risk premium methods directly estimate investors' required rate of return by adding an equity risk premium to observable bond yields)).

CAPM models.<sup>185</sup> Transource Energy further points to the publication of returns granted by regulators as evidence that investors rely on the Risk Premium model.<sup>186</sup>

97. MISO TOs contend that the implementation questions raised in Opinion No. 569 do not undermine the probity of the Risk Premium analysis supplied by MISO TOs. MISO TOs contend that the Commission's decision in Opinion No. 569 to disregard this evidence is inconsistent with Opinion No. 551, where the Commission evaluated those issues and found that the model was probative.<sup>187</sup>

98. MISO TOs disagree with the Commission's finding that the Risk Premium model is redundant with the CAPM. MISO TOs note that the Risk Premium model focuses on the bond market while the CAPM focuses on the equity market, using different inputs. MISO TOs contend that investors independently rely on both models and note that many jurisdictions employ a Risk Premium approach for determining utilities' cost of equity.<sup>188</sup> MISO TOs argue that the Commission's finding that the stability of the Risk Premium model "defies general financial logic" overlooks that the data inputs used in the Risk Premium model inherently smooth out volatility.<sup>189</sup> They also argue that the Commission's assertion that the DCF and CAPM approaches may have a greater prevalence does not go to the merits of the Risk Premium approach, and it contradicts the record and the Commission's prior finding that Risk Premium is a traditional method investors may use to estimate the expected return from an investment in a company.<sup>190</sup>

99. MISO TOs argue that implementation issues associated with the Risk Premium method are neither insurmountable nor unique to the Risk Premium method. They argue that the Commission's concerns about which ROE inputs to include and "how far back such data should go" are directly analogous to questions regarding proxy group selection and the determination of the study period for the DCF analysis.<sup>191</sup>

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<sup>185</sup> *Id.* at 24.

<sup>186</sup> *Id.* at 25, n.13 (citing MISO TOs, Supplemental Reply Brief, Docket No. EL14-12-003, App. 2 at 44).

<sup>187</sup> MISO TOs Rehearing Request at 52-53.

<sup>188</sup> *Id.* at 47-49.

<sup>189</sup> *Id.* at 48.

<sup>190</sup> *Id.* at 49 (citing Briefing Order, 165 FERC ¶ 61,118 at P 36).

<sup>191</sup> *Id.* at 50.

100. MISO TOs assert that the Commission's concerns regarding circularity arising from using Commission-approved ROEs as inputs are overblown and present in other methodologies. MISO TOs contend that such circularity is limited because of the presumption that orders and settlements are based on market-based methodologies.<sup>192</sup> MISO TOs also aver that the lack of a resulting zone of reasonableness from the Risk Premium model is not a problem because the evaluation of whether an ROE remains just and reasonable is less exact than setting a new base ROE. MISO TOs contend that, while the Commission should include the Risk Premium in setting new ROEs, it does not necessarily need to include it in evaluating existing ROEs.<sup>193</sup>

101. MISO TOs also contend that the Commission's failure to provide guidance on the Risk Premium model's implementation is not a valid justification for omitting the model, particularly since the Commission has reopened the implementation of the models in this proceeding.<sup>194</sup>

102. PJM TOs contend that investors recognize that each of the four financial models in the Briefing Order has its own advantages and disadvantages. PJM TOs contend that investors use multiple models because no single model provides accurate results under all market conditions.<sup>195</sup>

103. PJM TOs argue that the Risk Premium model complements the Commission's DCF model by recognizing that the Risk Premium varies over time and with interest rates whereas the DCF model does not account for this variation.<sup>196</sup> PJM TOs argue that the Commission-authorized ROEs used in the Risk Premium model reflect inputs and analyses of multiple experts as well as the Commission's judgment concerning factors that affect the cost of equity, and contend that investors are likely to consider Commission-authorized ROEs to an extent.<sup>197</sup>

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<sup>192</sup> *Id.* at 50-51.

<sup>193</sup> *Id.* at 51-52.

<sup>194</sup> *Id.* at 49-50.

<sup>195</sup> PJM TOs Rehearing Request at 12.

<sup>196</sup> *Id.* at 26.

<sup>197</sup> *Id.* at 15-16.

### C. Commission Determination

104. Upon reconsideration and with the modifications described below, we find that the defects of the Risk Premium model do not outweigh the benefits of model diversity and reduced volatility resulting from the averaging of more models.

105. In Opinion No. 569, the Commission expressed concerns that the Risk Premium model was an iteration of the CAPM, where both compared a derived return to a risk-free rate of return, affording too much weight to similar models. Upon reconsideration, we agree with the PJM TOs that the Risk Premium model is sufficiently distinct from the CAPM to use in our ROE analysis. The Risk Premium relies on corporate utility bonds while the CAPM uses Treasury Bond yields. Additionally, the Risk Premium model relies on the risk premiums implicit in regulatory judgements, including those using the DCF model, while the CAPM relies upon a different set of inputs, including S&P 500 dividend yields and growth rates as well as adjusted betas.

106. The Commission, in Opinion No. 569, found that the Risk Premium model contained substantial circularity. Upon reconsideration, we agree with MISO TOs<sup>198</sup> and find that, while it contains some circularity, the averaging of the results with those of the DCF and CAPM models sufficiently mitigates that circularity. Additionally, all of the models contain some circularity. And, upon consideration of the rehearing requests, we believe that the level of circularity in the Risk Premium model is acceptable.

107. The Commission also found that use of the Risk Premium model was inconsistent with the other models because it could only be used for the second prong of the section 206 analysis because it does not produce a zone of reasonableness. We continue to find that this is a serious concern, particularly in a circumstance where the Risk Premium model's ROE differs substantially from those of the DCF and CAPM models, such that the ROE produced in the second prong could fall within the applicable presumptively just and reasonable range from the first prong despite the challenged ROE falling outside that range or vice versa. To remedy this problem, we will impute the average width of the zones of reasonableness from the CAPM and DCF models onto the ROE produced by the Risk Premium model, with that ROE serving as the measure of central tendency of the zone of reasonableness. Doing so creates a zone of reasonableness for the ROE from the Risk Premium model, which can then be averaged with those of the other models in the first prong of the section 206 analysis. For example, if the Risk Premium model produces an ROE of 10% while the CAPM and DCF produce zones of reasonableness that average 400 basis points wide, the imputed zone of reasonableness for the Risk Premium would be 8% to 12%. We find that this is appropriate because the average width of those zones of reasonableness from models that

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<sup>198</sup> See MISO TOs Rehearing Request at 51.



produce a zone of reasonableness is the best estimate of how far a zone of reasonableness should span from a single point like that produced by the Risk Premium model. Moreover, addition of the Risk Premium model to our analysis under the first prong of section 206 will not impact the size of the overall composite zone of reasonableness. Instead, it will merely reflect the Risk Premium model in the zone of reasonableness, based on equally weighted information from the models that directly produce a zone of reasonableness, allowing the Commission to use this model in both prongs. Accordingly, we find that it is appropriate to impute a zone of reasonableness for the Risk Premium model so that our ROE determinations under both prongs of section 206 are based on the same data and models.<sup>199</sup>

108. The Commission also expressed concerns regarding the regression analysis, noting specifically that the low number of observations could impact the reliability of the results.<sup>200</sup> Here we propose to use the individual cases for the Risk Premium analysis and not the average of the data from each year. Consequently, instead of nine observations in the regression analysis as proposed by the MISO TOs, there are 71 observations used in the First Complaint regression and 77 in the Second Complaint regression, leading to a much more robust and reliable result. Although the resulting regression coefficients are similar to those in the MISO TOs' calculations, we conclude that they are now based on more sound inputs and are thus more reliable.

109. The Commission cited use of settlements as a deficiency of the Risk Premium model. Parties may consider many factors when settling rate case proceedings. However, because of how directly ROEs affect rates, we conclude that parties engaged in arms-length negotiations seriously consider the ROE in the course of reaching settlements, even if the records in certain proceedings do not contain specific ROE calculations or testimony. Consequently, upon further consideration, we find that the ROEs from such settlements are reasonable to include in the Risk Premium analysis. However, because of the need to more precisely correspond the timing of ROEs to the corresponding bond yields, discussed below, we revise the bond yields (and corresponding risk premiums) to correspond to the six months preceding the offer of settlement and not Commission orders approving the settlements, as discussed below.

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<sup>199</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 351 (“We would prefer to use the same models in the prong one and prong two analyses to ensure that our ROE determinations under each prong are based on the same data and models. It would not be logical to use different models and data sources to apply this same standard under the two prongs unless there is some compelling justification for the difference.”).

<sup>200</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 344.

This period, not the six months preceding Commission approval of settlements, best reflects when parties evaluated the ROE.

110. We also find that it is appropriate to eliminate certain cases from the Risk Premium analysis where the Commission did not consider the justness and reasonableness of the base ROE or the zone of reasonableness in making decisions. For example, we are excluding cases where transmission owners joined MISO and received the prevailing 12.38% ROE that was approved in 2002 without examination of the justness and reasonableness of that ROE. Similarly, in an order on a transmission rate incentives filing by PSEG,<sup>201</sup> the Commission explicitly stated that the ROE was beyond the scope of the proceeding.<sup>202</sup> In other cases, the MISO TOs' analysis unjustifiably contained multiple ROEs counted in the analysis from the same case.<sup>203</sup> We are also eliminating cases where the test period is in 2004, well before other proceedings on the list, given that there were likely other proceedings with test periods during 2004 and 2005 that were not included. We also propose, in order for the results of the Risk Premium analysis to be consistent with those of other models, to update the list of applicable cases to include data up through the conclusion of the test periods, which conclude June 2015 and December 2015 for the First Complaint and Second Complaint, respectively.

111. The Commission, in Opinion No. 569, also considered whether the bond yields used to determine the risk premium should more precisely align with test periods of Risk Premium cases. It found that, although a misalignment of the timing of bond yields and test periods might be acceptable when using the Risk Premium model corroboratively, using the model to set the actual ROE demanded correcting this imprecision. We continue to find that the risk premiums should not contain inconsistent dates for the ROEs and for the bond yields. Rather, they should be aligned by corresponding the ROE to the test periods on which it is based. For settlements, the relevant date is the date that parties file the settlement, not when the Commission approves it. Consequently, the six-month time period bond yields should be the six months preceding the settlements. Such information is reflected in the data in Appendix I.

112. In Opinion No. 569, the Commission also found that the record contained insufficient evidence to conclude that investors rely on risk premium analyses utilizing historic Commission ROE determinations or settlement approvals to determine the cost

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<sup>201</sup> *PJM Interconnection, L.L.C. and Pub. Serv. Elec. & Gas Co.*, 147 FERC ¶ 61,142, at P 48 (2014).

<sup>202</sup> However, the analysis does include those cases where the Commission made this finding, but the ROE was modified by settlement.

<sup>203</sup> See Appendix I. Note that when a case has multiple *different* ROEs, each of those are counted in the analysis.

of capital and make investment decisions. On rehearing, we find that investors do expect to earn a return on a stock investment that reflects a premium above the return they expect to earn on a bond investment,<sup>204</sup> and that the Risk Premium model is a method of estimating the premium over bond yields that investors require to invest in electric utility equities. In addition, as the Commission noted in Opinion No. 569, investors do observe regulatory ROEs and how changes in authorized ROE levels could affect utility earnings,<sup>205</sup> and while such considerations differ from the type of analysis employed by the Risk Premium model, it is a model that considers regulatory ROEs in estimating the premium that investors require to make equity investments instead of bond investments.

113. The Commission discussed in Opinion No. 569 that the MISO TOs' sample period, beginning in 2006, was substantially shorter than the period used by Dr. Morin, potentially leading to less credible results. We find that, although the data set for determining the risk premium would ideally be longer, that 10 years of data yielding over 60 observations is sufficient, noting that we are extending the sample periods slightly to the end of the updated test periods, as discussed above. Furthermore, the record lacks information on ROE proceedings whose order dates precede 2006.

114. The Commission also noted concerns, raised by Trial Staff, that the Risk Premium model should exclude periods of high volatility, specifically around the beginning of the Great Recession. We conclude that all periods should be included because the Risk Premium analysis should factor in periods where the bond yields change. A full sample size in this case *does* include the outlying periods because they reflect the Risk Premium at the time and such economic disturbances, which periodically recur.

## VII. Expected Earnings

### A. Opinion No. 569

115. In Opinion No. 569, the Commission determined that, in light of the record as supplemented after issuance of the Briefing Order, it is not appropriate to use the Expected Earnings model in our new base ROE methodology.<sup>206</sup>

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<sup>204</sup> See, e.g., Morin at 108 (“[B]ased on the simple idea that since investors in stocks take greater risk than investors in bonds, the former expect to earn a return on a stock investment that reflects a ‘premium’ over and above the return they expect to earn on a bond investment.”).

<sup>205</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 345.

<sup>206</sup> *Id.* P 200.

116. In particular, the Commission found that the record does not support departing from our traditional use of market-based approaches to determine base ROE.<sup>207</sup> The Commission determined that under *Hope*—which declares that “the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks”<sup>208</sup>—it is appropriate to consider the value of investment that is actually available to an investor in the market. Outside of the unlikely situation in which the market value and book value are exactly equal, investors do not have the opportunity to invest in an enterprise at its book value. Accordingly, the Commission deemed it most appropriate to exclude the Expected Earnings model, which relies on an enterprise’s book value instead of the market value.

117. The Commission explained that the return on book value is not indicative of what return an *investor* requires to invest in the utility’s equity or what return an investor receives on the equity investment, because those returns are determined with respect to the current market price that an investor must pay in order to invest in the equity.<sup>209</sup> Specifically, the Commission found that the Expected Earnings model measures returns on book value, without consideration of what market price an investor would have to pay to invest in the relevant company, so it does not accurately measure the investor’s expected returns on its investment, and, therefore, has been “thoroughly discredited.”<sup>210</sup> In other words, the return on book value does not reflect “the return to the equity owner” that we must ensure is “commensurate with returns on investments in other enterprises,” as *Hope* requires; therefore, the Commission found that this model is not useful in ensuring that these standards are satisfied.<sup>211</sup> Furthermore, the Commission found that there was insufficient record evidence to conclude that investors rely on the Expected Earnings analysis to estimate the opportunity cost of investing in a particular utility.<sup>212</sup>

118. The Commission also explained that, while it may be true that the Expected Earnings model does not involve the same complexities as the market-based approaches, this is because it does not reflect a utility’s cost of equity.<sup>213</sup> Furthermore, applying the

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<sup>207</sup> *Id.* PP 201, 221.

<sup>208</sup> *Hope*, 320 U.S. at 603.

<sup>209</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 202.

<sup>210</sup> *Id.* PP 205, 221.

<sup>211</sup> *Id.* PP 202, 221-22.

<sup>212</sup> *Id.* P 210.

<sup>213</sup> *Id.* P 204.

Expected Earnings model in the cost-of-service context would lead to illogical results because a company in such a context would receive a higher overall return when it features a higher equity ratio, despite this indicating a lower risk (and thereby indicating a lower required rate of return by investors) than a company featuring a lower equity ratio.<sup>214</sup> Even though companies with more depreciated assets are generally of lower risk and therefore would merit a lower return, the Expected Earnings model would instead provide higher returns to such companies.<sup>215</sup>

**B. Rehearing Requests**

119. MISO TOs, Ameren, and Transource Energy seek rehearing of the Commission's decision to exclude the Expected Earnings model in determining base ROEs.<sup>216</sup> Transource Energy argues that the alleged flaws in the Expected Earnings approach actually become strengths when combined with the other models.<sup>217</sup>

120. Transource Energy asserts that the Expected Earnings model is actually market-based in the sense that market participants use it for investment decisions and that the Commission's definition of "market-based" is too narrow.<sup>218</sup> Furthermore, Transource Energy argues that the fact that the Expected Earnings model does not fit into the Commission's narrow definition of "market-based" highlights that it is needed to diversify the other models.<sup>219</sup> On the other hand, MISO TOs contend that the Expected Earnings approach helps ensure a base ROE that meets the requirements of *Hope* precisely because it is *not* market-based.<sup>220</sup>

121. According to MISO TOs, the record demonstrates that the Expected Earnings approach provides a unique perspective that no other model addresses and thus provides

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<sup>214</sup> *Id.* P 223.

<sup>215</sup> *Id.* P 224.

<sup>216</sup> Ameren Rehearing Request at 2, 4-6, 10-13, 23-25; MISO TOs Rehearing Request at 8, 13, 53-62; Transource Energy Rehearing Request at 3-4, 6, 8-10, 15-26.

<sup>217</sup> Transource Energy Rehearing Request at 23.

<sup>218</sup> *Id.* at 16.

<sup>219</sup> *Id.*

<sup>220</sup> MISO TOs Rehearing Request at 59-61.

a check on the market-based cost of equity approaches.<sup>221</sup> MISO TOs assert that, because regulators do not set the returns that investors earn in the capital markets, the Expected Earnings approach provides a direct guide to ensure that the allowed ROE is similar to what other utilities of comparable risk will earn on invested capital.<sup>222</sup> In other words, MISO TOs explain, the Expected Earnings approach measures whether the allowed ROE is sufficient to assure confidence in the financial integrity of an enterprise so as to maintain its credit and attract capital.<sup>223</sup> In addition, MISO TOs state that, because it is not market-based, the Expected Earnings approach avoids the complexities, controversies, and limitations of capital market methods.<sup>224</sup> Transource Energy argues that the fact that Expected Earnings is not used independently of stock price is not disqualifying, because, under the four-model framework originally proposed, this approach actually works in concert with market-based methods like the included CAPM and DCF models.<sup>225</sup> According to MISO TOs, it is precisely because the Expected Earnings method examines the books of a proxy company rather than relying on market data that the approach provides a unique value in assessing whether a Commission-determined ROE meets the *Hope* and *Bluefield* standards.<sup>226</sup>

122. MISO TOs, Transource Energy, and Exelon assert that the Commission's finding that investors do not rely on the Expected Earnings analysis to estimate the ROE that a utility will earn in the future is contrary to the record in this proceeding and the record in the Commission's Notice of Inquiry proceeding<sup>227</sup> regarding its base ROE policy.<sup>228</sup> Transource Energy argues that Opinion No. 569 did not identify changed circumstances regarding how investors use the Expected Earnings and Risk Premium models and does

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<sup>221</sup> *Id.* at 59.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 60 (citing MISO TOs, Supplemental Reply Brief, Docket No. EL14-12-003, App. 2 at 65 (filed Apr. 10, 2019) (McKenzie Supplemental Reply Brief Affidavit)).

<sup>225</sup> Transource Energy Rehearing Request at 24.

<sup>226</sup> MISO TOs Rehearing Request at 62.

<sup>227</sup> *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (Base ROE NOI).

<sup>228</sup> MISO TOs Rehearing Request at 54-58; Transource Energy Rehearing Request at 18, 20-21, 24.

not find that investors no longer rely on them in evaluating investment decisions.<sup>229</sup> MISO TOs contend that testimony filed by multiple commenters in the Base ROE NOI proceeding, including MISO TOs, the New England TOs, the PJM TOs, and EEL, clearly demonstrates that investors do rely on the Expected Earnings analysis when making investment choices.<sup>230</sup> Exelon notes that the Commission stated in the Briefing Order that investors use the Expected Earnings model, but then later in Opinion No. 569 stated that there is insufficient evidence that investors rely on the Expected Earnings model. Exelon argues that the Expected Earnings model should be included in the ROE methodology even if only some investors rely on it.<sup>231</sup>

123. MISO TOs and Transource Energy also argue that the Commission cannot ignore evidence concerning the Expected Earnings model that it already found probative.<sup>232</sup> They contend that the Commission found the Expected Earnings approach to be reliable, corroborative evidence of the proper base ROE for electric utilities in Opinion Nos. 531, 531-B, and 551, and cannot now simply ignore evidence pertinent to the question before it with no basis for the sudden change.<sup>233</sup> Ameren contends that the Commission's assertion that the exclusion of the Expected Earnings model in Opinion No. 569 is not inconsistent with its determination in Opinion No. 551 is circular because the question on whether to exclude the model was never asked in Opinion No. 551.<sup>234</sup> Ameren explains that, in Opinion No. 551, the Commission relied on the Expected Earnings model to corroborate its finding and provides no explanation here for completely ignoring it. Ameren contends that this failure to at least consider the Expected Earnings model cannot be reconciled with the Commission's prior finding.<sup>235</sup> According to MISO TOs, the Expected Earnings analysis can inform whether the ROE produced by the Commission's methodology is appropriate, and ignoring pertinent evidence rooted in controlling Supreme Court precedent is arbitrary and capricious and not the product of reasoned

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<sup>229</sup> Transource Energy Rehearing Request at 21.

<sup>230</sup> MISO TOs Rehearing Request at 54-58.

<sup>231</sup> Exelon Rehearing Request, Docket No. EL14-12, at 12-13.

<sup>232</sup> MISO TOs Rehearing Request at 61-62; Transource Energy Rehearing Request at 18, 20-21, 24.

<sup>233</sup> MISO TOs Rehearing Request at 61.

<sup>234</sup> Ameren Rehearing Request at 25.

<sup>235</sup> *Id.*

decision-making.<sup>236</sup> Moreover, Ameren argues that this exclusion constitutes reversible error because the Commission never proposed the two-model approach in the Briefing Order or the Base ROE NOI, no party advocated for this approach in the instant docket, and the record does not support exclusion of the Expected Earnings model.<sup>237</sup>

124. MISO TOs and Transource Energy also assert that the Commission cannot deny the historical and regulatory acceptance of the Expected Earnings approach, as it was used in the Commission's prior "br + sv" approach for determining public utility ROEs and is closely related to the comparable earnings approach that originated in *Hope*.<sup>238</sup> Accordingly, they contend that the Commission can rely on the Expected Earnings model to determine whether a prospective base ROE meets the requirements of *Hope*, and to the extent a base ROE is inconsistent with the Expected Earnings analysis, significant explanation is needed as to how such a base ROE meets the requirements of *Hope*.<sup>239</sup> MISO TOs assert that the Commission should employ the Expected Earnings approach in setting the MISO TOs' base ROE or, failing that, should at least consider it as a check on the base ROE yielded by the Commission's alternative approach.<sup>240</sup>

### C. Commission Determination

125. We deny requests for rehearing of the Commission's decision to exclude the Expected Earnings model from its base ROE analysis under section 206 of the FPA. As an initial matter, we note that the requests for rehearing largely repeat arguments parties previously made and which the Commission addressed in Opinion No. 569. Nothing in the rehearing requests persuades us to alter our decision here.

126. We are not persuaded by MISO TOs', Transource Energy's, and Exelon's arguments that investors rely on the Expected Earnings analysis to project utilities' earned ROE. While the record in this proceeding contains evidence that investors have access to data on earnings per book value, we continue to find that it lacks evidence that investors use such data to directly value equities, determine the cost of equity, or make investment decisions without consideration of the market price of the relevant equities.

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<sup>236</sup> MISO TOs Rehearing Request at 62.

<sup>237</sup> Ameren Rehearing Request at 23-24.

<sup>238</sup> MISO TOs Rehearing Request at 60; Transource Energy Rehearing Request at 20-21, 24-25.

<sup>239</sup> MISO TOs Rehearing Request at 60-61; Transource Energy Rehearing Request at 20-21, 24-25.

<sup>240</sup> MISO TOs Rehearing Request at 62.



As the Commission explained in Opinion No. 569,<sup>241</sup> investors cannot use the Expected Earnings model to directly determine the return they would earn from purchasing a company's stock, because the return estimated by that model is a return on the company's book value, not a return on the current stock price, which is what the investor must pay in order to invest in the company. Therefore, the returns estimated by the Expected Earnings model are divorced from the returns required by investors, because investors cannot purchase a company's stock at its book value (except in the very rare instance where a utility's market capitalization happens to exactly equal its book value). Similarly, we are not persuaded by MISO TOs' and Transource Energy's arguments that the Expected Earnings analysis is probative because the Commission, until Opinion No. 531, considered book value in the "br + sv" calculations. Our decision to exclude the Expected Earnings model from our base ROE analysis is not inconsistent with the Commission's prior consideration of book value in this context because such information was used in conjunction with, rather than instead of, the market price of the stocks.

127. Moreover, because the current market values of utility stocks substantially exceed utilities' book value, a utility's expected earnings on its book value will inevitably exceed the return that investors require in order to purchase the utility's higher-value stock, which means that the Expected Earnings model does not accurately measure the returns that investors require to invest in utilities.<sup>242</sup>

128. As explained in Opinion No. 569, the Commission has found that it is important to base the ROE on the returns currently required by investors, and the Expected Earnings model does not measure those returns. Specifically, since the 1980s, the Commission has rejected the use of returns on book value in determining the cost of equity and emphasized the importance of incorporating the market cost of equity when estimating ROEs because the market price is what investors must pay when making an investment and therefore is the basis on which investors measure the return on their investment.<sup>243</sup> As discussed in Opinion No. 569, this is also supported by a variety of academic literature indicating that the Expected Earnings model is not relied upon to directly estimate cost of equity.<sup>244</sup>

129. We are also not persuaded by MISO TOs' arguments that the Expected Earnings model should be used because it provides a unique, non-market-based perspective, and thus increases model diversity. Simply because a model increases model diversity does

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<sup>241</sup> Opinion No. 569, 169 FERC ¶ 61,129 at PP 201-202.

<sup>242</sup> *See id.* P 211.

<sup>243</sup> *See id.* PP 201 & n.426, 202, 216-18.

<sup>244</sup> *Id.* P 218.

not mean that it is necessarily appropriate to include, if the model is fatally flawed. This is the case because the returns on investment received depend on the market price that investors must pay to make their investment, which the accounting-based Expected Earnings model does not consider.

130. In response to MISO TOs' argument that the Expected Earnings model should be used because it avoids the complexities, controversies, and limitations of market-based methods, we stand by the Commission's explanation in Opinion No. 569<sup>245</sup> that the Expected Earnings model is simpler because it does not take into account the vitally important market cost of investing in a utility's equity. The market price that an investor must pay for an investment is a critical factor in determining a utility's cost of equity, and a model that ignores that factor is not useful in estimating cost of equity. The Expected Earnings model's relative simplicity is due to and invalidated by this deficiency.

131. Finally, we disagree with MISO TOs' and Transource Energy's arguments that the Commission cannot exclude the Expected Earnings model now because it already relied on the model as corroborative evidence in the underlying Opinion No. 551 in these proceedings. As the Commission explained in Opinion No. 569,<sup>246</sup> the Commission is now deciding whether to use the Expected Earnings model as a direct input in its ROE estimates—not merely whether to use it as corroborative evidence—and more convincing evidence is required to justify using the model as a direct input. We continue to find that parties have not supplemented the record with this more convincing evidence. We further note that no parties have explained or refuted the Commission's observation in Opinion No. 569 that the use of the Expected Earnings model in this context leads to illogical results of higher ROEs from companies with more equity in their capital structure or more depreciated assets.<sup>247</sup> Furthermore, Opinion No. 531, whose logic and methodology the Commission adopted in Opinion No. 551, was vacated by the court, such that neither form binding precedent.

132. While we do not adopt the Expected Earnings model in our revised methodology here for the reasons discussed above, we do not necessarily foreclose its use in future proceedings if parties can demonstrate that the concerns discussed above have been addressed.

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<sup>245</sup> *Id.* PP 203-204.

<sup>246</sup> *Id.* P 226.

<sup>247</sup> *See id.* P 223.

## **VIII. Weighting of Models**

133. A number of parties made general comments that the Commission erred in overweighting the DCF and CAPM models by excluding the Risk Premium and Expected Earnings models. Section III above addresses such arguments.

### **A. Opinion No. 569**

134. In Opinion No. 569, the Commission chose to use the DCF and CAPM models to determine base ROE, with both approaches being given equal weight. The Commission argued that it was inappropriate to include the Expected Earnings and Risk Premium models, as discussed above. By excluding them, the Commission effectively gave those models a weight of zero in its analysis under prongs one and two of section 206 of the FPA.<sup>248</sup>

135. The Commission also described why it would create the zones of reasonableness for each model based on the proxy company results for those individual models, average the midpoints/medians and zones of reasonableness bounds for the used models, and then determine the midpoints and applicable quartiles based on the averaged zones of reasonableness.<sup>249</sup> The Commission declined to adopt CAPs' proposed alternative of averaging the results for multiple models for each proxy group company before determining the applicable midpoint/median and zone of reasonableness. Further, the Commission noted that there was no record evidence of the models being applied this way in other regulatory proceedings or that the assumptions and structure of the DCF and CAPM models contemplate the isolation of results for specific proxy group companies as the CAPs' proposal would do.

### **B. Rehearing Requests**

136. CAPs state that the Commission should not have equally weighted the results of the DCF and CAPM models in determining the composite zone of reasonableness. According to CAPs, the Commission disregarded the complainants' arguments regarding the "superiority of the DCF model, including evidence of broad industry recognition of the DCF model as the most appropriate way to determine allowable rates of return that meet the standards set out in *Hope* and *Bluefield*."<sup>250</sup> CAPs claim that the Commission relied more heavily on the MISO TOs' assertion that "investors base their decisions on factors more closely aligned with CAPM factors to disregard long-standing precedent

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<sup>248</sup> *Id.* PP 424-427.

<sup>249</sup> *Id.* PP 437-438.

<sup>250</sup> CAPs Rehearing Request at 85.

stating the superiority of the DCF model.” CAPs argue that the equal weighting of the DCF and CAPM models is not supported by the record evidence or Commission precedent indicating that the DCF model is superior to the CAPM.

137. CAPs assert that the Commission did not explain its conclusion that equal weighting will reduce model risk associated with a given model more so than giving one model greater weight over the other. CAPs note that the DCF model has not become less reliable over the time that the Commission used it exclusively to determine cost of equity. Lastly, CAPs criticize the Commission for not considering Dr. Berry’s rebuttal of the Briefing Order’s basis for its new concerns regarding the DCF model’s risk. According to CAPs, disregarding parties’ arguments constitutes arbitrary and capricious decision making.<sup>251</sup> CAPs also aver that the Commission did not address Dr. Berry’s testimony regarding the sequencing of model calculations.

138. Transource Energy argues that the Commission’s rationale does not support a 50% weight for the DCF model. Previously with a four-model methodology, the DCF approach received a 25% weight. That approach led to a diverse methodology that minimized measurement errors. According to Transource Energy, assigning no weight to the Expected Earnings and Risk Premium models does not mean that the DCF model should be weighted equally with the CAPM.<sup>252</sup>

139. MISO TOs state that benchmark estimates of utilities’ cost of equity using the Risk Premium and Expected Earnings models substantially exceed the Commission’s composite midpoint ROE. In addition, MISO TOs state that anomalous capital market conditions undercut the validity of the DCF analysis where that model holds a 50% weight in deriving the composite zone of reasonableness from which the Commission derived the new base ROE it adopted in Opinion No. 569.<sup>253</sup> MISO TOs also note that the Commission previously agreed with Ms. Lapson’s conclusion that using the DCF model does not satisfy *Hope* and *Bluefield*. MISO TOs assert that the DCF model does not satisfy *Hope* and *Bluefield* and therefore question the validity of the new ROE methodology when assigning a 50% weight to the DCF model. According to MISO TOs, the “same evidence of prevailing state ROEs on which the Commission relied in Opinion No. 551 undercuts the 50% weighting of the very same DCF analysis in Opinion No. 569.”<sup>254</sup> They argue that the Expected Earnings and Risk Premium models can be used to show that the DCF model has a downward bias on the resulting base ROE.

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<sup>251</sup> *Id.* at 85-87.

<sup>252</sup> Transource Energy Rehearing Request, Docket No. EL14-12, at 21-22.

<sup>253</sup> MISO TOs Rehearing Request, Docket No. EL14-12, at 13.

<sup>254</sup> *Id.* at 18-19.

Furthermore, the Commission had previously noted that investors utilize the Expected Earnings and Risk Premium models.<sup>255</sup>

### C. Commission Determination

140. We disagree with parties that assert that low reliability of the DCF model, the DCF model's similarity to the CAPM in terms of inputs, and the drawbacks of those two models as reasons against equal weighting. We also disagree with other parties that argue that the DCF should receive more weighting than other models given that it has been long-used by regulators. Parties arguing for less weighting do not suggest a specific alternative weighting scheme other than simply reducing the DCF's weight to less than 50% and overlook the distinctions between it and the other models. We disagree with contentions that, because the DCF gives results in these proceedings that are lower than those of the other models, that it should receive *less* weight than they do. The DCF model is clearly used by investors<sup>256</sup> and has been subject to extensive regulatory review and refinement. We also disagree with parties arguing for more weighting of the DCF model, because, as discussed above, we find substantial value in the CAPM and Risk Premium models and the evidence indicates that none of the three models is conclusively superior to any other. As discussed in this order and in Opinion No. 569, each model has unique aspects, and advantages and disadvantages that make it preferable to the other model in some respects, but not other respects.

141. We continue to find that the models used in our methodology should be afforded equal weighting to fully capture the model diversity that each brings. The evidence does not indicate that there is a clearly superior model for estimating cost of equity that should be given more weight than the others and we find that equally weighting the three models will reduce the model risk associated with any particular model more than giving one model greater weight than the other. Consequently, each model shall receive one-third weighting for both the first and second prongs of the section 206 analysis. The revised methodology ultimately addresses the concerns of certain commenters by reducing the weight attributed to the DCF model while expanding the diversity of the ROE methodology by including the Risk Premium model. We disagree with CAPs' assertion that the Commission in Opinion No. 569 failed to address Dr. Berry's concerns regarding model sequencing. The Commission provided a full and reasoned description of why it employed the sequencing order for ROE calculations that it had described in the Briefing Order.

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<sup>255</sup> *Id.* at 22.

<sup>256</sup> *See, e.g.*, Opinion No. 569, 169 FERC ¶ 61,129 at PP 171, 426.

## **IX. Natural Break Analysis**

### **A. Opinion No. 569**

142. In Opinion No. 569, the Commission affirmed the use of a natural break analysis to both the high and low-end outlier screens but declined to set a specific threshold level or formula to use in the analysis. The Commission stated that any numerical outlier test will necessarily be somewhat arbitrary, and that the natural break analysis gives the Commission the flexibility to determine whether a given proxy group company is truly an outlier, or whether it contains useful information.<sup>257</sup>

### **B. Rehearing Requests**

143. MISO TOs argue that, if the Commission retains the high-end outlier test and the natural break analysis, the high-end outlier threshold should be useable as evidence for retaining one or more cost-of-equity estimates that might otherwise be excluded because of a subjectively identified “natural break.”<sup>258</sup>

144. MISO TOs contend that the natural break analysis utilized by the Commission has no foundation and invites arbitrary application. MISO TOs contend that the analysis is especially erroneous when applied to the high-end outlier test.<sup>259</sup> MISO TOs also argue that, if the Commission continues to apply a natural break standard to its low-end outlier test, it should not use this threshold to include companies that investors would ignore as unrepresentative of acceptable equity returns.<sup>260</sup>

### **C. Commission Determination**

145. We deny MISO TOs’ request for rehearing on the natural break analysis. We note that the high and low-end outlier tests are not meant to be purely statistical tests and refute MISO TOs’ assertion that the natural break analysis is inherently flawed because it is subjective. Additionally, we clarify that the natural break analysis may be used as evidence for retaining one or more cost-of-equity estimates that might otherwise be excluded because of a high-end or low-end outlier test. Observations that are shown to be rational and not the result of error may still be included, even if they otherwise would fail one of the outlier tests. By the same logic, the natural break analysis can be used to

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<sup>257</sup> Opinion No. 569, 169 FERC ¶ 61,129 at PP 187-188.

<sup>258</sup> MISO TOs Rehearing Request at 76-77.

<sup>259</sup> *Id.* at 80-82.

<sup>260</sup> *Id.* at 83.

argue for exclusion of cost-of-equity estimates that do not fail either outlier test but can be shown to be irrational, anomalous, or the result of human error.

146. Model inputs can be flawed, due to incorrect inputs or the result of poor judgement by analysts. Such errors can improperly influence the analysis, especially when they affect estimates at the high and low end of the proxy group. As the Commission noted in the Briefing Order, one analyst's error involving the growth projections for Portland General Electric Company reduced the overall Reuters consensus projected short-term percentage growth in earnings from 10.96% to 7.8%.<sup>261</sup> This case illustrates the fallibility of model inputs and the importance of having a natural break analysis to enable the Commission to use its discretion with respect to high or low values.

## **X. High-End Outlier Test**

### **A. Opinion No. 569**

147. In Opinion No. 569, the Commission adopted the high-end outlier test proposed in the Briefing Order, which excludes from the proxy group any company whose cost of equity estimated under the model in question is more than 150% of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a natural break analysis. The Commission noted that financial metrics for individual utilities can fluctuate dramatically, potentially affecting ROEs that use midpoints as measures of central tendency and found that it was appropriate to eliminate members of the proxy group whose ROEs are unreasonably high.<sup>262</sup>

### **B. Rehearing Requests**

148. MISO TOs argue that the Commission should not adopt any high-end outlier test. MISO TOs argue that the high-end outlier test artificially narrows the zone of reasonableness. MISO TOs further argue that if the Commission retains the high-end outlier test, it should be used only as a rebuttable presumption, and then applied only to the highest of the median values produced by the analyses used.<sup>263</sup>

149. MISO TOs further argue that, even if the Commission retains the high-end outlier test, it should not be applied to the two-step DCF analysis. MISO TOs argue that,

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<sup>261</sup> Briefing Order, 165 FERC ¶ 61,118 at P 19 n.95 (*Coakley* Briefing Order, 165 FERC ¶ 61,030 at P 47).

<sup>262</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 179.

<sup>263</sup> MISO TOs Rehearing Request at 70-73.

because the median of the two-step DCF may be unreliable or produce unjust and unreasonable results, its use in the high-end outlier test is similarly unreliable.<sup>264</sup>

150. Transource Energy contends that there is no evidence that a logical high-end outlier test exists that would apply generically as the low-end outlier test does. Transource Energy argues that a generic exclusion based on distance from the median may reject potentially useful observations. Transource Energy contends that, if the Commission were to utilize a high-end outlier test, the Commission should treat the test as a high-end cap on the result and not a high-end exclusion of data points.<sup>265</sup>

151. Exelon contends that the high-end proxy group utilities that are excluded under the high-end outlier test represent actual data regarding utilities of a similar risk profile, and thus application of the test changes the range of studied ROEs from those that actual investors consider in the market.<sup>266</sup>

### **C. Commission Determination**

152. We grant in part and deny in part the requests for rehearing on the high-end outlier test. While the high-end outlier test uses the median, it is not solely meant to serve as a statistical test to remove proxy group companies that are not representative of typical utilities. Rather, the high-end outlier test, when coupled with a natural break analysis, screens for observations that are irrationally or anomalously high.

153. As an initial matter, we note that some parties have characterized the high-end outlier test as stricter than it is. As noted above, the high-end outlier test is subject to a natural break analysis, meaning observations that are shown to be rational and not the result of error may still be included, even if they are over the threshold.

154. However, we find that it is appropriate to modify the high-end outlier test to treat any proxy company as high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median—as opposed to the 150% of the median threshold applied in Opinion No. 569—result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a “natural break” analysis. The high-end outlier test is the Commission’s best attempt to use an objective test to identify proxy group ROEs that are irrationally or anomalously high because, for example, they are the result of atypical circumstances that are unrepresentative of the subject utility’s risk profile or otherwise likely to be in error.

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<sup>264</sup> *Id.* at 74-76.

<sup>265</sup> Transource Energy Rehearing Request at 28-29.

<sup>266</sup> Exelon Rehearing Request at 13-14.



We recognize such a test with a bright-line threshold could inappropriately exclude ROEs that are rational and not anomalous for the subject utility. In recognition of this risk, we find that increasing the threshold for the high-end outlier test to 200% of the median result of all of the potential proxy group members in the applicable model<sup>267</sup> is appropriate because it will reduce the risk that such rational results are inappropriately excluded. However, as we note above, the continued application of the natural break analysis will still allow the exclusion of ROEs that are truly irrational or anomalously high, even if they fall under the threshold set by this high-end outlier test.

155. While we are modifying the high-end outlier test to increase its exclusion threshold, we find that it is still appropriate to maintain the test as an objective check to help identify observations that are irrationally or anomalously high. This is especially true because we will continue to use the midpoint as a baseline to determine region-wide ROEs for groups of utilities and potentially flawed high-end observations from the proxy group play a large role in an ROE analysis that uses the midpoint. While we note that the addition of the Risk Premium model to the analysis diminishes the impact of outliers, we do not find this to be enough to warrant removal of the high-end outlier test entirely. Thus, the high-end outlier test continues to apply, but with the modification described above.

## **XI. Low-End Outlier Test**

### **A. Opinion No. 569**

156. In Opinion No. 569, the Commission adjusted the low-end outlier test to eliminate from the proxy group ROE results that are less than the yields of generic corporate Baa bonds plus 20% of the CAPM risk premium. The Commission found that it was necessary to exclude ROEs whose yield was “essentially the same expected return” as debt in order to determine the low end of the zone of reasonableness. The Commission noted that the risk premium that investors demand changes over time and found that using 20% of the CAPM risk premium struck an appropriate balance of accounting for the additional risk of equities over bonds while not inappropriately excluding proxy group members whose ROE is distinguishable from debt.<sup>268</sup>

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<sup>267</sup> The high-end outlier test only applies to the DCF model and CAPM because they utilize results of the relevant analysis applied to a proxy group, while the Risk Premium model is derived from actual ROEs.

<sup>268</sup> Opinion No. 569, 169 FERC ¶ 61,129 at PP 184-185.

## **B. Rehearing Requests**

157. RPGI argues that the Commission has not justified revising the low-end outlier test, and specifically has not supported including 20% of the CAPM risk premium.<sup>269</sup>

158. CAPs contend that using the Baa bond yield index is an inappropriate way to determine whether a ROE is an unreliable low-end outlier. CAPs further contend that this is inconsistent with Commission precedent, noting the Commission's explanation in Opinion No. 489 that, when applying a low-end outlier test, "it is appropriate to consider the company's own cost of debt, not the composite debt of the proxy group."<sup>270</sup> CAPs note that applying this to a company's own cost of debt results in OGE Energy being added back into the proxy group for the Second Complaint.<sup>271</sup>

159. CAPs similarly argue that the Commission's use of the risk premium should be rejected. However, CAPs contend that, if the Commission continues to utilize a risk premium, it should instead be 20% of the difference between the CAPM equity market return and the Moody's Baa utility bond yield.<sup>272</sup>

160. MISO TOs argue that the Commission erred in adopting its low-end outlier test and should instead apply the low-end methodology described by Mr. McKenzie in order to account for the inverse relationship between equity risk premiums and bond yields.<sup>273</sup>

## **C. Commission Determination**

161. We deny the requests for rehearing on the low-end outlier test. We are not persuaded by RPGI's and MISO TOs' assertions that the Commission erred in adopting its low-end outlier test based on 20% of the CAPM risk premium. Likewise, we disagree with CAPs that the low-end outlier test is inconsistent with prior Commission precedent. As the Commission noted in Opinion No. 569, the Commission has applied this test differently in the past and did not always examine a company's own cost of debt.<sup>274</sup>

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<sup>269</sup> RPGI Rehearing Request at 27-31.

<sup>270</sup> CAPs Rehearing Request at 88-90.

<sup>271</sup> *Id.* at 94.

<sup>272</sup> *Id.* at 90-92.

<sup>273</sup> MISO TOs Rehearing Request at 83-84.

<sup>274</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 389 n.783 (citing Opinion No. 531, 147 FERC ¶ 61,234 at P 123).

The Commission also found that “using the specific bond yield for each company . . . renders [the calculations] (and the resulting ROE) less predictable, as the credit ratings for individual companies are likely more volatile than the generic corporate rate Baa credit rating.”<sup>275</sup> Thus, we reiterate our finding here that applying the low-end outlier test to the Baa bond yield is appropriate. We also decline to adopt CAPs’ proposal to instead use 20% of the difference between the CAPM equity market return and the Moody’s Baa utility bond yield, and affirm our use of the United States 30 year treasury note in calculating the CAPM equity risk premium. There is no compelling evidence that, with respect to determining the risk premium, using Moody’s Baa utility bond yields is superior to the treasury yields. Treasury yields are generally more stable than corporate bond yields, which here increases model stability. Furthermore, the low-end outlier test already incorporates the Moody’s Baa utility bond, to which it adds 20% of the risk premium to determine the test. Using it twice would be unnecessarily duplicative. Additionally, we note that the risk premium is meant to reflect the opportunity cost of investing in equities generally, and therefore, using an industry-specific measure to determine the low end of the risk premium’s range is inappropriate.

162. We also decline to adopt MISO TOs’ proposed methodology. Opinion No. 569’s proposed low-end outlier test methodology recognizes the dynamic nature of risk premiums without eliminating numerous proxy group members as the MISO TOs’ methodology might in certain conditions. In Mr. McKenzie’s example, use of his proposed test leads to the exclusion of six rather than three companies, the upper three of which feature ROEs very close to those of other companies.<sup>276</sup> This indicates that MISO TOs’ proposed outlier test is excluding more than just outliers, systematically adding a significant upward bias to the DCF results.

## **XII. Consideration of State ROEs**

### **A. Opinion No. 569**

163. The Commission found that the ROE determination in these proceedings did not need to consider state-authorized ROEs. The Commission agreed with MISO TOs that there are material differences between state and Commission ROEs. As a result, the Commission stated that it would only consider state-authorized ROEs on a case-by-case

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<sup>275</sup> *Id.*

<sup>276</sup> Appendix 3 to McKenzie Affidavit in MISO TOs Initial Brief.

basis to the extent that the state-authorized ROEs demonstrate that the results of the Commission's CAPM and DCF analyses are substantially excessive or deficient.<sup>277</sup>

### **B. Requests for Rehearing**

164. Ameren, MISO TOs, and Transource Energy all note that the Commission stated in Opinion No. 569 that its new ROE approach would consider state-authorized ROEs, but argue that, despite the express inclusion, the Commission failed to perform this check. These parties assert that the Commission has previously found that transmission ROEs generally should be higher relative to those of distribution-only and integrated electric utilities. These parties claim that the Commission disregarded record evidence of state-authorized ROEs above 9.88%, and argue that this evidence demonstrates that, relative to the risk to transmission, 9.88% is an insufficient level of return to attract capital under the *Hope* and *Bluefield* standards.<sup>278</sup>

165. According to MISO TOs, the Commission's findings that transmission is riskier than state-regulated retail utility operations and that the MISO TOs are at least as risky as integrated utilities require that the MISO TOs' base ROE be somewhat higher than most, if not all, contemporaneous state-authorized ROEs. MISO TOs state that all state ROEs allowed during the Docket No. EL14-12 study period exceeded the DCF midpoint. Indeed, even the midpoint of all state-allowed ROEs, 9.95%, exceeded the base ROE of Opinion No. 569, and 31 out of 58 state-authorized ROEs for integrated utilities were between 10% and 10.4%.<sup>279</sup>

166. MISO TOs argue that *Emera Maine* did not disturb the Commission's finding in Opinion No. 531-B that the proper use of state commission ROEs is to compare the "significant number of state commission-authorized ROEs to the midpoint produced by the application of the Commission's traditional methodology" and determine whether "their levels, relative to each other, were illogical in light of the record evidence concerning the comparative risks of state-level electric distribution and interstate electric transmission." They contend that evidence of prevailing state ROEs during the study period indicates that a base ROE equal to or higher than 10.32% is justified.<sup>280</sup> They state that other estimates of the MISO TOs' cost of equity support the same inference, and thus support the Opinion No. 551 outcome. They note that: the Commission's

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<sup>277</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 363.

<sup>278</sup> Ameren Rehearing Request at 8-10; MISO TOs Rehearing Request at 14-16; Transource Energy Rehearing Request at 10-14.

<sup>279</sup> MISO TOs Rehearing Request at 33.

<sup>280</sup> *Id.* at 33-34 (citing Opinion No. 531-B, 150 FERC ¶ 61,165 at P 88).

application of the CAPM in Opinion No. 569 resulted in a midpoint of 10.45%; the Commission in Opinion No. 551 accepted a Risk Premium estimate of 10.36% and an Expected Earnings midpoint estimate of 11.99%; and the Briefing Order presented a restated Expected Earnings analysis with a midpoint of 11.41%, and repeated the Risk Premium estimate of 10.36%.<sup>281</sup>

### C. Commission Determination

167. As an initial matter, the modifications made in this order to the ROE determination methodology result in higher ROEs in these proceedings, at least in part rendering moot concerns about the relative levels of state-authorized ROEs for integrated utility operations versus Commission-authorized transmission ROEs. Furthermore, the 10.02% ROE resulting from this order exceeds the average ROEs in the MISO TOs' analysis for both vertically-integrated utilities and for all utilities.<sup>282</sup> Moreover, MISO TOs' comparison of Commission ROEs in this proceeding with state ROEs over a two-year period, concluding in 2014, before the test period in this proceeding, is inappropriate. As illustrated by the fact that the DCF and CAPM midpoint ROEs in the Second Complaint are lower than those in the First Complaint, capital market conditions can change over time, rendering past comparisons obsolete. The ROEs in this proceeding must reflect capital market conditions during the first half of 2015 for the First Complaint and the second half of 2015 for the Second Complaint, so comparisons to state ROEs during the preceding two years are of limited value. We also continue to find that state-authorized and Commission-authorized ROEs are conceptually distinct and do not necessarily need to be aligned. In Opinion No. 569, the Commission indicated that state-authorized ROEs would only be considered on a case-by-case basis and not as a necessary part of the Commission's ROE methodology, and accordingly we disagree that we were required to consider state-authorized ROEs as part of the ROE determination in this proceeding. Although the Commission may consider a wide range of evidence in its ROE determinations, it is not legally required to base its jurisdictional transmission ROE determinations on the ROEs determined by state utility commissions. Furthermore, that the Commission relied on state ROEs corroboratively in the vacated Opinion No. 531 and in Opinion No. 551 that was pending before the Commission on rehearing, does not create binding precedent that the Commission must justify departure from in its finding that it will not necessarily consider state ROEs when determining transmission ROEs.

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<sup>281</sup> *Id.* at 34.

<sup>282</sup> *See* MTO-20 at 1-2.

### **XIII. Use of the Midpoint**

#### **A. Opinion No. 569**

168. The Commission stated that it will continue to use the midpoint to determine the central tendency of the zone of reasonableness in cases involving an RTO-wide ROE, consistent with the policy set forth in the *MISO Remand Order*,<sup>283</sup> and that intervenors did not present a compelling reason as to why that policy should not be applied in this ROE proceeding.<sup>284</sup> The Commission explained that MISO TOs are a diverse set of companies and the central value becomes an important part in determining RTO-wide ROE.<sup>285</sup> The Commission also found that the high and low ends of the DCF and CAPM zones of reasonableness were representative of the highest and lowest risk profiles among the MISO TOs.<sup>286</sup>

#### **B. Requests for Rehearing**

169. CAPs contend that the Commission erred in using the midpoint, rather than the median, as the measure of central tendency for the ROE under the second prong of the section 206 analysis. CAPs point out that the Commission has found that the median best represents the central tendency in a skewed distribution<sup>287</sup> and is “less affected by extreme numbers than the midpoint.”<sup>288</sup> CAPs find unpersuasive the Commission’s finding in Opinion No. 569 that the companies that set the high and the low end of the zone of reasonableness in Opinion No. 569’s DCF and CAPM analyses have similar risk

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<sup>283</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302, at PP 9-10 (2004) (*MISO Remand Order*), *aff’d*, *Pub. Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005).

<sup>284</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 409.

<sup>285</sup> *Id.* PP 410-411.

<sup>286</sup> *Id.* PP 412-413.

<sup>287</sup> CAPs Rehearing Request at 83 (citing *S. Cal. Edison Co.*, 131 FERC ¶ 61,020 at PP 114-116, *reh’g denied*, 137 FERC ¶ 61,016 (2011) (SCE Rehearing), *aff’d in relevant part sub nom. S. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013); *Northwest Pipeline Corp.*, 99 FERC ¶ 61,305, at 62,276 (2002). *See also Transcontinental Gas Pipe Line Corp.*, Opinion No. 414-A, 84 FERC at 61,427, *aff’d* Opinion No. 414-B, 85 FERC ¶ 61,323 (1998), *rev. denied sub nom., N.C. Util. Comm’n v. FERC*, 203 F.3d 53 (D.C. Cir. 2000)).

<sup>288</sup> *Id.* (citing SCE Rehearing, 137 FERC ¶ 61,016 at P 19).

profiles to the MISO TOs. CAPs contend that this explanation misses the point because, even if the risk profile of the proxy group companies setting the high and low ends of the DCF and CAPM zones of reasonableness are within that wide variation, the averaged DCF and CAPM midpoints do not correspond to the highest and lowest cost of capital among Respondent MISO TOs. Consequently, according to CAPs, using the highest and lowest ROEs in the DCF and CAPM zones to calculate the presumptively just and reasonable zones or to determine the replacement ROE does not result in emphasizing the full range of the individual MISO TOs' costs of equity to serve a diverse group of TOs.

170. CAPs state that the premise for use of the midpoint is counter-factual because there is no direct correlation between credit ratings and the utilities setting the upper and lower bounds of the composite zone of reasonableness and the highest and lowest credit ratings of the MISO TOs.<sup>289</sup> CAPs state that the Commission dismissed this concern on the basis that such lack of correlation is not a problem because the credit ratings of the proxy companies that turn out to define the DCF-CAPM combined range are within the MISO TOs' wide variation of credit ratings.

### **C. Commission Determination**

171. We disagree with arguments on rehearing that the Commission erred in continuing to use the midpoint as the measure of central tendency when establishing an ROE for groups of utilities like the MISO TOs. Such arguments fail to provide a basis for reversing a court-affirmed finding that it is just and reasonable to use the midpoint as the measure of central tendency for groups of utilities.<sup>290</sup> Additionally, the Commission described in great detail the general correspondence between the credit rating of proxy group companies and those at the high and low end of the zone of reasonableness, even if this examination was not specific to the MISO TOs.<sup>291</sup> The fact that the MISO TOs' highest and lowest credit ratings do not fully correspond to the high and the low ends of the CAPM and DCF zone of reasonableness in this particular proceeding does not change the fundamental purpose of applying the midpoint to groups of utilities, which is capturing a variety of risks that they feature.

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<sup>289</sup> *Id.*

<sup>290</sup> See *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d at 1004, 1010.

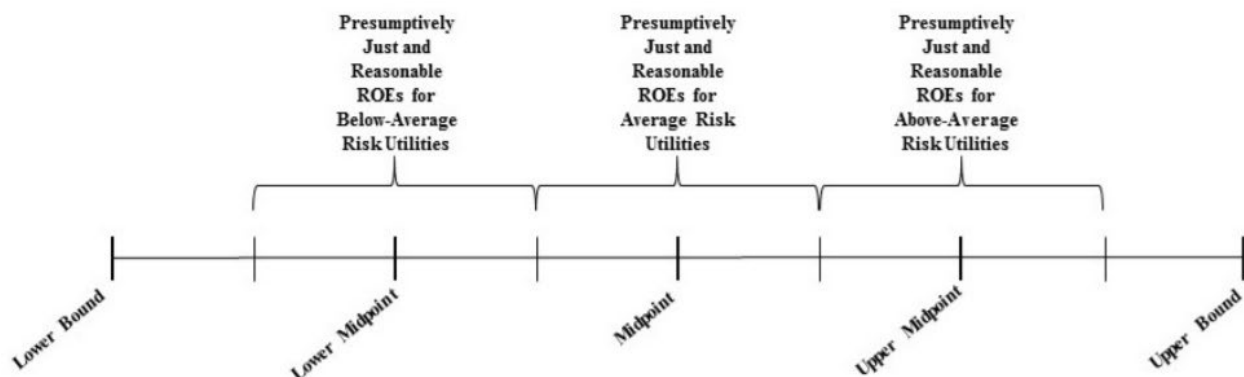
<sup>291</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 412.

#### **XIV. Ranges of Presumptively Just and Reasonable ROEs**

##### **A. Opinion No. 569**

172. In Opinion No. 569, the Commission adopted the use of ranges of presumptively just and reasonable ROEs based on the risk profile of a utility or group of utilities to inform the Commission’s decision of whether an existing ROE has become unjust and unreasonable, as proposed in the Briefing Order.<sup>292</sup> Specifically, the Commission found that, for average risk utilities, the presumptively just and reasonable range is the quartile of the overall composite zone of reasonableness centered on the central tendency of the overall zone of reasonableness; for below average risk utilities, that range is the quartile of the zone of reasonableness centered on the central tendency of the lower half of the zone of reasonableness; and for above average risk utilities, that range is the quartile of the zone of reasonableness centered on the central tendency of the upper half of the zone of reasonableness. These ranges of presumptively just and reasonable base ROEs located within the overall composite zone of reasonableness are illustrated below.

Figure 1: Zone of Reasonableness Quartiles



173. In constructing the ranges of presumptively just and reasonable base ROEs, the Commission noted its precedent that the midpoint of the overall zone of reasonableness is a good starting place for the placement of an ROE and found that the measure of central tendency for the entire zone of reasonableness should be the starting point for identifying the range of presumptively just and reasonable base ROEs for utilities with an average risk profile.<sup>293</sup> The Commission then found that, similarly, the starting points for identifying the ranges of presumptively just and reasonable base ROEs for utilities with above or below average risk profiles should be the historic measures of central tendency

<sup>292</sup> See *id.* P 57.

<sup>293</sup> *Id.* P 63 (citing *Emera Maine*, 854 F.3d at 27 (citing *Tenn. Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1213 (D.C. Cir. 1991)) (“We have noted that the midpoint is a good ‘starting place’ for the placement of the ROE.”)).



of the upper and lower halves of the zone of reasonableness, respectively – their respective midpoints.<sup>294</sup> The Commission explained that it was logical for the end points of those ranges to not be closer to the starting points for the ranges of utilities with different risk profiles than they are to their own starting point. Applying this rationale, the Commission found that the range within the overall zone of reasonableness that best represents presumptively just and reasonable ROEs for average risk utilities is the quartile of the zone of reasonableness centered on the central tendency of the entire zone of reasonableness, while the ranges within the overall zone of reasonableness that best represent presumptively just and reasonable ROEs for above- and below- average utilities are the quartiles centered on the central tendencies of the upper and lower halves of the zone of reasonableness, respectively.<sup>295</sup>

174. The Commission explained that adopting the use of ranges of presumptively just and reasonable base ROEs was necessary to satisfy the requirements of the *Emera Maine* decision, which found that the Commission’s decision that “a single ROE analysis generating a new just and reasonable ROE necessarily proved that the Transmission Owners’ existing ROE was unjust and unreasonable” is contrary to the FPA.<sup>296</sup> Such ranges were also necessary, the Commission reasoned, because, according to the *Emera Maine* decision, “the zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE,” and thus that a finding that a particular ROE is just and reasonable, “standing alone, ‘does not amount to a finding that every other rate of return’” is not just and reasonable.<sup>297</sup> The Commission found that, in light of these findings, the Commission’s explanation of the particular circumstances that support an explicit finding that the existing ROE has become unjust and unreasonable must include a showing that the existing ROE is now outside some range of potentially just and reasonable ROEs within the zone of reasonableness for the public utility at issue, in light of our estimate of the current market cost of equity. Alternatively, the Commission found that it could find that it could determine that other evidence

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<sup>294</sup> *Id.* (citing *Emera Maine*, 854 F.3d at 30 (citing *Tenn. Gas Pipeline*, 926 F.2d at 1213) (“[Where] the utility at issue was riskier than the proxy group . . . the midpoint of the upper half was ‘an obvious place to begin.’”); *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050, at PP 270, 273 (2017) (setting ROE at the “measure of central tendency of the lower half of the zone of reasonableness . . . [g]iven [the utility’s] low level of risk as compared to the proxy group.”)).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* P 57 (citing *Emera Maine*, 854 F.3d at 26).

<sup>297</sup> *Id.* (citing *Emera Maine*, 854 F.3d at 26 (quoting *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 857 (D.C. Cir. 1983))).

convincingly demonstrates that the existing ROE is unjust and unreasonable despite it falling within that range.<sup>298</sup>

175. The Commission also explained that the base ROEs that fall within the applicable range of presumptively just and reasonable base ROEs will be presumed to be just and reasonable, and those that fall outside of the applicable range will be presumed to be unjust and unreasonable.<sup>299</sup> The Commission further found that those presumptions would only be rebuttable presumptions because the ultimate determination of whether an existing ROE is unjust and unreasonable still “depends on the particular circumstances of the case.”<sup>300</sup> The Commission noted that other evidence regarding the particular circumstances of the case could rebut a presumption that applies, such as evidence regarding non-utility stock prices, investor expectations for non-utility stocks, various types of bond yields and their relation to stock prices, investor and other expert testimony, and testimony regarding the effects of rates on customers.<sup>301</sup>

## **B. Rehearing Requests**

176. MISO TOs argue that, while the concept of a range of presumptively just and reasonable ROE values has merit, there are problems with the quartile approach used in Opinion No. 569. First, MISO TOs contend that the Commission never reconciles its concept of risk-associated sub-ranges with its long-standing rationale for using the midpoint to establish base ROEs for groups of utilities (i.e., to reflect such a group’s broad range of risks). They contend that, while the midpoint rationale dovetails with *Emera Maine*’s recognition that “the zone of reasonableness creates a broad range of potentially lawful ROEs,” the quartile approach of Opinion No. 569 does not. MISO TOs state that the Commission’s historical reference to the midpoint explicitly recognizes the need to reflect the full range of required returns for a proxy group determined to be representative of a group of utilities such as the MISO TOs. But they contend that the Commission’s attempt to further parse this composite zone uses an unexplained and arbitrary notion of relative risk based on arbitrary quartiles and is inconsistent with the Commission’s own rationale for referencing the midpoint. Moreover, they assert that, as applied in Opinion No. 569, the effort lacks any foundation in case-specific evidence.<sup>302</sup>

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<sup>298</sup> *Id.* PP 61-62.

<sup>299</sup> *Id.* P 85.

<sup>300</sup> *Id.* P 68 (citing *Emera Maine*, 854 F.3d at 23).

<sup>301</sup> *Id.*

<sup>302</sup> MISO TOs Rehearing Request at 29.

177. In addition, MISO TOs contend that the Commission's new approach is inconsistent with the logic it uses to select the proxy group. They state that the proxy group is assembled using criteria which limit the proxies to companies that are considered to present investment risks comparable to those of the utility or group of utilities whose rates are at issue. Nevertheless, they argue, the Commission's quartile approach effectively truncates the zone of reasonableness by omitting from consideration the top one-eighth and the bottom one-eighth of the composite zone. They argue that the Commission's reasoning departs without explanation from the principle that every value in the zone of reasonableness is potentially a lawful ROE.<sup>303</sup>

178. MISO TOs further argue that the Commission derives its quartiles from the composite range of DCF and CAPM results but overlooks that different proxy companies' results are found at the low end, the middle, and the high end of each of the two analyses on which the Commission relies. Thus, MISO TOs assert, one or more proxies that fall within the "above average risk" quartile in the results of the DCF model appear in a different quartile of the CAPM results. MISO TOs argue that the Commission therefore cannot rationally distinguish "high risk" proxy companies from "low risk" proxies in its composite zone. They contend that the Commission has not provided an economic or financial rationale for the quartile approach.<sup>304</sup>

179. With regard to the Second Complaint, MISO TOs contend that there likewise is no need for a new ROE methodology to justify dismissal of the Second Complaint. According to MISO TOs, the upper midpoint of the Commission's IBES-based DCF analysis for the Second Complaint study period is only 9.83%, reflecting—just as in the First Complaint—anomalous capital market conditions. But they assert that alternative benchmark estimates and state ROE data demonstrate, as the Presiding Judge found, that the DCF outcome is unreliable. They argue that midpoint CAPM and Expected Earnings estimates (10.49% and 11.41%, respectively), as well as a Risk Premium estimate of 10.36%, establish that the Second Complaint record does not support a finding that the 10.32% base ROE determined in Opinion No. 551 was unjust and unreasonable for the Second Complaint study period.<sup>305</sup> They state that state-authorized ROEs for lower-risk integrated and distribution utilities further corroborate that conclusion, citing witness Lapson's national survey of state regulatory decisions in 2014-2015 that authorized base ROEs of 10% or more for retail utility operations in states within the MISO region.<sup>306</sup>

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<sup>303</sup> *Id.* at 29-30.

<sup>304</sup> *Id.* at 30.

<sup>305</sup> *Id.* at 35.

<sup>306</sup> *Id.* at 35-37.

180. MISO TOs state that, if the Commission continues to pursue Opinion No. 569's approach to using ranges of presumptively just and reasonable ROEs based on a portion of the zone of reasonableness, two alternative approaches would remedy the principal shortcoming of the Commission's quartile approach (i.e., its excision of the highest and lowest eighths of the composite zone). They state that this can be resolved either by dividing the entire zone of reasonableness into equal thirds, rather than quarters, or by using the upper and lower midpoints of the zone of reasonableness to segregate the three portions of the zone.<sup>307</sup>

181. Exelon argues that the Commission's ranges of presumptively just and reasonable ROEs are too narrow. Exelon contends that the Commission does not explain why it makes sense to treat only 25% of the range of investor expectations that is developed by the financial models as presumptively just and reasonable. Exelon asserts that the Commission already identifies a screened peer group with comparable risk to the subject utility when it selects a proxy group, and that it is unreasonable to adjust again for that same risk in determining quartiles for ranges of presumptively just and reasonable ROEs.<sup>308</sup>

182. Exelon also argues that there is no rationale for placing the top eighth and bottom eighth of the zone of reasonableness out of the ranges of presumptively just and reasonable ROEs. Exelon further contends that, while quartiles result in an even division, the Commission never justifies its use of quartiles.<sup>309</sup> In addition, Exelon asserts that the Commission's ranges of presumptively just and reasonable ROEs are so narrow that small proxy group changes, such as the exclusion of a proxy group company or a change in the performance of a particular proxy group company, could result in a utility's ROE changing from presumptively just and reasonable to presumptively unjust and unreasonable. Exelon argues that this will create rate instability that will chill investment.<sup>310</sup>

183. Exelon also disagrees with the Commission's conclusion in Opinion No. 569 that the use of ranges of presumptively just and reasonable ROEs does not change the burdens that apply in the context of section 206 complaints. Exelon contends that, under Opinion No. 569, an average risk utility whose base ROE is above the applicable range of presumptively just and reasonable ROEs bears the burden of overcoming a presumption that its ROE is unjust and unreasonable, which removes the burden on the complainant to

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<sup>307</sup> *Id.* at 38.

<sup>308</sup> Exelon Rehearing Request at 8-10.

<sup>309</sup> *Id.* at 10-11.

<sup>310</sup> *Id.* at 15-17.

demonstrate that such an ROE is unjust and unreasonable. Exelon asserts that this departure from section 206 is especially unreasonable because the upper and lower eighths of the zone of reasonableness can never be presumptively just and reasonable.<sup>311</sup>

184. Transource Energy argues that the full zone of reasonableness represents the broad range of potentially reasonable ROEs, as the court stated in *Emera Maine*, and thus that full zone presents the best evidence of what is a potentially lawful ROE, not a subzone within the overall zone. Transource Energy contends that the full zone of reasonableness already accounts for risk and contains comparable and representative companies. Transource Energy asserts that the Commission does not provide evidence justifying that there are identifiable distinctions in the risk profiles of firms that constitute the proxy group which fall neatly into quartiles. Transource Energy further argues that the Commission's exclusion of the top and bottom eighths of the zone of reasonableness ignore otherwise valid ROE estimates in the ranges of presumptively just and reasonable ROEs.<sup>312</sup>

185. CAPs argue that *Emera Maine* did not require the Commission to adopt a new methodology, but only to better explain Opinion No. 531's finding that the New England TOs' existing 11.14% base ROE was unjust and unreasonable.<sup>313</sup> If the Commission decides to adopt a new methodology, CAPs argue that the quartile approach is flawed. CAPs argue that the presumptively just and reasonable zones raise the customers' burden of proof to challenge ROEs that may have become unjust and unreasonable. CAPs assert that the presumptively just and reasonable zones are contrary to the customer protection principles embodied in the FPA and introduces an unlawful asymmetry between rate increases sought by utilities under section 205 of the FPA and rate reductions sought by customers under section 206 of the FPA.<sup>314</sup>

186. If the Commission keeps the presumptively just and reasonable zones, CAPs argue that the Commission should narrow these zones. They contend that the quartile approach results in unnecessarily broad presumptive zones. They reiterate their argument from their initial briefs that the Commission could narrow the presumptive immunity zones by, for example, establishing five risk groups: very-low risk; moderately low risk; average risk; moderately high risk; and very high risk. Under this approach, CAPs argue, the zones would be narrower, representing sextiles rather than quartiles of the composite

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<sup>311</sup> *Id.* at 19-22.

<sup>312</sup> Transource Energy Rehearing Request at 30-35.

<sup>313</sup> CAPs Rehearing Request at 12-16.

<sup>314</sup> *Id.* at 16.

range.<sup>315</sup> Regarding the Commission’s statement that the quartile approach using three risk groups strikes an appropriate balance between the interests of customers and utilities, CAPs argue that the very establishment of presumptively just and reasonable zones already tilts the balance of interests in favor of shareholders.<sup>316</sup>

187. CAPs argue that the Commission did not explain why the “traditional” starting point for assessing risk is relevant or even preferable to a narrower and more precise definition of risk that would better protect customers. CAPs argue that it is possible to start the risk assessment at a point of central tendency within any sub-range of the zone of reasonableness. Furthermore, CAPs assert that the proximity of potentially lawful ROEs to the just and reasonable ROE does not render these ROEs presumably just and reasonable (i.e., ROEs within the zone of reasonableness that are close to the just and reasonable ROE may be a little less unjust and unreasonable, but remain unjust and unreasonable nonetheless). They argue that the courts have ruled that the just and reasonable standard does not permit “even a little unlawfulness.”<sup>317</sup>

188. CAPs also argue that the notion of presuming the justness and reasonableness of ROEs close to the lawful ROE runs afoul of multiple rulings made by the court in *Emera Maine*: (1) it is arbitrary and capricious to assume that there are only three possible stopping points—lower midpoint, midpoint, and upper midpoint—on the continuum of “potentially just and reasonable” ROEs that lie within the range of adopted proxy results; (2) the fact that a rate falls within the zone of reasonableness does not establish that the rate is the just and reasonable rate for the utility at issue; and (3) whether a rate, even one within the zone of reasonableness, is unlawful depends on the particular circumstances of the case, and, therefore, requires that a numerical comparison of model results to an existing ROE be accompanied by a narrative explanation of what made a difference between the two unreasonable.<sup>318</sup> CAPs argue that, if the proximity of an ROE to the just and reasonable ROE does not conclusively prove the justness and reasonableness of an ROE, then such proximity cannot be used to infer that all ROEs that are close to the just and reasonable ROE within a certain range “may” be just and reasonable.<sup>319</sup>

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<sup>315</sup> *Id.* at 16-17.

<sup>316</sup> *Id.* at 17.

<sup>317</sup> *Id.* at 18 (citing *Consumers Fed’n of Am. v. FPC*, 515 F.2d 347, 358 n.64 (D.C. Cir. 1975) (quoting *FPC v. Texaco*, 417 U.S. 380, 399 (1974))).

<sup>318</sup> *Id.* at 18-19.

<sup>319</sup> *Id.* at 19-20.

189. RPGI asserts that, for average risk utilities, the midpoint of the zone of reasonableness is what the existing ROE must be compared to—not a range of presumptively just and reasonable ROEs—and any existing ROE that exceeds that midpoint should be presumed unjust and unreasonable. RPGI also contends that the use of ranges of presumptively just and reasonable ROEs contravenes the FPA’s consumer protection purpose because it can insulate an existing ROE from a section 206 challenge even if, for example, an existing ROE for an average-risk group of utilities exceeds the midpoint. In addition, RPGI argues that, while the Commission states that the ranges of presumptively just and reasonable ROEs create only a rebuttable presumption, it is difficult to imagine the circumstances under which the presumption could be rebutted. RPGI asks the Commission to grant rehearing to reject the use of ranges of presumptively just and reasonable ROEs.<sup>320</sup>

### C. Commission Determination

190. We grant rehearing and hold that the ranges of presumptively just and reasonable base ROEs will be calculated by dividing the overall composite zone of reasonableness into three equal portions. We are persuaded by the requests for rehearing that contend that the Commission’s ranges of presumptively just and reasonable base ROEs should encompass the entire composite zone of reasonableness. The court in *Emera Maine* stated that “the zone of reasonableness creates a broad range of potentially lawful ROEs[,]”<sup>321</sup> and we now find that excluding the bottom eighth and top eighth of the overall zone of reasonableness, as the Commission’s approach in Opinion No. 569 did, is inappropriate because it will ignore some “potentially lawful ROEs” when determining which ranges of ROEs should be considered presumptively just and reasonable. The ranges of presumptively just and reasonable base ROEs are intended to help inform the Commission’s analysis under section 206 by identifying what subset of the “potentially lawful ROEs” for given utilities represents the range of base ROEs that would likely be just and reasonable for utilities of that risk profile. We find that it would be inappropriate to identify a subset of “potentially lawful ROEs” for given utilities without considering all of those potentially lawful ROEs.

191. We are further persuaded by arguments that it is inappropriate to exclude the bottom eighth and top eighth of the overall composite zone of reasonableness because even those portions of the overall composite zone of reasonableness are results from proxy group companies that have been screened using criteria which limit the proxies to companies that are considered to present investment risks comparable to those of the utility or group of utilities whose rates are at issue. We find that, when we have already

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<sup>320</sup> RPGI Rehearing Request at 9-16.

<sup>321</sup> *Emera Maine*, 854 F.3d at 26.

constructed a proxy group using limitations for comparable risk, it would be too restrictive to then construct ranges of presumptively just and reasonable base ROEs using only the results of some of those risk-screen proxy group companies. That initial proxy group screening process is intended to lead to the “broad range of potentially lawful ROEs” for a given utility or utilities, and we find that is more appropriate for the ranges of presumptively just and reasonable base ROEs to encompass the results from all of the proxy group companies that were identified in that process, rather than to exclude the results of the bottom eighth and top eighth of those results.

192. Exelon argues that the ranges of presumptively just and reasonable ROEs used in Opinion No. 569 are too narrow. MISO TOs make a similar argument, contending that the Commission’s ranges of presumptively just and reasonable ROEs are inappropriate because they overlook that one or more proxies that fall within a particular risk profile range for one of the models used by the Commission may fall within a different risk profile range for a different model. CAPs make an opposing argument, asserting that the Commission’s ranges are unnecessarily broad. We continue to find that using three risk groups strikes an appropriate balance between the interests of customers and utilities because they will be narrow enough to protect customers from unjust and unreasonable ROEs while also providing utilities and all market participants with an additional objective benchmark that the Commission will use to assess whether an ROE is likely unjust and unreasonable.<sup>322</sup> With respect to MISO TOs’ argument that the ranges are inappropriate because the proxies that fall within a particular risk profile range for one of the models used by the Commission may fall within a different risk profile range for a different model, we find that this concern is addressed by averaging the results of the different models. We recognize that proxy group companies may fall within different risk profile ranges in different models, and this is why we average the results of those models. Indeed, this is a significant reason why we are considering different models and averaging their results—so that we can consider and give equal weight to the different results that are produced by these models, reflecting to a greater extent the models that investors consider.

193. Accordingly, we will continue to use three ranges of presumptively just and reasonable base ROEs and that they should be constructed by dividing the overall zone of reasonableness into three equal segments. This construction will include all of the “potentially lawful ROEs” in the zone of reasonableness in one of the ranges of presumptively just and reasonable base ROEs.

194. The Commission explained that its approach to constructing the ranges of presumptively just and reasonable base ROEs in Opinion No. 569 was based on the logic that the end points of a range for a given risk profile should be closer to the traditional

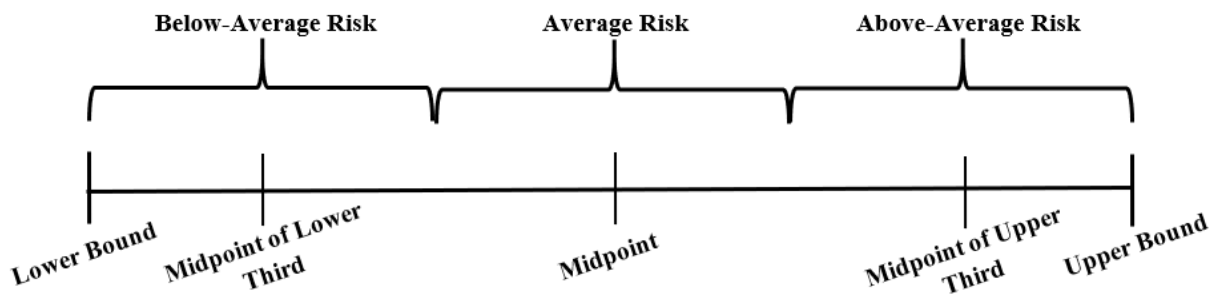
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<sup>322</sup> See *id.* P 84.



starting point for analyzing the ROEs of utilities with that risk profile than they are to the traditional starting points for utilities with a different risk profile.<sup>323</sup> Upon further consideration, given our decision to use three ranges of presumptively just and reasonable base ROEs that together encompass the overall zone of reasonableness, we find it appropriate to modify the traditional starting points for below-average and above-average risk utilities to be the midpoint of the lower and upper thirds, respectively. Applying these new starting points, as well as the traditional midpoint of the zone of reasonableness starting point for average risk utilities, will ensure that the end points for all three risk profile ranges will be closer to the starting point for analyzing ROEs of utilities with each respective risk profile than they are to the starting points for utilities with different risk profiles. Below is an illustration of the overall composite zone of reasonableness divided into three equal ranges of presumptively just and reasonable base ROEs.

Figure 2: Ranges of Presumptively Just and Reasonable Base ROEs



195. Exelon asserts that the use of ranges of presumptively just and reasonable base ROEs removes the burden on the complainant to demonstrate that an existing base ROE is unjust and unreasonable when such a base ROE is above the applicable range of presumptively just and reasonable ROEs because the utility or utilities then bear the burden of overcoming a presumption that its ROE is unjust and unreasonable. CAPs make a similar argument in the opposite direction, contending that the presumptively just and reasonable zones raise the customers' burden of proof to challenge ROEs that may have become unjust and unreasonable. We find these arguments unavailing. As the

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<sup>323</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 63. Those traditional starting points were the midpoint of the zone of reasonableness for average risk utilities, the midpoint of the lower half of the zone for below-average risk utilities, and the midpoint of the upper half of the zone for above-average risk utilities.

Commission explained in Opinion No. 569,<sup>324</sup> the change to our ROE methodology to utilize ranges of presumptively just and reasonable ROEs does not change the burdens that parties face under section 206. It is merely an objective benchmark that will be used in our overall analysis of base ROEs to help determine if an existing rate has been shown to be unjust and unreasonable under section 206. It remains the case, as it was before implementing this modification to our ROE methodology, that “[t]he proponent of a rate change under section 206 . . . bears ‘the burden of proving that the existing rate is *unlawful*.’”<sup>325</sup> The use of ranges of presumptively just and reasonable ROEs does not change this burden. Those ranges will merely serve to inform our assessment of ROEs. The fact that our use of those ranges will involve employing a rebuttable presumption does not change the burdens that apply.

196. MISO TOs and CAPs also take issue with the use of presumptively just and reasonable base ROEs because they assert that *Emera Maine* did not require the Commission to adopt the use of such ranges. As the Commission explained in Opinion No. 569,<sup>326</sup> the use of ranges of presumptively just and reasonable ROEs in our ROE methodology ensures that our determinations satisfy the requirements of the *Emera Maine* decision. The court in *Emera Maine* found that the Commission must “explain what circumstances” support its “actual finding as to the lawfulness” of an existing base ROE in a section 206 proceeding, and the use of ranges of presumptively just and reasonable base ROEs will allow us to do so in a structured manner. Using such ranges will produce a specific result from our risk profile determination—a rebuttable presumption—and then we will make an explicit finding as to whether the other evidence presented by the parties in the case has rebutted that presumption; therefore, this analysis will require us to “explain what circumstances” support our “actual finding as to the lawfulness” of an existing base ROE. Moreover, because risk profile is the particular circumstance most relevant to determining whether an existing ROE is unjust and unreasonable, using ranges of presumptively just and reasonable ROEs based on a utility’s risk profile will ensure that the risk profile determination has a clear and significant connection to our ultimate finding relating to lawfulness. Accordingly, we continue to find that that the use of ranges of presumptively just and reasonable ROEs in our ROE methodology will ensure that our determinations satisfy the requirements of the *Emera Maine* decision.

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<sup>324</sup> See *id.* P 79.

<sup>325</sup> *Emera Maine*, 854 F.3d at 24 (emphasis in original) (quoting *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993)).

<sup>326</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at PP 70-71.

197. CAPs and RPGI assert that the use of ranges of presumptively just and reasonable base ROEs is inappropriate because any base ROE that exceeds the applicable base ROE produced by the Commission’s analyses should be found unjust and unreasonable. We disagree. As the Commission stated in Opinion No. 569,<sup>327</sup> the court in *Emera Maine* rejected this approach, finding that the Commission must do more than simply identify a single ROE from its own analysis and then determine if the existing ROE is unjust and unreasonable based on whether it exceeds that single ROE. Accordingly, we affirm the Commission’s finding that it should not continue to follow the approach that was reversed in *Emera Maine* of identifying a single cost of equity result and then finding that an existing ROE is unjust and unreasonable under prong one of section 206 if it exceeds that cost of equity.

198. CAPs also reiterate their argument that the use of ranges of presumptively just and reasonable base ROEs creates an unlawful asymmetry between rate increases sought by utilities under section 205 and rate reductions sought by customers under section 206. We disagree and affirm the Commission’s finding that the use of presumptively just and reasonable ranges does not create any such unlawful asymmetry.<sup>328</sup> As the Commission explained, the showing that is required under section 206 differs from the showing that is required under section 205. The D.C. Circuit explained that “[t]he purpose of section 206 is ‘quite different’ from that of section 205,”<sup>329</sup> “[s]ection 206’s procedures are ‘entirely different’ and ‘stricter’ than those of section 205,” and that, while “[a] utility filing a rate adjustment under section 205 must show that the adjustment is *lawful* . . . [t]he proponent of a rate change under section 206 [] bears ‘the burden of proving that the existing rate is *unlawful*.’”<sup>330</sup> The Commission does not have the authority to change those standards and our modification of the Commission’s ROE methodology to use ranges of presumptively just and reasonable ROEs adheres to those standards; therefore, we reject CAPs’ argument on this point.

199. We also are not persuaded by CAPs’ argument that the use of ranges of presumptively just and reasonable base ROEs is inconsistent with other rulings made by the court in *Emera Maine*. Contrary to CAPs’ assertion, the use of such ranges does not assume that there are only three possible stopping points—lower midpoint, midpoint, and upper midpoint—on the continuum of “potentially just and reasonable” ROEs. In fact, it

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<sup>327</sup> See *id.* P 73.

<sup>328</sup> See *id.* P 74.

<sup>329</sup> *Emera Maine*, 854 F.3d at 24 (quoting *City of Winnfield, La. v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984)).

<sup>330</sup> *Id.* (emphasis in original) (quoting *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993)).

does the opposite—it recognizes that there may be more than one just and reasonable return and employs ranges of just and reasonable ROEs to help determine if a particular existing base ROE is just and reasonable in light of the overall composite zone of reasonableness and the risk profile of the utilities at issue. The use of presumptively just and reasonable ranges also does not find that if a rate falls within the zone of reasonableness, then it is just and reasonable, as CAPs suggest. As described above, the fact that a rate falls within the zone of reasonableness will not result in a finding that such a rate is just and reasonable. In fact, it is possible that a rate that falls within the overall zone, but outside of the applicable presumptively just and reasonable range, would be presumed unjust and unreasonable. Similarly, whether an existing ROE is unjust and unreasonable, even one that falls within the applicable range of presumptively just and reasonable ROEs, still “depends on the particular circumstances of the case.”<sup>331</sup> Accordingly, if an existing ROE falls within the applicable range of presumptively just and reasonable ROEs, the presumption that the ROE is just and reasonable is a rebuttable presumption. Therefore, other evidence regarding the particular circumstances of the case can demonstrate that an existing ROE is unjust and unreasonable even if it falls within the applicable range of presumptively just and reasonable ROEs, such as evidence regarding non-utility stock prices, investor expectations for non-utility stocks, various types of bond yields and their relation to stock prices, investor and other expert testimony, and testimony regarding the effects of rates on customers.

## **XV. Acting in these Proceedings as Opposed to in Base ROE NOI Proceeding**

### **A. Rehearing Requests**

200. Parties on rehearing argue that, because the Commission has sought public input on the Commission’s base ROE policy from all interested parties in the Base ROE NOI proceeding,<sup>332</sup> it would be inappropriate for the Commission to establish a new base ROE policy in these MISO ROE proceedings without considering the broader universe of comments and evidence submitted in response to the Base ROE NOI.

201. Specifically, Exelon states that the thousands of pages of comments from utilities, industry groups, and other interested parties provided the Commission with a wide range of perspectives and valuable data. Exelon, MISO TOs, and Ameren argue that promulgating a new ROE method in an individual proceeding ignores the evidence submitted in the Base ROE NOI docket.<sup>333</sup> Moreover, Exelon, Transource Energy, and

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<sup>331</sup> *Id.*

<sup>332</sup> Base ROE NOI, 166 FERC ¶ 61,207.

<sup>333</sup> Exelon Rehearing Request at 27; *see also* MISO TOs Rehearing Request at 56-57; Ameren Rehearing Request at 27.

Ameren explain that, in the Base ROE NOI proceeding, the Commission specifically sought comments regarding the ROE four-financial model approach and, therefore, those parties participating in the Base ROE NOI proceeding did not address the new ROE two-model method that was introduced in Opinion No. 569 or the potential issues with the ROE four-model financial model approach revealed in Opinion No. 569.<sup>334</sup> Exelon and Ameren comment that establishing a new base ROE policy in these proceedings, as opposed to the Base ROE NOI proceeding, is inappropriate because the Commission's actions here will not reflect the input and evidence that was provided in the Base ROE NOI proceeding by other stakeholders who are not parties to these proceedings.<sup>335</sup> Exelon argues that the Commission should not rely on the fact that an outcome is reasonable as applied to this group of transmission owners, without analyzing the potential outcomes that will result from wider application of this method.<sup>336</sup> Transource Energy recognizes that the Commission has some discretion to enact policies through adjudication. However, it contends that under this set of circumstances the Commission's reliance on an adjudication and not the pending Base ROE NOI "amounts[s] to an abuse of discretion" that violates the Administrative Procedure Act.<sup>337</sup>

202. MISO TOs also assert that the Commission does not engage in reasoned decision-making when it disregards relevant evidence available to it, even if the evidence is in a different docket,<sup>338</sup> and it would be arbitrary and capricious for the Commission to set an industry-wide, binding precedent while ignoring this evidence.<sup>339</sup> Accordingly, MISO TOs argue that the Commission should take official notice in this proceeding of pertinent evidence introduced in the NOI docket.<sup>340</sup> MISO TOs state that the Commission's generic, industry-wide NOI on the methodology for determining base ROEs provides a more logical and reasonable forum for the Commission to develop, with

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<sup>334</sup> Exelon Rehearing Request at 27-28; Transource Energy Rehearing Request at 36-37; Ameren Rehearing Request at 24.

<sup>335</sup> Exelon Rehearing Request at 5, 12, 27; Ameren Rehearing Request at 24.

<sup>336</sup> Exelon Rehearing Request at 27.

<sup>337</sup> Transource Energy Rehearing Request at 37 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

<sup>338</sup> MISO TOs Rehearing Request at 55.

<sup>339</sup> *Id.* at 58.

<sup>340</sup> *Id.* at 55.

the benefit of the extensive stakeholder input it solicited, any changes to its ROE methodology that it may find to be appropriate.<sup>341</sup>

203. Ameren argues that the fact that the Commission has left open the generic NOI docket, while at the same time making an industry-wide policy change in this adjudicated proceeding, constitutes arbitrary and capricious agency decision-making.<sup>342</sup>

204. Finally, Exelon asserts that the Commission should limit the application of any new method for assessing base ROEs adopted by Opinion No. 569 to these MISO cases and clarify that the Commission is not prejudging the application of any new method to other utilities.<sup>343</sup>

## **B. Commission Determination**

205. We are not persuaded that it is inappropriate for the Commission to establish a new base ROE policy in these MISO complaint proceedings when it has also issued the Base ROE NOI to obtain input on this topic from interested parties. The Commission “has substantial discretion to establish rules of general application by case-specific adjudication and is not restricted to the use of a separate generic proceeding”<sup>344</sup> to

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<sup>341</sup> *Id.* at 37.

<sup>342</sup> Ameren Rehearing Request at 24.

<sup>343</sup> Exelon Rehearing Request at 28.

<sup>344</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 449 (quoting *Procedures for Disposition of Contested Audit*, Order No. 675, 114 FERC ¶ 61,178, at P 32 (2006). See also *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267, 294 (1974) (“[A]djudicative cases may and do serve as vehicles for the formulation of agency policies.”); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1974) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”); *Michigan-Wisconsin Pipeline Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975) (“[T]here is no question that the Commission may attach precedential and even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a stare decisis manner.”); *Pac. Gas and Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“[A]gency may establish binding policy through rulemaking procedures . . . or through adjudications which constitute binding precedents.”); *AEP Power Mktg., Inc.*, 108 FERC ¶ 61,026, at P 187 (2004) (“Our decision to establish new policy in the context of case-specific proceedings is clearly within our authority.”); *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349, at P 51 (2003) (“The Commission, moreover, is not limited to notice and comment rulemaking to develop

establish such rules. The Commission similarly has explained that “[o]ur decision to establish new policy in the context of case-specific proceedings is clearly within our authority.”<sup>345</sup> Thus, while the Commission issued the Base ROE NOI, this did not prohibit it from changing its base ROE policy in an adjudication nor require that changes in base ROE policy occur in that Base ROE NOI proceeding. Importantly, we note that the due process protections afforded to all parties to these proceedings are available to every party to Commission proceedings. Any party in other proceedings will be free to argue, just as the parties to these proceedings were, that the base ROE methodology applied in any of these proceedings should be modified or applied differently because of the specific facts and circumstances of the proceeding involving that party.

## **XVI. Complaint-Specific Results: First Complaint**

206. As discussed in this order, we are revising the methodology for determining whether an existing ROE is unjust and unreasonable and, if so, what is a just and reasonable ROE pursuant to section 206 of the FPA. Applying this methodology to the First Complaint proceeding, we continue to find that the rate to be reviewed in that proceeding— MISO TOs’ 12.38% ROE—is unjust and unreasonable. Having addressed the first prong of the Commission’s dual burden under section 206 and thus satisfied the “condition precedent”<sup>346</sup> to exercising our authority to change a rate under section 206, we grant rehearing of Opinion No. 569 and find that a just and reasonable replacement ROE for MISO TOs in the First Complaint proceeding is 10.02% under the second prong of section 206.

207. Below we address the “specific findings”<sup>347</sup> as to the “particular circumstances”<sup>348</sup> of the First Complaint proceeding that establish “a rational connection”<sup>349</sup> between the record evidence in that proceeding and our decisions under both prongs of section 206 herein to establish that we have “made a principled and

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policy. Agencies generally are permitted considerable discretion to choose whether to proceed by rulemaking or by adjudication.”)).

<sup>345</sup> *AEP Power Mktg.*, 107 FERC ¶ 61,018, at P 199 (2004).

<sup>346</sup> *Emera Maine*, 854 F.3d at 25 (citing *FPC v. Sierra Pac. Power*, 350 U.S. 348, 353 (1956)).

<sup>347</sup> *Id.* at 30.

<sup>348</sup> *Id.* at 27 (citing *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)).

<sup>349</sup> *Id.* at 28 (citing *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 782 (2016)).

reasoned decision supported by the evidentiary record.”<sup>350</sup> The Commission bases its decisions concerning just and reasonable ROEs for public utilities on the most recent information in the record regarding market cost of equity. Consequently, the starting point for determining whether MISO TOs’ existing ROE has become unjust and unreasonable must be a consideration of whether the current market cost of equity has changed since the MISO TOs’ existing ROE was established based on financial data for the six months ending February 2002, such that the existing base ROE is no longer just and reasonable. Accordingly, we begin by determining a composite zone of reasonableness using the most recent financial information in the record of the First Complaint proceeding. We continue to find that the appropriate study period including this most recent financial information is the first six months of 2015.<sup>351</sup>

#### A. DCF Analysis

208. In Opinion No. 569, the Commission affirmed Opinion No. 551’s approval of the Presiding Judge’s DCF analysis, with one exception. In Opinion No. 569, the Commission held that only the IBES short-term growth projection should be used for calculating the (1+.5g) adjustment to the dividend yield, instead of the composite growth rate including both short- and long-term growth rates that was used by the Presiding Judge. Here, we affirm the Commission’s holding on that issue and the Commission’s use of the low-end outlier test applied in Opinion No. 569. Accordingly, our determinations on those issues do not result in any changes to the DCF analysis that was used in Opinion No. 569 for the First Complaint proceeding.

209. As discussed above, we grant rehearing of Opinion No. 569 to modify the high-end outlier test that was used there to now treat any proxy company as high-end outlier if its cost of equity estimated under the model in question is more than 200% of the median result of all of the potential proxy group members in that model before any high or low-end outlier test is applied, subject to a “natural break” analysis. The Commission explained in Opinion No. 569 that applying the version of the high-end outlier test that was used there did not result in the exclusion of any company from the DCF proxy group as a high-end outlier.<sup>352</sup> The high-end outlier test as modified in this order also does not result in any exclusions. Accordingly, our determination on this issue also does not result in any changes to the DCF analysis that was used in Opinion No. 569. We also grant rehearing of Opinion No. 569 to find that the long-term growth rate should be given 20% weighting and the short-term growth rate 80% weighting in the two-step

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<sup>350</sup> *Id.* at 30 (citing *S. Cal. Edison v. FERC*, 717 F.3d at 181).

<sup>351</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 460; Opinion No. 551, 156 FERC ¶ 61,234 P 19.

<sup>352</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 512.



DCF model. Our DCF analysis in the First Complaint proceeding reflecting this finding is shown in Appendix II to this order. Based on these determinations, we conclude that the DCF zone of reasonableness is 6.97% to 12.07%.

## **B. CAPM Analysis**

210. In Opinion No. 569, the Commission affirmed Opinion No. 551's approval of the Presiding Judge's CAPM analysis in the First Complaint proceeding, with two exceptions related to the market risk premium. The Commission held that only the IBES short-term growth projection should be used in the one-step DCF analysis of the dividend paying members of the S&P 500, instead of the average of the IBES and *Value Line* growth projections approved by the Presiding Judge.<sup>353</sup> In addition, the Commission held that companies with negative ROEs or ROEs above 20% should be excluded from that analysis.<sup>354</sup>

211. As discussed above in section IV.C.1, we grant rehearing of Opinion No. 569 to, in future proceedings, consider the use of *Value Line* short-term growth rate projections in the one-step DCF analysis of the dividend paying members of the S&P 500 that is conducted in the CAPM. However, we find that the record is insufficient to allow us to use only *Value Line* short-term growth rates in the CAPM in the First Complaint proceeding. In addition, we affirm the Commission's application of the low-end outlier test and grant rehearing to modify the high-end outlier test, as described above. As the Commission explained in Opinion No. 569, the application of the low-end outlier test and the version of the high-end outlier that was used there did not result in the exclusion of any company from the CAPM proxy group.<sup>355</sup> The low-end outlier test and the modified high-end outlier test adopted herein also do not result in the exclusion of any company from the CAPM proxy group. Accordingly, we will continue to use the CAPM analysis that was relied upon in Opinion No. 569 for the First Complaint proceeding.<sup>356</sup> Based on these determinations, we conclude that the CAPM zone of reasonableness is 7.80% to 13.09%.

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<sup>353</sup> Opinion No. 551, 156 FERC ¶ 61,234 at PP 169, 172.

<sup>354</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 513.

<sup>355</sup> See *id.* PP 514-515.

<sup>356</sup> See *id.* P 513. The results of this CAPM analysis are reflected in page 6 of Attachment A to Trial Staff's Initial Briefs. See Trial Staff Initial Br. (II), Attachment A to App. 2 at 6.

### **C. Risk Premium Analysis**

212. As discussed above, we grant rehearing of Opinion No. 569 to find that the Risk Premium Model should be used in our ROE analysis under section 206 of the FPA. As described above, we adopt modifications to the Risk Premium analysis that was provided by MISO TOs in the record for the First Complaint proceeding. Appendix I to this order shows the results of the Risk Premium Model, as applied with modifications adopted herein.

213. This Risk Premium Model produces an ROE result of 10.10%.<sup>357</sup> As further discussed above, we will impute a zone of reasonableness from the ROE produced by the Risk Premium model for purposes of using the Risk Premium model in our analysis under the first prong of section 206. We do so by applying the average of the widths of the zones of reasonableness from the CAPM and DCF models to the ROE produced by the Risk Premium model, with that ROE serving as the measure of central tendency of the zone of reasonableness. In the First Complaint proceeding, the result of the Risk Premium Model is 10.10% and the average width of the zones of reasonableness produced by the CAPM and DCF models is 520 basis points. Applying this value to the Risk Premium result to impute a zone of reasonableness results in a Risk Premium zone of reasonableness of 7.50% to 12.70%.<sup>358</sup>

### **D. Composite Zone of Reasonableness and Section 206 Findings**

214. Averaging the top and bottom of the DCF, CAPM, and Risk Premium zones of reasonableness determined above based on financial data for the first six months of 2015 produces a composite zone of reasonableness in the First Complaint proceeding of 7.42% to 12.62%. The midpoint of that zone of reasonableness is 10.02%.

215. Having determined the composite zone of reasonableness based on financial data for the first half of 2015, we now turn to considering whether the MISO TOs' 12.38% ROE, which was determined based on financial data for the six months ending February 2002, may be found unjust and unreasonable pursuant to the first prong of section 206. In this order, we affirm the Commission's decision in Opinion No. 569 to use ranges of presumptively just and reasonable ROEs based on the risk profile of the MISO TOs to inform our decision whether their ROE has become unjust and unreasonable. However, as discussed above, we grant rehearing of Opinion No. 569 to find that those ranges should be calculated by dividing the overall composite zone of reasonableness into equal thirds.

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<sup>357</sup> See Appendix I.

<sup>358</sup> *Id.*

216. We affirm the Commission's determination in Opinion No. 569 that the MISO TOs should be treated as of average risk for purposes of determining the range of presumptively just and reasonable ROEs applicable to the MISO TOs.<sup>359</sup> In light of this determination, we find that the range of presumptively reasonable ROEs for consideration in determining whether MISO TOs' base ROE of 12.38% ROE in the First Complaint proceeding is unjust and unreasonable should be the middle third of the zone of reasonableness based on the revised construction of the presumptively just and reasonable zones adopted in this order. In the First Complaint proceeding, that range is from 9.15% to 10.89%.<sup>360</sup>

217. The MISO TOs' 12.38% is 149 basis points above the range of presumptively just and reasonable ROEs for the MISO TOs. Accordingly, we find that it is presumptively unjust and unreasonable. It is thus clear that, in light of our estimate of the cost of capital, the MISO TOs' 12.38% ROE is well outside any possible range of potentially just and reasonable ROEs for the MISO TOs. In order to rebut the presumption that the ROE is unjust and unreasonable, we would look at other evidence, such as state ROEs, ROEs of non-utility companies, ROEs produced by other methodologies, non-utility stock prices, investor expectations for non-utility stocks, various types of bond yields and their relation to stock prices, investor and other expert testimony, or testimony regarding the effects of rates on customers that would indicate that this is not the case. However, the record lacks such evidence sufficient to rebut the presumption. For example, the evidence in the record regarding state ROEs indicates that all state-authorized ROEs during the period April 1, 2013 through March 31, 2015 for integrated electric utilities providing generation, transmission, and distribution services ranged from 9.5% to 10.4% and that 87.34% of state-authorized ROEs for both integrated electric utilities and distribution-only electric utilities during that period were within this range.<sup>361</sup> The fact that MISO TOs' 12.38% ROE is 198 basis points above this range further demonstrates that MISO TOs' 12.38% ROE is unjust and unreasonable. In these circumstances, we find under the first prong of section 206 that the MISO TOs' 12.38% ROE that is the subject of the First Complaint proceeding has become unjust and unreasonable.

218. Having found that the MISO TOs' existing ROE is unjust and unreasonable, we turn to the establishment of a just and reasonable replacement ROE under the second prong of section 206. As discussed above, we have found that the midpoint of the composite zone of reasonable ROEs based on the most recent financial information in the record of the First Complaint proceeding is 10.02%. As discussed above, we find that the

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<sup>359</sup> See *id.* PP 518-521.

<sup>360</sup> See Appendix III.

<sup>361</sup> See, e.g., Opinion No. 551, 156 FERC ¶ 61,234 at P 240.

MISO TOs are of average risk. Our policy is to set an RTO-wide ROE at the midpoint of the zone of reasonableness when the transmission owners receiving the RTO-wide ROE are of average risk. Accordingly, we find that the just and reasonable replacement ROE for the MISO TOs in the First Complaint proceeding is 10.02%. We therefore grant rehearing of Opinion No. 569 in part to require the MISO TOs to adopt a 10.02% ROE effective September 28, 2016, the date Opinion No. 551 required the MISO TOs to adopt a 10.32% ROE.

## **XVII. Complaint Specific Results: Second Complaint**

### **A. Existing Rate for Purposes of Second Complaint and Overview**

219. As discussed further below, we affirm the Commission’s finding in Opinion No. 569 that the 10.02% base ROE established in the First Complaint proceeding is the existing rate to be reviewed for purposes of the Second Complaint proceeding because that is the rate which we would have to find unjust and unreasonable under the first prong of section 206 of the FPA, before we could require a new ROE “to be thereafter observed” pursuant to the second prong of section 206. As the Commission explained in Opinion No. 569, any new just and reasonable rate that we require “to be thereafter observed” pursuant to section 206(a) will replace the currently effective rate, not some previously effective rate. Accordingly, in order to determine a new rate to be thereafter observed, we must examine what the currently effective rate is because that is the rate that will need to be replaced if it is unjust and unreasonable. As discussed in the preceding section, in the First Complaint proceeding, we require MISO TOs to reduce their ROE to 10.02% effective prospectively from September 28, 2016. Therefore, that is the MISO TOs’ currently effective ROE when we are deciding whether MISO TOs’ ROE is unjust and unreasonable and should be modified prospectively pursuant to section 206 in the Second Complaint proceeding.

220. As discussed in this order, we are revising the methodology for determining whether an existing ROE is unjust and unreasonable and, if so, what is a just and reasonable ROE pursuant to section 206. Applying this methodology to the Second Complaint proceeding, we continue to find that the rate to be reviewed in that proceeding— 10.02% base ROE established in the First Complaint proceeding—has not been shown to be unjust and unreasonable.

221. Below we address the “specific findings”<sup>362</sup> as to the “particular circumstances”<sup>363</sup> of the Second Complaint proceeding that establish “a rational

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<sup>362</sup> *Emera Maine*, 854 F.3d at 30.

<sup>363</sup> *Id.* at 27 (citing *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)).

connection”<sup>364</sup> between the record evidence in that proceeding and our decisions under both prongs of section 206 herein to establish that we have “made a principled and reasoned decision supported by the evidentiary record.”<sup>365</sup> Because the Commission bases its decisions concerning just and reasonable ROEs for public utilities on the most recent information in the record regarding market cost of equity, the starting point for determining whether the MISO TOs’ existing ROE has become unjust and unreasonable must be a consideration of whether the current market cost of equity has changed such that the 10.02% base ROE established in the First Complaint proceeding is unjust and unreasonable. Accordingly, we begin by determining a composite zone of reasonableness using the most recent financial information in the record of the Second Complaint proceeding. We continue to find that the appropriate study period including this most recent financial information is July 1, 2015 through December 31, 2015.<sup>366</sup>

## **B. DCF Analysis**

222. In Opinion No. 569, the Commission affirmed the Presiding Judge’s DCF analysis in Initial Decision (II) with one exception. The Commission held that only the IBES short-term growth projection should be used for calculating the (1+.5g) adjustment to the dividend yield, instead of the composite growth rate including both short- and long-term growth rates that was used by the Presiding Judge. Here, we affirm the Commission’s holding on that issue and the Commission’s use of the low-end outlier test applied in Opinion No. 569. Accordingly, our determinations on those issues do not result in any changes to the DCF analysis that was used in Opinion No. 569 for the Second Complaint proceeding.

223. As discussed above, we grant rehearing of Opinion No. 569 to modify the high-end outlier test that was used there. The Commission explained in Opinion No. 569 that applying the version of the high-end outlier test that was used there did not result in the exclusion of any company from the DCF proxy group as a high-end outlier.<sup>367</sup> The high-end outlier test as modified in this order also does not result in any exclusions. Accordingly, our determination on this issue also does not result in any changes to the DCF analysis that was used in Opinion No. 569. We also grant rehearing of Opinion No. 569 to find that the long-term growth rate should be given 20% weighting and the short-term growth rate 80% weighting in the two-step DCF model. Our DCF analysis in the Second Complaint proceeding reflecting this finding is shown in Appendix II to this

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<sup>364</sup> *Id.* at 28 (citing *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 782 (2016)).

<sup>365</sup> *Id.* at 30 (citing *S. Cal. Edison v. FERC*, 717 F.3d at 181).

<sup>366</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 524.

<sup>367</sup> *Id.* P 554.

order. Based on these determinations, we conclude that the DCF zone of reasonableness is 7.37% to 11.37%.

### C. CAPM Analysis

224. In Opinion No. 569, the Commission affirmed the Presiding Judge's CAPM analysis in the Second Complaint proceeding, with one exception related to the market risk premium. The Commission held that only the IBES short-term growth projection should be used in the one-step DCF analysis of the dividend paying members of the S&P 500, which was consistent with the Presiding Judge's approach in Initial Decision (II).<sup>368</sup> In addition, the Commission held that companies with negative ROEs or ROEs above 20% should be excluded from that analysis.<sup>369</sup>

225. As discussed above in section IV.C.1, we grant rehearing of Opinion No. 569 to, in future proceedings, consider the use of *Value Line* short-term growth rate projections in the one-step DCF analysis of the dividend paying members of the S&P 500 that is conducted in the CAPM. However, we find that the record is insufficient to allow us to use only *Value Line* short-term growth rates in the CAPM in the Second Complaint proceeding. In addition, we affirm the Commission's application of the low-end outlier test and grant rehearing to modify the high-end outlier test as described above. As the Commission explained in Opinion No. 569, the application of the low-end outlier test and the version of the high-end outlier test that was used there did not result in the exclusion of any company from the CAPM proxy group.<sup>370</sup> The low-end outlier test and modified high-end outlier test adopted herein also do not result in the exclusion of any company from the CAPM proxy group. Accordingly, we will continue to use the CAPM analysis that was relied upon in Opinion No. 569 for the Second Complaint proceeding.<sup>371</sup> Based on these determinations, we conclude that the CAPM zone of reasonableness is 8.35% to 12.63%.

### D. Risk Premium Analysis

226. As discussed above, we grant rehearing of Opinion No. 569 to find that the Risk Premium Model should be used in our ROE analysis under section 206 of the FPA. As

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<sup>368</sup> See Initial Decision (II), 155 FERC ¶ 63,030 at P 412.

<sup>369</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 555.

<sup>370</sup> See *id.* PP 556-557.

<sup>371</sup> See *id.* P 513. The results of this CAPM analysis are reflected in page 6 of Attachment A to Trial Staff's Initial Briefs. See Trial Staff Initial Br. (II), Attachment A to App. 2 at 6.

described above, we are adopting modifications to the Risk Premium analysis that was provided by the MISO TOs in the record for the Second Complaint proceeding. Appendix I of this order shows the results of the Risk Premium Model, as applied with modifications adopted herein.

227. This Risk Premium analysis produces an ROE result of 10.29%.<sup>372</sup> As further discussed above, we find that we will impute a zone of reasonableness from the ROE produced by the Risk Premium model for purposes of using the Risk Premium model in our analysis under the first prong of section 206. We do so by applying the average of the widths of the zones of reasonableness from the CAPM and DCF models to the ROE produced by the Risk Premium model, with that ROE serving as the measure of central tendency of the zone of reasonableness. In the Second Complaint proceeding, the result of the Risk Premium analysis is 10.29% and the average width of the zones of reasonableness produced by the CAPM and DCF models is 414 basis points. Applying this value to the Risk Premium result to impute a zone of reasonableness results in a Risk Premium zone of reasonableness of 8.22% to 12.36%.<sup>373</sup>

**E. Composite Zone of Reasonableness and Section 206 Findings**

228. Averaging the top and bottom of the DCF, CAPM, and Risk Premium zones of reasonableness determined above based on the most recent financial data in the record of the Second Complaint proceeding produces a composite zone of reasonableness in the Second Complaint proceeding of 7.98% to 12.12%. The midpoint of that zone of reasonableness is 10.05%.

229. The applicable range of presumptively just and reasonable ROEs for the MISO TOs in the Second Complaint proceeding is from 9.36% to 10.74%. As discussed above, the issue to be addressed in the Second Complaint is whether the ROE established in the First Complaint remains just and reasonable during the applicable test period as addressed by the evidence presented by the participants in the Second Complaint. The MISO TOs' 10.02% ROE established upon resolution of the First Complaint proceeding falls within the range of presumptively just and reasonable ROEs that applies in the Second Complaint. We find that this presumption has not been rebutted by the evidence in the Second Complaint proceeding. We see no evidence in the record, such as state ROEs, ROEs of non-utility companies, and other methodologies that rebuts this presumption. Accordingly, we do not find that the MISO TOs' ROE established in the First Complaint proceeding and in effect as of the date of this order is unjust and unreasonable under the first prong of section 206. For that reason, we do not establish a

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<sup>372</sup> See Appendix I.

<sup>373</sup> *Id.*

new just and reasonable ROE in the Second Complaint proceeding to be in effect prospectively from the date of this order.

## **XVIII. Refund Issues**

### **A. Opinion No. 569**

230. In Opinion No. 569, the Commission granted rehearing of Opinion No. 551 in part, found that the challenged 12.38% base ROE in the First Complaint proceeding was unjust and unreasonable, and additionally found that a replacement base ROE of 9.88% was just and reasonable—instead of the 10.32% replacement ROE that was set in Opinion No. 551. The Commission made the 9.88% ROE effective as of September 28, 2016, the date on which Opinion No. 551 was issued.<sup>374</sup> The Commission ordered MISO and the MISO TOs to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a, for the 15-month refund period for the First Complaint proceeding from November 12, 2013 through February 11, 2015 and for the period from September 28, 2016—the date on which Opinion No. 551 was issued—to the date of Opinion No. 569.<sup>375</sup>

231. The Commission then found that the 9.88% base ROE established in the First Complaint proceeding was the existing rate to be analyzed for purposes of the Second Complaint proceeding. In brief, the Commission reasoned that, for purposes of deciding whether a rate charged by a utility is unjust and unreasonable and determining a new just and reasonable rate “to be thereafter observed” pursuant to section 206(a) of the FPA, it must assess whether the public utility’s currently effective rate is unjust and unreasonable, not some earlier rate that may have been in effect when the complaint was filed but has now been superseded. The Commission explained that, in other words, in order to determine a new rate to be thereafter observed, it must examine the currently effective rate because that is the rate that will need to be replaced if it is unjust and unreasonable. The Commission then explained that, because the 9.88% base ROE established in the First Complaint proceeding is effective prospectively from September 28, 2016, that is the currently effective rate that the Commission would have to find unjust and unreasonable under the first prong of section 206, before we could require a new ROE “to be thereafter observed” pursuant to the second prong of section 206.<sup>376</sup>

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<sup>374</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 20.

<sup>375</sup> *Id.* at ordering para. (B).

<sup>376</sup> *Id.* P 530.



232. The Commission then concluded that the 9.88% ROE was just and reasonable based on the facts and circumstances of the Second Complaint and therefore dismissed the Second Complaint. The Commission then found that section 206 dictates that refunds may be ordered in a complaint proceeding only when the Commission grants prospective relief in that proceeding (i.e., the Commission sets a new just and reasonable rate which it “orders to be thereafter observed and in force.”).<sup>377</sup> The Commission concluded that it could not order refunds for the Second Complaint proceeding’s refund period because it was dismissing the complaint and not granting any prospective relief. The Commission found that ordering refunds in the Second Complaint proceeding despite the fact that it was granting no prospective relief would exceed the statutory authority in section 206 because it would effectively extend the 15-month refund period for the First Complaint since the refunds would be based on the relief granted in the First Complaint and not any action taken in the Second Complaint.

## **B. First Complaint Proceeding Refunds**

### **1. Rehearing Requests**

233. MISO TOs argue that the Commission erred in directing refunds for the period from September 28, 2016, through the date of Opinion No. 569 based on the new ROE set in the First Complaint proceeding. MISO TOs contend that the effective date of the new base ROE resulting from resolution of the First Complaint proceeding should be November 21, 2019, the date on which Opinion No. 569 was issued. MISO TOs acknowledge that, in cases of legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made, but they assert that this is not a case of legal error because Opinion No. 569’s adoption of a new ROE methodology goes beyond what is necessary to fix the problems identified by the *Emera Maine* court. MISO TOs contend that the court merely found that the Commission never explained how its ultimate placement of the base ROE was just and reasonable and that the Commission could correct this error by better tying the 10.32% base ROE set in Opinion No. 551 to the evidence in the record, rather than adopting a new base ROE methodology.<sup>378</sup> MISO TOs maintain that, therefore, the Commission’s adoption of the 9.88% ROE for the First Complaint proceeding in Opinion No. 569 does not remedy a legal error.<sup>379</sup>

234. MISO TOs further argue that this is also not a case where the Commission fixed an error on rehearing of Opinion No. 551. They contend that, while the Commission

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<sup>377</sup> *Id.* P 568.

<sup>378</sup> MISO TOs Rehearing Request at 84-85 (citing *Emera Maine*, 854 F.3d at 28).

<sup>379</sup> *Id.*

“grant[ed] rehearing of Opinion No. 551 in part to require the MISO TOs to adopt a 9.88% ROE effective September 28, 2016, the date Opinion No. 551 required the MISO TOs to adopt a 10.32% ROE,”<sup>380</sup> it is unclear as to which issue presented on rehearing the Commission actually granted. MISO TOs assert that none of the rehearing requests asked the Commission to adopt a new ROE methodology, and instead opposing parties requested rehearing on the grounds that the composition of the DCF proxy group was incorrect, and that Commission should consider only DCF results, ignore the anomalous capital market conditions that impacted the DCF model inputs, and ignore cost of equity evidence produced by alternative models.<sup>381</sup>

235. MISO TOs argue that, therefore, in establishing the new 9.88% base ROE upon resolution of the First Complaint proceeding, the Commission was acting on its own motion pursuant to its authority under section 313(a) of the FPA<sup>382</sup> to modify Opinion No. 551. They contend that, as a result, the 9.88% base ROE that the Commission established upon resolution of the First Complaint proceeding can be effective only prospectively as of the date of the issuance of Opinion No. 569—November 21, 2019.<sup>383</sup>

236. MISO TOs argue that, if the Commission holds that it did fix a legal error through the adoption of the new methodology for determining a base ROE, the Commission should nonetheless use its discretion not to require the payment of interest on the refunds directed. MISO TOs note that “the Commission is not required to order that interest be paid on all refunds”<sup>384</sup> and contend that the Commission should use its discretion not to include interest with the refunds for the period from September 28, 2016, going forward because the full status quo ante cannot be restored in this case. They assert that this is the case because the Commission has implicitly recognized that some non-public utility members of MISO do not have a refund obligation relating to complaints that were filed prior to 2017,<sup>385</sup> and thus that non-public utility members of MISO may not have an obligation to make refunds for the First Complaint, which was filed in 2013. MISO TOs

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<sup>380</sup> *Id.* at 85-86 (citing Opinion No. 569, 169 FERC ¶ 61,129 at PP 20, 523).

<sup>381</sup> *Id.* at 86.

<sup>382</sup> *Id.* (citing 16 U.S.C. § 8251(a) (2018)).

<sup>383</sup> *Id.* at 86-87.

<sup>384</sup> *Id.* at 87 (citing *Trunkline Gas Co.*, 69 FERC ¶ 61,047, at 61,183 (1994) (citing *Estate of French v. FERC*, 603 F.2d 1158, at 1167-68 (5th Cir. 1979))).

<sup>385</sup> *Id.* at 88-89 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,050, at P 24 (2015) (only as of the effective date of their RTO adder are non-public utilities obligated to make refunds for Docket Nos. EL14-12 and EL15-45)).

argue that, without all transmission-owning members of MISO contributing their share of refunds, it will be impossible to reinstitute the full status quo ante.<sup>386</sup>

237. Ameren similarly argues that the 9.88% base ROE that the Commission found to be a new just and reasonable base ROE in the First Complaint proceeding cannot be made effective as of the date of Opinion No. 551, and thus no refunds can be directed for the period from September 28, 2016 to November 21, 2019. Ameren contends that section 206 of the FPA only permits the Commission to make a new just and reasonable rate effective prospectively and that, therefore, the Commission acted beyond its authority in making the 9.88% base ROE established in Opinion No. 569 effective as of the date of Opinion No. 551.<sup>387</sup>

238. Ameren asserts that the D.C. Circuit's decision in *City of Anaheim v. FERC* also prohibits the Commission from requiring refunds for the period from September 28, 2016 to November 21, 2019, based on its finding in the First Complaint proceeding that 9.88% is a new just and reasonable base ROE. Ameren contends that, in that case the Commission granted a complaint, but stated that it would set a just and reasonable rate in the future, and the court found that the Commission could not make the rate that it set in the future effective retroactively. Ameren argues that there is no meaningful difference between postponing the fixing of a new rate as the Commission did in *City of Anaheim* and modifying Opinion No. 551 and replacing the rate fixed there with another one calculated by a different method, as the Commission did in Opinion No. 569. Ameren contends that the act of fixing a new rate under section 206 cannot be a three-year process because that would impermissibly expand the Commission's refund authority.<sup>388</sup>

239. Ameren argues that the legal error doctrine does not give the Commission authority to direct refunds for the period from September 28, 2016, to November 21, 2019, as a result of its decision in the First Complaint proceeding. Ameren asserts that, unlike the *ISO New England Inc. v. Bangor Hydro-Electric Co.*<sup>389</sup> case that the Commission cites in Opinion No. 569, a court has not vacated any of the Commission decisions in these proceedings and therefore the legal error doctrine does not apply in these proceedings. Ameren acknowledges that the Commission is empowered to change

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<sup>386</sup> *Id.* at 89.

<sup>387</sup> Ameren Rehearing Request at 13-20.

<sup>388</sup> *Id.* at 17-19.

<sup>389</sup> 161 FERC ¶ 61,031 (2017).

its order on rehearing, but argues that, when doing so, it can only fix a new rate that is “thereafter observed.”<sup>390</sup>

240. Transource Energy argues that the Commission can only make the rate that it adopts for the First Complaint proceeding effective prospectively, and not effective as of the date of Opinion No. 551.<sup>391</sup> Transource Energy asserts that, if the Commission believes it has the discretion to make the rate adopted upon resolution of the First Complaint proceeding effective as of the date of Opinion No. 551, it should find that the 10.32% ROE ordered in Opinion No. 551 is just and reasonable. Transource Energy further contends that under the Commission’s methodology adopted in Opinion No. 569, there is no evidence showing that a 10.32% ROE is not just and reasonable. Transource Energy notes that the 10.32% base ROE adopted in Opinion No. 551 falls within the quartile range of presumptively just and reasonable ROEs for the period at issue in Opinion No. 551, which is 9.29% to 10.47%. Transource Energy further contends that the Commission’s decision in Opinion No. 569 represents a change in policy and not a correction of a legal error. In addition, Transource Energy argues that the Commission should use its discretion to not order additional refunds for the First Complaint proceeding’s 15-month refund period because customers benefitted from investments during the refund period.<sup>392</sup>

## 2. Commission Determination

241. We deny the requests for rehearing of the Commission’s decision in Opinion No. 569 to order refunds for the period from September 28, 2016, to November 21, 2019, based on its decision in the First Complaint proceeding. In Opinion No. 569, the Commission granted rehearing of the Commission’s decision in Opinion No. 551 that, in the First Complaint proceeding, a 10.32% base ROE was a just and reasonable new ROE under the second prong of section 206, instead finding that a 9.88% base ROE was a just and reasonable new ROE. Accordingly, the Commission’s decision in Opinion No. 569 granted rehearing of the decision in Opinion No. 551 to make 10.32% the new base ROE effective prospectively from the date of Opinion No. 551. Consequently, the new ROE that the Commission set in Opinion No. 569 in granting rehearing, and which is modified in this order, is effective as of the date of the original decision which is being modified on rehearing (i.e., the date of Opinion No. 551).

242. As the Commission has explained, “[R]ate changes required in section 206 proceedings should take effect as of the date of the order setting rates, *not* the date of the

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<sup>390</sup> Ameren Rehearing Request at 20-23.

<sup>391</sup> Transource Energy Rehearing Request at 36-38.

<sup>392</sup> *Id.*

rehearing—regardless of whether and to what extent the rehearing order changes the rates originally allowed.”<sup>393</sup> The Commission further explained that “[s]uch a policy is fair to both utilities and ratepayers since it allows finally determined just and reasonable rates to go into effect at the earliest possible date, thereby preventing unjust enrichment of one party for any period of time. It also eliminates any incentive parties would have to delay the effective date of new rates.”<sup>394</sup> Accordingly, the Commission’s decision to grant rehearing of Opinion No. 551 to modify the rate established in that order for the First Complaint proceeding under section 206 takes effect as of the date of the order setting that rate (i.e., Opinion No. 551), not as of the date of Opinion No. 569 or this order. As discussed further below, because the changed rate set on rehearing of Opinion No. 551 is effective as of the date of that order, it is appropriate to direct refunds for the period from that date through the date of this order, which establishes the finally determined just and reasonable rate.

243. We disagree with MISO TOs’ argument that this is not a case where the Commission fixed an error on rehearing of Opinion No. 551, and with Ameren’s and Transource Energy’s arguments that the new replacement base ROE established in granting rehearing of Opinion No. 551 can only be effective prospectively from the date of Opinion No. 569. MISO TOs contend that, while the Commission granted rehearing of Opinion No. 551 in part, it is unclear as to which issue presented on rehearing the Commission granted because none of the rehearing requests asked the Commission to adopt a new ROE methodology.<sup>395</sup> MISO TOs, instead, contend that opposing parties requested rehearing on the grounds that the composition of the DCF proxy group was incorrect, and that Commission should consider only DCF results, ignore the anomalous capital market conditions that impacted the DCF model inputs, and ignore cost of equity evidence produced by alternative models.<sup>396</sup> While it may be true that a party did not explicitly request that the Commission reach each and every exact decision that it made in Opinion No. 569, the Commission nonetheless acted within its discretion to reach its conclusions and these conclusions involved granting rehearing of the Commission’s decision in Opinion No. 551 to establish a 10.32% base ROE as the new ROE under the second prong of section 206 in the First Complaint proceeding.

244. In Opinion No. 551, the Commission relied on the DCF analysis and looked to the CAPM, Risk Premium, and Expected Earnings models as corroborative evidence to support its decision. On rehearing, certain parties argued, as MISO TOs note, that the

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<sup>393</sup> *Ariz. Pub. Serv. Co.*, 26 FERC ¶ 61,087, at 61,221 (1984).

<sup>394</sup> *Id.*

<sup>395</sup> MISO TOs Rehearing Request at 85-86.

<sup>396</sup> *Id.* at 86.

Commission should have considered only DCF results and ignored those alternative models.<sup>397</sup> In Opinion No. 569, as modified in this order, the Commission granted rehearing to reach a logical middle ground that does not consider only DCF, as those parties requested, but does depart from Opinion No. 551 by considering only some of the other three models that the Commission initially considered in Opinion No. 551. Specifically, here we consider the CAPM and Risk Premium models in addition to the DCF model, but not the Expected Earnings model, which the Commission initially did consider in Opinion No. 551. In reaching its decision on rehearing of Opinion No. 551, the Commission is not limited to only reaching a conclusion that replicated every detail of a conclusion that a party had explicitly proposed.<sup>398</sup> In relevant part, the Commission, upon a party's application for rehearing, "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing."<sup>399</sup> Accordingly, the Commission may modify its order on rehearing as it has here, because there exists no such limitation as a requirement that the Commission may only modify its order if the exact modification is explicitly proposed by a party on rehearing. The Commission found merit in some of the arguments against considering all of the non-DCF models but was not persuaded to ignore all of the models. Accordingly, it reached a conclusion arising from compromise that considered some, but not all, of the alternative models that were considered in Opinion No. 551. As a result of partially granting rehearing on these issues, the Commission granted rehearing of its decision to establish 10.32% as a new replacement base ROE in the First Complaint proceeding. Accordingly, this is a case where the Commission granted rehearing to modify Opinion No. 551, and that modified conclusion is effective as of the date of Opinion No. 551.

245. While the Commission's grant of rehearing of Opinion No. 551 is sufficient to justify the Commission's ordering of refunds from the date of Opinion No. 551—September 28, 2016—through the date of this order, the Commission's decision to order such refunds is further justified by the fact that it is correcting a legal error in granting rehearing to change the new just and reasonable ROE established for the First Complaint proceeding in Opinion No. 551. Although Ameren is correct that none of the Commission decisions in these proceedings have been vacated by a court, that does not mean that there was no legal error in the Commission's decisions in these proceedings. In *Emera Maine*, the D.C. Circuit found that the Commission failed to satisfy its dual burden under section 206 of the FPA by finding that the result of a single ROE analysis was sufficient to demonstrate that an existing base ROE was unjust and unreasonable if it exceeded that result and that such result was a just and reasonable

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<sup>397</sup> See *id.* at 86.

<sup>398</sup> See 16 U.S.C. § 825l.

<sup>399</sup> *Id.*

replacement ROE. Opinion No. 551 and Initial Decision (II) in the Second Complaint proceeding both used the same reasoning that the D.C. Circuit found was insufficient to satisfy the Commission's burden under section 206. Accordingly, while no court has vacated a specific decision in this case, the rationale on which Opinion No. 551 and Initial Decision (II) in the Second Complaint proceeding are based has been rejected by the D.C. Circuit as in violation of section 206. As a result, those Commission decisions are based on a legal error identified by the D.C. Circuit. The fact that the court did not explicitly identify that legal error in a case involving a decision in these proceedings does not mean that there is no error in Opinion No. 551 and Initial Decision (II). To find otherwise would allow the Commission to continue to make decisions that are based on reasoning that has been found to be unlawful and only require the Commission to correct those decisions when a court has repeated its previous conclusion in every individual applicable case.

246. MISO TOs and Transource Energy also argue that the legal error doctrine does not apply here because the methodology adopted in Opinion No. 569 goes beyond what they contend is necessary to fix the problems identified by the *Emera Maine* court, and therefore represents a change in policy and not correction of a legal error. We disagree. The court in *Emera Maine* found that the Commission acted arbitrarily and outside of its statutory authority because its single ROE analysis failed to include an actual finding as to the lawfulness of the existing base ROE at issue. The court remanded the proceeding for the Commission to make that actual finding, but it did not specify exactly how the Commission needed to make that finding. In Opinion No. 569, as modified herein, the Commission concluded that the best way to make that finding in these proceedings in light of its statutory obligations was to revise its methodology for analyzing base ROEs under section 206 as explained herein. Accordingly, while MISO TOs and Transource Energy would prefer the Commission to arrive at this finding in a different way, that does not mean that the Commission's action is a change in policy instead of a correction of a legal error.

247. We are also not persuaded by arguments that the Commission should exercise its discretion to not order interest on the refunds for the period from the date of Opinion No. 551 through the date of this order replacing the base ROE set in in Opinion No. 551. While MISO TOs are correct that the Commission is not required to order that interest be paid on all refunds, we find that there are no equitable reasons that would warrant not ordering interest on the refunds ordered from the date of Opinion No. 551 through the date of this order. The parties to the First Complaint proceeding had notice that the base ROE established to be prospective from the date of Opinion No. 551 was subject to rehearing and therefore could be modified such that the modified rate would result in refunds, with interest pursuant to the Commission's authority under section 206. We are also not persuaded by MISO TOs' argument that the Commission should exercise its discretion to not require interest on the refunds because the status quo ante cannot be

fully restored since a separate Commission order “implicitly has recognized”<sup>400</sup> that some non-public utility members of MISO do not have a refund obligation relating to complaints that were filed prior to 2017.<sup>401</sup> As the precedent cited by MISO TOs provides, the Commission is not restricted to only requiring interest on refunds when it can completely restore the status quo ante, but rather, whether the status quo ante can be fully restored is merely a consideration that “may . . . offset . . . at least in part”<sup>402</sup> a full refund. MISO TOs also correctly recognize that “whether to order interest in crafting a remedy is a matter of Commission discretion.”<sup>403</sup> MISO TOs have not persuaded us that the fact that some members of MISO may have different obligations with respect to the subject refunds is sufficient to use to our discretion to deny the complainants a full refund with interest. The payment of interest on refunds merely “ensures that the amounts to be refunded are, in fact, refunded through the addition of interest so that the recipient receives payment in inflation-adjusted dollars . . . to make the recipients whole,”<sup>404</sup> consistent with the Commission’s “general policy of granting full refunds” for overcharges.”<sup>405</sup> While we may exercise our discretion to decline to make recipients whole through the payment of interest on refunds, MISO TOs’ argument on this point is not a sufficient reason to do so. On balance, we find that is more appropriate to ensure that the overcharged entities are made whole through the payment of interest on refunds than it is to decline to require interest because some members of MISO may have different obligations with respect to the subject refunds such that the refunds paid do not exactly reconstitute the status quo ante.

248. Transource Energy argues that the Commission should use its discretion to not order additional refunds for the First Complaint proceeding’s 15-month refund period because customers benefitted from investments during the refund period.<sup>406</sup> We find that this argument is similarly unavailing. Transmission owners are constantly making new

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<sup>400</sup> MISO TOs Rehearing Request at 89.

<sup>401</sup> *Id.* at 88-89 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,050 at P 24).

<sup>402</sup> *Panhandle E. Pipe Line Co.*, 69 FERC ¶ 61,048, at 61,189 (1994) (quoting *Consumer Fed’n of America v. FPC*, 515 F.2d 347, 359 (D.C. Cir. 1975)).

<sup>403</sup> MISO TOs Rehearing Request at 87 (quoting *Transcon. Gas Pipe Line Corp.*, 71 FERC ¶ 61,108, at 61,361 (1995)).

<sup>404</sup> *La. Pub. Serv. Comm’n*, 153 FERC ¶ 61,033, at P 14 (2015).

<sup>405</sup> *Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

<sup>406</sup> Transource Energy Rehearing Request at 38.



investments and changing investments during proceedings that may result in refund obligations. Therefore, to find that the existence of these investments alone would absolve such transmission owners from ordering refunds resulting from a Commission decision would mean that transmission owners would only owe refunds in the rarest of circumstances. We find that this would be contrary to the purpose of the refund obligation in section 206.

249. Consequently, we deny rehearing on this issue and find that, by granting rehearing of the decision in Opinion No. 551 to establish a new just and reasonable base ROE, and by acting to correct a legal error, it is appropriate to direct refunds, with interest, for the period from the effective date of the just and reasonable base ROE that was set in Opinion No. 551 which is being replaced in this order—September 28, 2016—through the date of this order, based on the new 10.02% base ROE established for the First Complaint proceeding in this order.

### **C. Second Complaint Proceeding Refunds**

#### **1. Rehearing Requests**

250. CAPs argue that the Commission erred in not requiring refunds for the Second Complaint proceeding's refund period. They contend that the First Complaint and Second Complaint each challenged the base ROE in effect as of the date of filing of each complaint and had separate refund periods.<sup>407</sup> CAPs assert that, therefore, the mere fact that the two separate refund periods exceed 15 months does not mean that section 206 of the FPA is violated, "particularly in view of the fact that Commission orders set both refund periods, and the Commission itself acknowledged that the ROE in force when each complaint was filed was demonstrated to be unjust and unreasonable based on evidence of market conditions during the relevant study period."<sup>408</sup>

251. CAPs further contend that the Commission's interpretation of the existing rate to be analyzed in the Second Complaint proceeding creates a loophole that utilities could exploit to vitiate the consumer protection intended by section 206. In particular, CAPs assert that a utility could make a tactical section 205 filing after a section 206 filing is signaled or underway to undermine section 206's refund and prospective relief remedies. CAPs argue that, for example, if an initial decision identifies a new just and reasonable base ROE resulting from a section 206 complaint, the subject utility could make a section 205 filing before issuance of a Commission order on the initial decision that reduces its base ROE to a level well above the base ROE the initial decision determined was just and reasonable, but just within the top end of what the initial decision identifies

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<sup>407</sup> CAPs Rehearing Request at 52-53.

<sup>408</sup> *Id.* at 53.

as the zone of presumptively just and reasonable ROEs, such that the utility's proposed base ROE in the section 205 filing would likely be accepted by the Commission. CAPs argue that, under the Commission's rationale in Opinion No. 569, in such a case, the base ROE in the utility's section 205 filing would become the currently effective base ROE that the Commission would examine for purposes of acting on the initial decision, meaning that this base ROE would likely not be found unjust and unreasonable in the Commission's order on the initial decision because it falls within the zone of presumptively just and reasonable ROEs identified in the initial decision. CAPs contend that, in such a case, the utility would have successfully shielded itself both from refunds and from a prospective reduction down to the cost-based level found in the initial decision. CAPs argue that, because of this possibility, the Commission should reconsider its finding that the FPA requires section 206 relief to be denied if the rate in effect just before a final order applying section 206 is just and reasonable, or at least clarify how it would prevent such tactics from vitiating relief under section 206.<sup>409</sup>

252. CAPs further contend that, even if the Commission does not reverse its determination that the outcome of the Second Complaint was dependent on the outcome of the First Complaint, it still has and should exercise discretion to order refunds for the Second Complaint proceeding. CAPs assert that, because section 206 contains no deadline for the Commission to act on a complaint, where two complaints raising overlapping issues are pending before the Commission simultaneously, the order in which the Commission acts on the complaints is within the Commission's discretion. CAPs argue that the Commission should have acted on the Second Complaint before acting on rehearing of Opinion No. 551 because this would have kept prospective rates, which can affect future conduct, aligned with the most recent and accurate evidence of the MISO TOs' cost of equity. CAPs contend that, by acting in this sequence, MISO transmission customers would have been entitled to refunds for the Second Complaint proceeding's refund period and the First Complaint proceeding's refund period because the ROE set by an order in the Second Complaint could not be deemed to be the "existing" ROE for purposes of deciding the First Complaint. CAPs assert that, therefore, the Commission's rationale for denying refunds in the Second Complaint proceeding effectively claims that the Commission's procedural decisions can expand or contract the statutory rights of public utility customers.<sup>410</sup>

253. LPSC argues that Opinion No. 569 interprets section 206 to mean that the Commission must decide whether the rate that is "currently effective" at the time it issues its opinion is just and reasonable, as opposed to the rate that was in effect at the time the

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<sup>409</sup> *Id.* at 53-54.

<sup>410</sup> *Id.* at 56-59.

complaint was filed and contends that this interpretation violates the FPA.<sup>411</sup> LPSC contends that section 206 provides that the Commission shall determine the just and reasonable rate, if the Commission determines that the rate “demanded, observed, charged, or collected by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential.”<sup>412</sup> LPSC asserts that Opinion No. 569 is inconsistent with this plain language because it requires an analysis of whether a new rate that had never been charged or collected by the utility is just and reasonable. LPSC contends that the MISO TOs have never “demanded, observed, charged, or collected” the 9.88% ROE that was established in Opinion No. 569 from their customers, so the FPA could not have intended for that to be the rate analyzed by the Commission.<sup>413</sup>

254. LPSC argues that the Commission’s interpretation of the existing rate to be analyzed in the Second Complaint proceeding would prevent the Commission from ever granting refunds in a second ROE proceeding, even if the Commission found that the newly effective ROE that resulted from the first ROE proceeding had become unjust and unreasonable by the time the second complaint was filed. LPSC contends that this is the case because section 206 provides for refunds to “persons who have paid those rates” but no person would have paid the rate established in such a first complaint proceeding.<sup>414</sup>

255. LPSC also contends that the Commission’s interpretation on this point is inconsistent with the Commission’s precedent in *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*<sup>415</sup> LPSC asserts that, in that case, the Commission rejected a company’s argument that a 2013 ROE complaint should be dismissed because it served only to extend the refund effective period associated with a 2012 ROE complaint, and explained that, “In assessing the 2013 Complaint, the relevant comparison is between the current ROE and the ROE sought in the 2013 Complaint.”<sup>416</sup>

256. LPSC further argues that Opinion No. 569 is also arbitrary because its conclusions rely entirely on the order that the Commission decides the ROE proceedings, but there is no statute or regulation that requires the Commission to resolve section 206 proceedings

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<sup>411</sup> LPSC Rehearing Request at 17-19.

<sup>412</sup> *Id.* at 19 (citing 16 U.S.C. § 824e (2018)).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at 19-20.

<sup>415</sup> 151 FERC ¶ 61,126 (2015).

<sup>416</sup> LPSC Rehearing Request at 21 (citing *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 151 FERC ¶ 61,126 at P 24).

chronologically. LPSC contends that refunds could have been granted for the second complaint proceeding and a different ROE would have applied prospectively if Opinion No. 569 had resolved the second complaint proceeding first. LPSC asserts that Congress did not intend to give the Commission the power to decide the justness and reasonableness of rates and whether refunds should be granted based on the order that it chooses to decide complaints.<sup>417</sup>

257. In addition, LPSC argues that Opinion No. 569 is inconsistent with the Commission's precedent that a second ROE complaint can be filed and a second refund effective period can be ordered, as long as the second complaint is based on new analyses and data. LPSC contends that, "Contrary to its precedent, Opinion No. 569 now finds that determining whether the ROE in a second ROE complaint proceeding is unjust and unreasonable by analyzing the ROE that was in effect when the complaint was filed would effectively extend the statutory fifteen-month refund effective period."<sup>418</sup> LPSC argues that, in *Firstenergy Service Co. v. FERC*, 758 F.3d 346 (D.C. Cir. 2014), the D.C. Circuit stated that "FERC is required to evaluate a 206 complaint as to existing rates specifically because they might have become unjust and unreasonable by intervening shifts in circumstances"<sup>419</sup> and that the Commission should do the same here and rule that the rate in effect at the time the Second Complaint was filed should be analyzed to assess possible "intervening shifts in circumstances."<sup>420</sup>

258. RPGI similarly argues that the Commission's interpretation of section 206 to not permit refunds for the Second Complaint proceeding is unsupported. RPGI asserts that the Commission's interpretation sets up a scenario in which the ROE in force on a second complaint's date of filing becomes virtually irrelevant. RPGI contends that a complainant would know that, if it filed, the benchmark against which its case would be evaluated would not be the ROE in effect on the date the second complaint would be filed—which is known—but rather the ROE set by the first proceeding and where it falls in the second proceeding's updated zone of reasonableness, neither of which is known at the second proceeding's outset. RPGI asserts that, thus, after Opinion No. 569, filing a second complaint upon the expiration of a first complaint's refund period represents such

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<sup>417</sup> *Id.* at 21-23.

<sup>418</sup> *Id.* at 24.

<sup>419</sup> *Id.* at 27-28 (citing *Firstenergy Service Co. v. FERC*, 758 F.3d at 356).

<sup>420</sup> *Id.*

a high risk of a “no-change” outcome as to effectively bar successive complaints, even if the data from the second proceeding supports an ROE lower than that set by the first.<sup>421</sup>

259. RPGI argues that, if the Commission’s concern is that successive complaints require it to make duplicative findings of one ROE’s unlawfulness, then it could consolidate proceedings. RPGI further contends that, if the Commission’s concern is the effect of successive refund periods on the MISO TOs, the appropriate course of action is seeking a statutory change, not adopting a strained statutory interpretation.<sup>422</sup>

## **2. Commission Determination**

260. We deny rehearing on this issue. We continue to find, as the Commission did in Opinion No. 569, that, for purposes of deciding whether a rate charged by a public utility is unjust and unreasonable and determining a new just and reasonable rate “to be thereafter observed” pursuant to section 206(a) of the FPA, we must assess whether the public utility’s currently effective rate is unjust and unreasonable, not some earlier rate that may have been in effect when the complaint was filed but has now been superseded. As explained in Opinion No. 569, in the context of successive, or pancaked, complaints like those in these proceedings, if the Commission’s analysis in the successive complaint analyzed some earlier rate that may have been in effect when the complaint was filed but has since been superseded, it would permit the Commission to order refunds for a period beyond the 15-month statutory refund period based on a single decision in the preceding complaint decision. We find that this would allow the Commission to use a single decision as the predicate for issuing refunds beyond the refund period applicable to that decision, which would exceed the refund authority granted to the Commission in section 206.

261. CAPs argue that the First Complaint and Second Complaint each challenged the base ROE in effect as of the date of filing of each complaint and had separate refund periods, and the mere fact that the two separate refund periods exceed 15 months does not mean that section 206 is violated. CAPs misinterpret the Commission’s finding in Opinion No. 569. In Opinion No. 569, the Commission did not find that the mere fact that the First Complaint and Second Complaint proceedings had separate refund periods that combined exceed 15 months rendered the Commission unable to issue refunds in the Second Complaint proceeding. It would have been possible for the Commission to order refunds for the refund periods in both complaint proceedings if the base ROE resulting from resolution of the First Complaint proceeding was no longer just and reasonable based on the facts and circumstances of the Second Complaint proceeding. However, complainants did not show that the existing rate reviewed in the Second Complaint

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<sup>421</sup> RPGI Rehearing Request at 17-21.

<sup>422</sup> *Id.* at 22-23.

proceeding was unjust and unreasonable under the facts and circumstances of that proceeding.

262. Both complaints challenged the MISO TOs' base ROE, and the Commission established a new just and reasonable base ROE in the First Complaint proceeding that was filed first chronologically. As discussed above, the Commission found that it was required to review that new base ROE as the existing rate for purposes of the Second Complaint and complainants did not show that this existing rate was unjust and unreasonable. The Commission then found that section 206 provides that refunds may be ordered in a complaint proceeding only when the Commission grants prospective relief in that proceeding because section 206 only permits refunds in proceedings where the Commission sets a new rate to be "thereafter observed and in force."<sup>423</sup> As a result, the Commission found that it did not have authority under section 206 to order refunds in the Second Complaint proceeding because it did not grant prospective relief by establishing a new base ROE in that proceeding. The Commission further explained that ordering refunds in the Second Complaint proceeding even though it did not grant prospective relief in that proceeding would in fact allow its determination in the First Complaint proceeding to serve as the predicate for two 15-month refund periods, which is beyond the Commission's authority in section 206. Accordingly, the fact that the First Complaint and Second Complaint proceedings had separate refund periods that together exceeded 15 months did not render the Commission unable to issue refunds in the Second Complaint proceeding. Rather, it was the fact that the Commission could not grant prospective relief in the Second Complaint proceeding because the complainants did not show that the rate that was reviewed in that Second Complaint proceeding was unjust and unreasonable. Had the complainants made that showing, the Commission could have ordered refunds in the Second Complaint proceeding, regardless of the fact that the refund periods in the First Complaint proceeding and Second Complaint proceeding add up to more than 15 months. However, that was not the case and consequently we find CAPs' argument on this point unavailing.

263. CAPs argue that the Commission's interpretation of the existing rate to be analyzed in the Second Complaint proceeding creates a loophole pursuant to which a utility could make a tactical section 205 filing after a section 206 filing is signaled or underway to undermine section 206's refund and prospective relief remedies. CAPs assert that such a filing could, for example, propose to reduce the utility's base ROE to a level well above the base ROE the initial decision determined was just and reasonable, but just within the top end of what the initial decision identifies as the zone of presumptively just and reasonable ROEs, such that the utility's proposed base ROE in the section 205 filing would likely be accepted by the Commission and then become the currently effective base ROE that the Commission would examine for purposes of acting

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<sup>423</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 568.

on the initial decision. This argument does not persuade us that our interpretation is inappropriate. As an initial matter, we note that the presumptively just and reasonable ranges applied in this order are limited to our analysis of complaints filed under section 206. There is no section 205 filing before us in this proceeding and we are not making any determinations regarding whether or how the presumptively just and reasonable ranges used in this order would apply in the context of a section 205 filing. Moreover, if a utility were to make such a tactical section 205 filing proposing a new base ROE while a section 206 proceeding challenging the utility's base ROE is still pending a final Commission decision, then the Commission could consider such a section 205 filing in light of the pending section 206 proceeding. "The Commission has broad discretion to structure its proceedings so as to resolve a controversy in the way it best sees fit,"<sup>424</sup> and, in addressing such a section 205 filing, the Commission could consider the common issues that would likely be raised by a section 205 filing to change the same base ROE that is being challenged in a pending section 206 proceeding. For example, in analogous circumstances, the Commission consolidated a rate filing pursuant to section 4 of the Natural Gas Act (NGA) with an ongoing complaint proceeding pursuant to section 5 of the NGA involving the same rates. There the Commission noted that "KCC asserts that Southwest Gas's instant section 4 rate filing is nothing more than an attempt to circumvent the ongoing section 5 complaint proceeding"<sup>425</sup> and found that "the section 4 filing appears as an outgrowth of the section 5 complaint proceeding"<sup>426</sup> for which consolidation would "provide the most efficient and effective forum to handle issues common to both proceedings."<sup>427</sup> Any section 205 filing like the type suggested by CAPs would be considered by the Commission in light of any other proceedings

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<sup>424</sup> *PJM Transmission Owners*, 120 FERC ¶ 61,013, at P 12 (2007). See also *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081, at P 23 (2004) ("The courts have repeatedly recognized that the Commission has broad discretion in managing its proceedings."); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (citing *Telecomm. Resellers Assoc. v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998) (stating that administrative agencies enjoy broad discretion to manage their own dockets); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (stating that agencies can determine how best proceed to develop the needed evidence); *Richmond Power & Light v. FERC*, 574 F.2d 610, 624 (D.C. Cir. 1978) (stating that agencies have wide leeway in controlling their calendars)).

<sup>425</sup> *Panhandle Complainants v. Sw. Gas Storage Co.*, 120 FERC ¶ 61,207, at P 19 (2007).

<sup>426</sup> *Id.* P 20.

<sup>427</sup> *Id.* P 21.

involving common issues, including section 206 proceedings.<sup>428</sup> We do not believe that the Commission's interpretation of the existing rate to be analyzed in the Second Complaint proceeding would somehow allow utilities to make section 205 filings that would dictate or otherwise limit the Commission's ability to appropriately determine just and reasonable rates in section 206 proceedings.

264. LPSC argues that Opinion No. 569's decision to not order refunds in the Second Complaint proceeding is inconsistent with section 206 because section 206 requires the Commission to determine whether a rate "demanded, observed, charged, or collected by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential"<sup>429</sup> but MISO TOs have never "demanded, observed, charged, or collected" the base ROE that was established in the First Complaint proceeding from their customers, but that is the rate that the Commission analyzed in making its determination in the Second Complaint proceeding. We find this argument unavailing. While at the time the Second Complaint was filed, the new just and reasonable rate established in the First Complaint proceeding had not yet been demanded, observed, charged or collected, the Commission's decision in the First Complaint proceeding made the new base ROE established in that proceeding the rate that was demanded, observed, charged and collected for the First Complaint proceeding's refund period. Therefore, when the Commission analyzed the new just and reasonable rate established in the First Complaint proceeding in making its determination in the Second Complaint proceeding, that rate was the one demanded, observed, charged and collected for the First Complaint proceeding's refund period, which is consistent with the language of section 206. The fact that the Commission acted on the successive complaints in the First Complaint and Second Complaint proceedings in a single order instead of in two separate sequential ones does not render the new base ROE established in the First Complaint proceeding a fiction that is not actually applied by the MISO TOs. Rather, the Commission's decision in the First Complaint proceeding made the rate established there the rate "demanded, observed, charged, or collected" for purposes of the First Complaint proceeding and the Commission then reviewed that rate as the existing rate in making its decision on the Second Complaint which followed the First Complaint. We are not persuaded that this analysis is inconsistent with section 206.

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<sup>428</sup> See, e.g., *Mobil Oil Explor. & Prod. SE Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures."); *Nadar v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) ("[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.").

<sup>429</sup> LPSC Rehearing Request at 19 (citing 16 U.S.C. § 824e).



265. CAPs and LPSC argue that the Commission is not required to act on the First Complaint proceeding first and should have acted on the Second Complaint proceeding first. They contend that there is no requirement that the Commission resolve section 206 proceedings chronologically. As an initial matter, we note that, “The Commission has broad discretion to structure its proceedings so as to resolve a controversy in the way it best sees fit.”<sup>430</sup> The Commission “is generally master of its own calendar and procedures.”<sup>431</sup> In these proceedings, we find that it is appropriate to act on the First Complaint proceeding first and then the Second Complaint proceeding. The Commission permitted the Second Complaint because it was “was based on financial data from a different time period, and produced a different proxy group, than the DCF analysis set forth in the [First Complaint].”<sup>432</sup> In that order, the Commission explained that it “has allowed multiple complaints regarding the same ROE, where the subsequent complaints are based on ‘new, more current data.’”<sup>433</sup> Accordingly, the premise for permitting the Second Complaint was that it was based on different, more current data, than the data in the First Complaint proceeding. We find that it is appropriate to address the First Complaint first because the Commission must first determine what the final data and results from the First Complaint are before determining whether the Second Complaint can be granted based on how the Second Complaint’s data have changed as compared to the data in the First Complaint. Moreover, we find that it would not be appropriate to follow the approach suggested by CAPs and LPSC because it could force the Commission to delay action on a preceding complaint that is likely closer to resolution until it has first acted on a successive complaint because that successive complaint is

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<sup>430</sup> *PJM Transmission Owners*, 120 FERC ¶ 61,013 at P 12.

<sup>431</sup> *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984); see also *Ameren Energy Generating Co.*, 108 FERC ¶ 61,081 at P 23 (“The courts have repeatedly recognized that the Commission has broad discretion in managing its proceedings.”); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (citing *Telecomm. Resellers Assoc. v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998) (stating that administrative agencies enjoy broad discretion to manage their own dockets); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (stating that agencies can determine how best proceed to develop the needed evidence); *Richmond Power & Light v. FERC*, 574 F.2d 610, 624 (D.C. Cir. 1978) (stating that agencies have wide leeway in controlling their calendars)).

<sup>432</sup> MISO II Rehearing Order, 156 FERC ¶ 61,061 at P 34.

<sup>433</sup> *Id.* P 33 (quoting *Consumer Advocate Div. of the Pub. Serv. Of West Virginia v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, order on reh’g, 68 FERC ¶ 61,207, at 61,998 (1994)).

“aligned with the most recent and accurate evidence.”<sup>434</sup> This could further delay Commission action on section 206 complaint proceedings that are often already very protracted. In addition, CAPs’ and LPSC’s approach would not always benefit ratepayers over utilities. For example, it is possible that, in resolving a successive complaint first, ratepayers would be subject a higher rate during such a complaint’s refund period than they would have been subject to if the preceding complaint resulted in a prospectively effective rate that overlapped with the successive complaint’s refund period which was lower than the rate resulting from the successive complaint. Accordingly, we find that it is appropriate to address the complaints in these proceedings in chronological order by deciding the First Complaint before deciding the Second Complaint.

266. RPGI argues that, if the Commission’s concern in deciding to not order refunds in the Second Complaint proceeding was that it would be required to make duplicative findings of one ROE’s unlawfulness, then it could consolidate the First Complaint and Second Complaint proceedings. We find this argument unavailing. The Commission has explained that “[i]n general, the Commission consolidates matters only if . . . consolidation will ultimately result in greater administrative efficiency.”<sup>435</sup> However, these proceedings have progressed through hearing, initial decision and, in the case of the First Complaint proceeding, Commission decision, separately with separate records. At this point there would be no greater administrative efficiency in consolidating these two proceedings because they are already close to final resolution. Moreover, RPGI does not explain how consolidation would eliminate the need to identify the existing rate to be analyzed in the Second Complaint proceeding and then determine whether refunds could be issued based on the Commission’s analysis of that rate under section 206. Thus, RPGI has not explained how consolidation would change the analysis underlying our decision to not order refunds in the Second Complaint proceeding.

267. RPGI also contends that, if the Commission’s concern in making its decision in Second Complaint proceeding is the effect of successive refund periods on the MISO TOs, the appropriate course of action is seeking a statutory change, not adopting a strained statutory interpretation. However, here we must determine how to act in these section 206 complaint proceedings and in order to do so we must determine how to interpret and apply section 206 to these proceedings. The issue before us is not whether it would be appropriate or preferable to seek a statutory change. We must apply the statute as it exists to these proceedings. The fact that RPGI would prefer that the Commission adopt a different interpretation does not mean that the Commission had the option of not applying section 206 as it exists to these proceedings. For the reasons discussed in this order, we find that the application of section 206 to the Second

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<sup>434</sup> See CAPs Rehearing Request at 59.

<sup>435</sup> See, e.g., *Startrans IO, LLC*, 122 FERC ¶ 61,253, at P 25 (2008).

Complaint proceeding requires us to dismiss the complaint and not order refunds in that proceeding. Accordingly, we find that RPGI's argument on this point does not persuade us to grant rehearing of our decision to not order refunds in the Second Complaint proceeding.

### **XIX. Conclusion**

268. For the reasons discussed above, we grant in part and deny in part the requests for rehearing of Opinion No. 569. In particular, we require the MISO TOs to adopt a 10.02% base ROE effective September 28, 2016, the date Opinion No. 551 initially required the MISO TOs to adopt a 10.32% ROE. As discussed above, we therefore require the MISO TOs to provide refunds based on that 10.02% base ROE, with interest, for the First Complaint proceeding's 15-month refund period from November 12, 2013 through February 11, 2015, and for the period from September 28, 2016 to the date of this order. Further, as discussed above we are denying rehearing of the Commission's dismissal of the Second Complaint in Opinion No. 569 and its finding that no refunds will be ordered in the Second Complaint proceeding.

#### The Commission orders:

(A) Rehearing of Opinion No. 569 is granted in part and denied in part, as discussed in the body of this order.

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

(C) MISO and MISO TOs are directed to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2019), by December 23, 2020, for the 15-month refund period for the First Complaint from November 12, 2013 through February 11, 2015 and for the period from September 28, 2016 to the date of this order, as discussed in the body of this order.

(D) MISO and MISO TOs are directed to file a refund report detailing the principal amounts plus interest paid to each of their customers by December 23, 2020.

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

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

**Appendix I: Risk Premium Results****Risk Premium Model Results**

<b><u>Current Equity Risk Premium</u></b>	MISO I	MISO II
Average Yield Over Study Period	6.10%	6.02%
Baa Utility Bond Yield	4.65%	5.41%
Change in Bond Yield	-1.45%	-0.61%
Risk Premium/Interest Rate Relationship	-0.7006	-0.6866
Adjustment to Average Risk	1.02%	0.42%
Average Risk Premium over Study Period	4.43%	4.46%
<b>Adjusted Risk Premium</b>	<b>5.45%</b>	<b>4.88%</b>
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<b><u>Implied Cost of Equity</u></b>		
Baa Utility Bond Yield	4.65%	5.41%
Adjusted Equity Risk Premium	5.45%	4.88%
<b>Risk Premium Cost of Equity</b>	<b>10.10%</b>	<b>10.29%</b>

**Risk Premium Model Inputs**

<b>Docket Number</b>	<b>Utility</b>	<b>Type</b>	<b>Date</b>	<b>Base ROE</b>	<b>Baa Bond Yield</b>	<b>Implied Risk Premium</b>
<b>ER05-515</b>	BG&E	Settlement - Uncontested	Feb-06	10.80	6.07	4.73
<b>ER05-515</b>	BG&E	Settlement - Uncontested	Feb-06	11.30	6.07	5.23
<b>ER05-925</b>	Westar	Settlement - Uncontested	Jun-06	10.80	6.36	4.44
<b>ER07-284</b>	SDG&E	Settlement - Uncontested	Feb-07	11.35	6.14	5.21
<b>ER06-787</b>	Idaho Pwr	Settlement - Uncontested	May-07	10.70	6.15	4.55
<b>ER06-1320</b>	Wisconsin Elec. Pwr	Settlement - Uncontested	May-07	11.00	6.15	4.85
<b>ER07-583</b>	Commonwealth Edison	Settlement - Uncontested	Sep-07	11.00	6.41	4.59
<b>ER06-1549</b>	Duquesne	Settlement - Uncontested	Sep-07	10.90	6.41	4.49
<b>ER08-92</b>	VEPCO	Order	Oct-07	10.90	6.43	4.47
<b>ER08-374</b>	Atlantic Path	Order	Nov-07	10.65	6.44	4.21
<b>ER08-413</b>	Startrans IO	Order	Nov-07	10.65	6.44	4.21
<b>ER08-396</b>	Westar	Declaratory order.	Nov-07	10.80	6.44	4.36
<b>ER08-686</b>	Pepco Holdings	Order	Jan-08	11.30	6.41	4.89
<b>ER07-562</b>	Allegheny	Settlement	Feb-08	11.20	6.42	4.78

<b>ER07-1142</b>	Ariz. Pub. Service	Settlement - uncontested	Apr-08	10.75	6.54	4.21
<b>ER08-1207</b>	VEPCO	Order	May-08	10.90	6.62	4.28
<b>ER08-1402</b>	Duquesne	Order	Jun-08	10.90	6.69	4.21
<b>ER08-1423</b>	Pepco Holdings	Order	Jun-08	10.80	6.69	4.11
<b>ER08-1584</b>	Black Hills	Settlement - Uncontested	Jun-08	10.80	6.69	4.11
<b>ER09-35/36</b>	Tallgrass / Prairie Wind	Commission Order	Jul-08	10.80	6.80	4.00
<b>ER09-249</b>	Public Service Elec. & Gas	Accepted by FERC	Aug-08	11.18	6.86	4.32
<b>ER09-548</b>	ITC Great Plains	Settlement - Uncontested	Sep-08	10.66	6.94	3.72
<b>ER09-75</b>	Pioneer	Order	Sep-08	10.54	6.94	3.60
<b>ER09-187</b>	SoCal Edison	Order on Paper Hearing	Sep-08	10.04	6.94	3.10
<b>ER08-375</b>	SoCal Edison	Order on Paper Hearing	Nov-08	10.55	7.60	2.95
<b>ER09-745</b>	Baltimore Gas & Elec.	Accepted by FERC	Dec-08	11.30	7.80	3.50
<b>ER07-1069</b>	AEP - SPP Zone	Settlement - Uncontested	Jan-09	10.70	7.95	2.75
<b>ER09-681</b>	Green Power Express	Commission Order	Jan-09	10.78	7.95	2.83
<b>ER08-281</b>	Oklahoma Gas & Elec.	Settlement - Uncontested	Apr-09	10.60	8.13	2.47
<b>ER08-1457</b>	PPL Elec. Utilities Corp.	Settlement - Uncontested	Apr-09	11.00	8.13	2.87

<b>ER08-1457</b>	PPL Elec. Utilities Corp.	Settlement - Uncontested	Apr-09	11.14	8.13	3.01
<b>ER08-1588</b>	Kentucky Utilities Co.	Settlement - Uncontested	Apr-09	11.00	8.13	2.87
<b>ER08-552</b>	Niagara Mohawk	Settlement - Uncontested	Jul-09	11.00	7.62	3.38
<b>ER09-628</b>	National Grid Generation LLC	Settlement - Uncontested	Aug-09	10.75	7.39	3.36
<b>ER08-313</b>	Southwestern Public Service Co.	Settlement - Uncontested	Aug-09	10.77	7.39	3.38
<b>ER10-160</b>	SoCal Edison	Order on Paper Hearing	Sep-09	10.33	7.08	3.25
<b>ER08-1329</b>	AEP - PJM Zone	Settlement - Uncontested	Mar-10	10.99	6.20	4.79
<b>ER10-230</b>	Kansas City Power & Light Co.	Settlement - Uncontested	Aug-10	10.60	6.05	4.56
<b>ER10-355</b>	AEP Transcos - PJM	Settlement - Contested	Aug-10	10.99	6.05	4.95
<b>ER10-355</b>	AEP Transcos - SPP	Settlement - Contested	Aug-10	10.70	6.05	4.66
<b>ER11-1952</b>	SoCal Edison	Order	Sep-10	10.30	5.93	4.37
<b>EL11-13</b>	Atlantic Grid Operations	Declaratory Order	Oct-10	10.09	5.84	4.26
<b>ER11-2895</b>	Duke Energy Carolinas	Settlement - Initial Filing	Oct-10	10.20	5.84	4.37
<b>ER11-2377</b>	Northern Pass Tx	Order	Nov-10	10.40	5.79	4.62
<b>ER12-2300</b>	PSCo	Order	Nov-10	10.25	5.79	4.47



<b>ER10-1377</b>	Northern States Power Co. (MN)	Settlement - Uncontested	Mar-11	10.40	5.94	4.46
<b>ER10-992</b>	Northern States Power Co.	Settlement - Uncontested	Apr-11	10.20	6.00	4.20
<b>ER10-516</b>	South Carolina Electric and Gas	Settlement - Uncontested	Apr-11	10.55	6.00	4.55
<b>ER11-4069</b>	RITELine	Order	May-11	9.93	5.98	3.95
<b>ER12-296</b>	PSEG	Order	Aug-11	11.18	5.71	5.47
<b>ER08-386</b>	PATH	Settlement - uncontested	Sep-11	10.40	5.57	4.83
<b>ER11-2560</b>	Entergy Arkansas, Inc.	Settlement - Uncontested	Dec-11	10.20	5.21	4.99
<b>ER11-2853</b>	PSCo	Settlement - Uncontested	Mar-12	10.10	5.08	5.03
<b>ER11-2853</b>	PSCo	Settlement - Uncontested	Mar-12	10.40	5.08	5.33
<b>ER12-1378</b>	Cleco	Settlement - Uncontested	Nov-12	10.50	4.74	5.77
<b>ER12-2554</b>	Transource Missouri	Settlement - Uncontested	Jan-13	9.80	4.65	5.16
<b>ER12-778</b>	Puget Sound Energy	Settlement - Uncontested	Jan-13	9.80	4.65	5.16
<b>ER12-778</b>	Puget Sound Energy	Settlement - Uncontested	Jan-13	10.30	4.65	5.66
<b>ER11-3643</b>	PacifiCorp Inc.	Settlement - Uncontested	Feb-13	9.80	4.62	5.18
<b>ER12-1650</b>	Maine Public Service Co.	Settlement - Uncontested	Feb-13	9.75	4.62	5.13

<b>ER11-3697</b>	SoCal Edison	Settlement - Uncontested	Jul-13	9.30	4.82	4.49
<b>ER13-941</b>	San Diego Gas and Electric	Settlement - Uncontested	Jan-14	9.55	5.22	4.33
<b>ER12-1589</b>	PSCo	Settlement	Aug-14	9.72	4.76	4.96
<b>ER12-91</b>	Duke Energy Ohio	Settlement - Uncontested	Sep-14	10.88	4.73	6.15
<b>EL12-101</b>	Niagara Mohawk	Settlement - Uncontested	Jan-15	9.80	4.66	5.14
<b>ER13-685</b>	Public Service Company New Mexico	Settlement - Uncontested	Feb-15	10.00	4.62	5.38
<b>ER14-1661</b>	MidAmerican Central California	Settlement - Uncontested	Mar-15	9.80	4.58	5.22
<b>ER15-303</b>	American Transmission Systems, Inc.	Settlement - Uncontested	May-15	9.88	4.58	5.30
<b>ER15-303</b>	American Transmission Systems, Inc.	Settlement - Uncontested	May-15	10.56	4.58	5.98
<b>EL14-93</b>	Westar Energy	Settlement - Uncontested	May-15	9.80	4.58	5.22
<b>EL12-39</b>	Duke Energy Florida	Settlement - Uncontested	Jun-15	10.00	4.65	5.35
<b>ER14-192</b>	SPS	Settlement - Uncontested	Jul-15	10.00	4.79	5.21
<b>ER13-2428</b>	Kentucky Utilities	Settlement - Uncontested	Jul-15	10.25	4.79	5.46
<b>ER14-2751</b>	XEST	Settlement - Uncontested	Sep-15	10.20	5.07	5.13

<b>ER15-572</b>	New York Transco LLC	Settlement - Uncontested	Oct-15	9.50	5.23	4.27
<b>ER15-2237</b>	Kanstar Transmission LLC	Settlement - Uncontested	Dec-15	9.80	5.41	4.39
<b>ER15-2114</b>	Transource West Virginia	Settlement - Uncontested	Dec-15	10.00	5.41	4.59

\*Highlighted cases only included in MISO II

### Cases removed from the Risk Premium Model

As noted above, the Commission refined the Risk Premium Model by, among other things, removing some cases from the analysis. A full list of those cases, along with the reason for their removal, is below:

Cases removed because the utility was merely adopting an existing ROE, such as the MISO ROE, without consideration of whether that ROE would be determined to be just and reasonable under fresh analysis:

- EL08-77, *Central Maine Power Co.*
- ER08-1548, *Northeast Utilities Service Co.*
- ER09-14, *NSTAR Elec. Co.*
- ER07-694, *New England Power Co.*
- EL10-80, *Ameren*
- ER12-1593, *DATC Midwest Holdings*
- ER12-2681, *ITC Holdings*

Cases removed because the ROE was clearly not under consideration:

- ER08-10, *Pepco Holdings, Inc.*
- ER11-3352, *PJM and Public Service Enterprise Group*

Cases removed for being duplicative:

- EL13-86, *Public Service Co. of Colorado*

Cases removed because the ROE was set for a definite future date, and the Commission could not have evaluated a risk premium for a future date:

- ER08-1457, *PPL Elec. Utilities Corp.*<sup>436</sup>

Cases removed because the test period predates 2006:

- EL05-19, *Golden Spread Electric Cooperative, Inc.*
- ER05-154, *Bangor Hydro Electric Company*

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<sup>436</sup> Only the 11.18% was removed from consideration. The other two resulting ROEs, because they were not solely applied to a future period, are still included in the analysis.

**Appendix II: DCF Results****MISO I DCF Results**

Line	Company	Unadjusted Dividend Yield	Short-Term	Long-Term	Composite Growth	Dividend Yield Adjustment One-Step	Adjusted Dividend Yield	DCF Results
			Yahoo! Finance	GDP				
1	Consolidated Edison, Inc.	4.14%	2.38%	4.39%	2.78%	101.19%	4.19%	6.97%
2	Public Service Enterprise Group	3.74%	2.95%	4.39%	3.24%	101.48%	3.80%	7.03%
3	PPL Corporation	4.39%	2.23%	4.39%	2.66%	101.12%	4.44%	7.10%
4	CenterPoint Energy, Inc.	4.69%	1.91%	4.39%	2.41%	100.96%	4.73%	7.14%
5	IDACORP Inc.	3.04%	4.00%	4.39%	4.08%	102.00%	3.10%	7.18%
6	OGE Energy Corp.	3.09%	4.00%	4.39%	4.08%	102.00%	3.15%	7.23%
7	Westar Energy Inc.	3.74%	3.40%	4.39%	3.60%	101.70%	3.80%	7.40%
8	Portland General Electric Co.	3.11%	4.70%	4.39%	4.64%	102.35%	3.18%	7.82%
9	DTE Energy Co.	3.38%	4.51%	4.39%	4.49%	102.26%	3.46%	7.94%
10	PG&E Corp.	3.39%	4.71%	4.39%	4.65%	102.36%	3.47%	8.12%
11	The Southern Co.	4.62%	3.32%	4.39%	3.53%	101.66%	4.70%	8.23%
12	SCANA Corp.	3.91%	4.30%	4.39%	4.32%	102.15%	3.99%	8.31%
13	Xcel Energy Inc.	3.68%	4.69%	4.39%	4.63%	102.35%	3.77%	8.40%
14	NorthWestern Corp.	3.60%	5.00%	4.39%	4.88%	102.50%	3.69%	8.57%
15	Duke Energy Corp.	4.05%	4.49%	4.39%	4.47%	102.25%	4.14%	8.61%
16	American Electric Power Co. Inc.	3.68%	5.08%	4.39%	4.94%	102.54%	3.77%	8.72%
17	Vectren Corp.	3.46%	5.50%	4.39%	5.28%	102.75%	3.56%	8.83%
18	Alliant Energy Corp.	3.50%	5.45%	4.39%	5.24%	102.73%	3.60%	8.83%

19	Avista Corp.	3.93%	5.00%	4.39%	4.88%	102.50%	4.03%	8.91%
20	NextEra Energy, Inc.	2.94%	6.27%	4.39%	5.89%	103.14%	3.03%	8.93%
21	Pinnacle West Capital Corp.	3.74%	5.30%	4.39%	5.12%	102.65%	3.84%	8.96%
22	Empire District Electric Co.	4.12%	5.00%	4.39%	4.88%	102.50%	4.22%	9.10%
23	Dominion Resources, Inc.	3.58%	5.89%	4.39%	5.59%	102.95%	3.69%	9.28%
24	Eversource Energy (Northeast Utilities)	3.27%	6.60%	4.39%	6.16%	103.30%	3.38%	9.54%
25	Ameren Corp.	3.91%	5.85%	4.39%	5.56%	102.93%	4.02%	9.58%
26	El Paso Electric Co.	3.01%	7.00%	4.39%	6.48%	103.50%	3.12%	9.59%
27	ALLETE Inc.	3.85%	6.00%	4.39%	5.68%	103.00%	3.97%	9.64%
28	CMS Energy Corp.	3.35%	6.73%	4.39%	6.26%	103.37%	3.46%	9.72%
29	Great Plains Energy, Inc.	3.65%	6.37%	4.39%	5.97%	103.19%	3.77%	9.74%
30	Otter Tail Corp.	4.06%	6.00%	4.39%	5.68%	103.00%	4.18%	9.86%
31	Black Hills Corp.	3.28%	7.00%	4.39%	6.48%	103.50%	3.39%	9.87%
32	Sempra Energy	2.59%	7.93%	4.39%	7.22%	103.97%	2.69%	9.91%
33	Exelon	3.64%	6.81%	4.39%	6.33%	103.41%	3.76%	10.09%
34	PNM Resources	2.85%	8.56%	4.39%	7.73%	104.28%	2.97%	10.70%
35	UIL Holdings	3.59%	7.79%	4.39%	7.11%	103.90%	3.73%	10.84%
36	TECO Energy	4.61%	7.68%	4.39%	7.02%	103.84%	4.79%	11.81%
37	ITC Holdings Corp.	1.76%	11.66%	4.39%	10.21%	105.83%	1.86%	12.07%
38	Unitil Corp.	Merger						
39	MGE Energy	Merger						
40	Edison International	2.66%	0.37%	4.39%	1.17%	100.19%	2.66%	4.38%
41	FirstEnergy Corp.	3.97%	-0.64%	4.39%	0.37%	99.68%	3.96%	5.01%
42	Entergy Corp.	4.21%	-0.48%	4.39%	0.49%	99.76%	4.20%	5.36%

Moody's Baa Utility Bonds 4.65%  
Low With Outlier Test 6.97%  
High 12.07%

Midpoint	9.52%
Low-End Outlier Test	6.47%
High-End Outlier Test	17.67%
Mean	8.93%

**MISO II DCF Results**

			Short-Term	Long-Term		Dividend Yield Adjustment		
Line	Company	Unadjusted Dividend Yield	Yahoo! Finance	GDP	Composite	One-Step	Adjusted Dividend Yield	DCF Results
1	Consol. Edison, Inc.	4.08%	2.95%	4.35%	3.23%	101.48%	4.14%	7.37%
2	Westar Energy Inc.	3.70%	3.50%	4.35%	3.67%	101.75%	3.76%	7.43%
3	Portland General Electric Co.	3.33%	4.11%	4.35%	4.16%	102.06%	3.40%	7.56%
4	Vectren Corp.	3.10%	5.00%	4.35%	4.87%	102.50%	3.18%	8.05%
5	Amer. Elec. Power Co., Inc.	3.84%	4.47%	4.35%	4.45%	102.24%	3.93%	8.37%
6	Xcel Energy, Inc.	3.68%	4.68%	4.35%	4.61%	102.34%	3.77%	8.38%
7	SCANA Corp.	3.90%	4.45%	4.35%	4.43%	102.23%	3.99%	8.42%
8	PPL Corp.	4.67%	3.74%	4.35%	3.86%	101.87%	4.76%	8.62%
9	Great Plains Energy	3.83%	4.80%	4.35%	4.71%	102.40%	3.92%	8.63%
10	DTE Energy Co.	3.75%	5.00%	4.35%	4.87%	102.50%	3.84%	8.71%
11	Pinnacle West Capital Corp.	3.92%	4.95%	4.35%	4.83%	102.48%	4.02%	8.85%
12	Avista Corp.	3.98%	5.00%	4.35%	4.87%	102.50%	4.08%	8.95%
13	Dominion Resources, Inc.	3.72%	5.49%	4.35%	5.26%	102.75%	3.82%	9.08%
14	PG&E Corp.	3.50%	5.80%	4.35%	5.51%	102.90%	3.60%	9.11%
15	Alliant Energy	3.72%	5.55%	4.35%	5.31%	102.78%	3.82%	9.13%
16	ALLETE, Inc.	4.16%	5.00%	4.35%	4.87%	102.50%	4.26%	9.13%
17	Eversource Energy	3.39%	6.57%	4.35%	6.13%	103.29%	3.50%	9.63%
18	CMS Energy Corp.	3.36%	6.72%	4.35%	6.25%	103.36%	3.47%	9.72%
19	Ameren Corporation	3.96%	6.00%	4.35%	5.67%	103.00%	4.08%	9.75%
20	El Paso Elec. Co.	3.20%	7.00%	4.35%	6.47%	103.50%	3.31%	9.78%
21	Otter Tail Corp.	4.05%	6.00%	4.35%	5.67%	103.00%	4.17%	9.84%
22	NorthWestern Corp.	3.61%	6.81%	4.35%	6.32%	103.41%	3.73%	10.05%
23	WEC Energy Group, Inc.	3.58%	7.55%	4.35%	6.91%	103.78%	3.72%	10.63%
24	Sempra Energy	2.84%	9.35%	4.35%	8.35%	104.68%	2.97%	11.32%
25	PNM Resources, Inc.	2.92%	9.30%	4.35%	8.31%	104.65%	3.06%	11.37%
27	IDACORP, Inc.	3.03%	4.00%	4.35%	4.07%	102.00%	3.09%	7.16%
26	CenterPoint Energy, Inc.	5.47%	0.40%	4.35%	1.19%	100.20%	5.48%	6.67%
28	OGE Energy Corp.	3.81%	2.17%	4.35%	2.61%	101.09%	3.85%	6.46%
29	Public Service Enterprise Group	3.85%	1.38%	4.35%	1.97%	100.69%	3.88%	6.28%



30	FirstEnergy Corp.	4.51%	-0.92%	4.35%	0.13%	99.54%	4.49%	5.38%
31	Edison International	2.85%	-0.51%	4.35%	0.46%	99.75%	2.84%	3.92%
32	Black Hills Corp.	Merger						
33	Cleco Corp.	Merger						
34	Duke Energy Corp.	Merger						
35	Empire District	Merger						
36	Exelon Corp.	Merger						
37	Hawaii Elec. Ind. Inc.	Merger						
38	ITC Holdings	Merger						
39	NextEra Energy Inc.	Merger						
40	Pepco Holdings Inc.	Merger						
41	Souther Co.	Merger						
42	TECO Energy Inc.	Merger						
43	UIL Energy	Merger						

Moodys Baa Utility Bonds	5.41%
Low With Outlier Test	7.37%
High	11.37%
Midpoint	9.37%
High-End Outlier Test	17.43%
Low-End Outlier Test	7.18%

**Appendix III: Overall Results**

MISO I	Zone of Reasonableness		Lower Third		Middle Third		Upper Third	
	Lower	Upper	Lower	Upper	Lower	Upper	Lower	Upper
DCF (1)	6.97%	12.07%	6.97%	8.67%	8.67%	10.37%	10.37%	12.07%
CAPM (2)	7.80%	13.09%	7.80%	9.56%	9.56%	11.33%	11.33%	13.09%
Risk Premium (3)	7.50%	12.70%	7.50%	9.23%	9.23%	10.97%	10.97%	12.70%
Average	7.42%	12.62%	7.42%	9.16%	9.16%	10.89%	10.89%	12.62%
Midpoint	<b>10.02%</b>							
Average Width of DCF and CAPM Zones of Reasonableness:					5.195			
Risk Premium ROE:		10.10%						
Risk Premium Imputed Zone of Reasonableness:					7.50%	to	12.70%	
MISO II	Zone of Reasonableness		Lower Third		Middle Third		Upper Third	
	Lower	Upper	Lower	Upper	Lower	Upper	Lower	Upper
DCF (4)	7.37%	11.37%	7.37%	8.70%	8.70%	10.04%	10.04%	11.37%
CAPM (5)	8.35%	12.63%	8.35%	9.78%	9.78%	11.20%	11.20%	12.63%
Risk Premium (6)	8.22%	12.36%	8.22%	9.60%	9.60%	10.98%	10.98%	12.36%
Average	7.98%	12.12%	7.98%	9.36%	9.36%	10.74%	10.74%	12.12%
Midpoint	<b>10.05%</b>							
Average Width of DCF and CAPM Zones of Reasonableness:					4.14			
Risk Premium ROE:		10.29%						
Risk Premium Imputed Zone of Reasonableness:					8.23%	to	12.37%	

(1) See Appendix II

(2) See Trial Staff Initial Br. (I), Attachment A to App. 2 at 6.

(3) See Appendix I

(4) See Appendix II

(5) See Trial Staff Initial Br. (II), Attachment A to App. 2 at 6.

(6) See Appendix I

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Association of Businesses Advocating Tariff Equity      Docket No.      EL14-12-004  
Coalition of MISO Transmission Customers  
Illinois Industrial Energy Consumers  
Indiana Industrial Energy Consumers, Inc.  
Minnesota Large Industrial Group  
Wisconsin Industrial Energy Group

v.

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

Arkansas Electric Cooperative Corporation  
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

(Issued May 21, 2020)

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

1. Today's order is yet another twist in the Commission's decade-long effort to adapt its methodology for setting public utilities' return on equity (ROE) to the low-interest rate conditions that have prevailed since the late 2000s. In that time, the Commission has proposed multiple different ways of dealing with the fact that its long-standing ROE methodology produces cost-of-equity estimates well below the ROEs it generally permitted public utilities to collect in the years before the Great Recession. The

Commission's most recent attempt to address this issue, Opinion No. 569,<sup>1</sup> was far from perfect. Nevertheless, I supported it because it represented a reasonable compromise that I hoped would bring some much-needed certainty and predictability to the Commission's approach to setting public utilities' ROEs.

2. So much for that. Today, we are once again changing course and revamping our ROE methodology. And, in so doing, we are sacrificing whatever certainty Opinion No. 569 might have provided.

3. In addition, I am particularly troubled that the Commission is portraying its change of heart as a dispassionate assessment of various technical questions—the comparative merits of one financial model, the right source of data for another, or the appropriate application of various assumptions. It is hard for me to believe that anyone buys that this latest twist is a genuine reassessment of those technical minutiae or that those details are what led Chairman Chatterjee to express his eagerness to consider rehearing requests at the December 2019 Open Meeting, before those requests were even filed. Instead, it appears that the Commission again has chosen a path directed by the results, in this case the perceived need to award a higher ROE, rather than the law and the facts.

4. In fairness, it may be that the methodology established in Opinion No. 569 would yield ROEs that are too low. And it may also be that the ROE established in this proceeding—10.02 percent—is a just and reasonable number. But, even so, the Commission must be transparent about the factors driving its decisionmaking process. If we think the ROEs set by the Commission's methodology are too low—or, for that matter, too high—we ought to say so and explain our reasoning, rather than pretending to be concerned only with the technical details of our models, data, and assumptions. Accordingly, I dissent in part because I do not believe that today's order adequately justifies several of the changes it adopts, even if the end result is an appropriate number.

5. Finally, today's order affirms the one aspect of Opinion No. 569 that merited a grant of rehearing. Opinion No. 569 declined to order refunds for a period in which everyone agrees customers paid an unjust and unreasonable rate. I continue to believe that decision was an abdication of our responsibility to protect consumers. As a result, I also dissent from the portion of today's order that affirms that decision.

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

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

6. Between 2011 and 2015, various entities representing customers' interests filed a series of complaints under section 206 of the Federal Power Act<sup>2</sup> (FPA) arguing that the base ROE available to transmission owners in ISO New England, Inc. and the Midcontinent Independent System Operator (MISO) was unjust and unreasonable. In Opinion No. 531, the Commission addressed the first of those complaints, with its most significant findings being that "anomalous capital market conditions" required the Commission to consider a variety of financial models and that those models supported an elevated ROE.<sup>3</sup> The Commission subsequently applied that approach to a similar complaint involving the MISO Transmission Owners.<sup>4</sup> Shortly thereafter, however, the D.C. Circuit vacated Opinion No. 531, sending it back to the Commission and the Commission back to the drawing board.<sup>5</sup> Following that remand, the Commission proposed to expressly rely on the four financial models considered in Opinion No. 531.<sup>6</sup> A year later, in Opinion No. 569, we narrowed it to two models, while making a number of changes to how we implemented those models.<sup>7</sup> Today, we're back up to three models, with another round of tweaks to those models.<sup>8</sup>

7. With the exception of the Commission's finding of anomalous market conditions, which at least hinted at its real concern, the Commission's various orders in this saga have suggested that each new iteration of its ROE methodology is a largely technical affair that turns on the Commission's evaluation of discrete issues with the various

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<sup>2</sup> 16 U.S.C. ¶ 824e (2018).

<sup>3</sup> *Coakley Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at PP 41, 152 (2014).

<sup>4</sup> *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016).

<sup>5</sup> *Emera Maine v. FERC*, 854 F.3d 9 (2017).

<sup>6</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018) (Briefing Order).

<sup>7</sup> Opinion No. 569, 169 FERC ¶ 61,129.

<sup>8</sup> Although the complaints against the RTO-wide ROEs in MISO and ISO New England garnered the most attention, the last ten years have also seen a host of other complaints against individual transmission owner's ROEs, which have also been affected by the Commission's back-and-forth over these complaints.

financial models. In so doing, the Commission has added new models,<sup>9</sup> removed some of those models,<sup>10</sup> tweaked some of those models,<sup>11</sup> introduced new inputs,<sup>12</sup> modified existing inputs,<sup>13</sup> introduced new screens,<sup>14</sup> modified existing screens,<sup>15</sup> and even altered how the Commission places the ROE within the zone of reasonableness.<sup>16</sup> But, with each

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<sup>9</sup> See, e.g., Opinion No. 551, 156 FERC ¶ 61,234 at P 9 (relying on four alternative models to place the ROE within the zone of reasonableness).

<sup>10</sup> See, e.g., Opinion No. 569, 169 FERC ¶ 61,129 at PP 200, 340 (declining to rely on the Expected Earnings or Risk Premium methodologies). Indeed, at this point, the Commission has considered, but not relied on the risk premium model, Opinion No. 551, 156 FERC ¶ 61,234 at P 191, proposed relying on the risk premium model, Briefing Order, 165 FERC ¶ 61,118 at PP 18-19, declined to rely on the risk premium model, Opinion No. 569, 169 FERC ¶ 61,129 at P 340, and, with today's order, now elected to rely on the rely risk premium model, *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 171 FERC ¶ 61,154, at P 104 (2020).

<sup>11</sup> See, e.g., Opinion No. 569-A, 171 FERC ¶ 61,154 at P 107 (modifying the risk premium model to produce a zone of reasonableness rather than a single point estimate).

<sup>12</sup> Compare Opinion No. 569, 169 FERC ¶ 61,129 at P 274 (rejecting the use of *Value Line* short-term growth rates in the Capital Asset Pricing Model (CAPM)) with Opinion No. 569-A, 171 FERC ¶ 61,154 at P 78 (“clarify[ing]” that the Commission will consider *Value Line* short-term growth rates in the CAPM).

<sup>13</sup> See, e.g., Opinion No. 569-A, 171 FERC ¶ 61,154 at P 57 (reducing the weighting of the long-term growth rate in the two-step Discounted Cash Flow model (DCF) from one-third to one-fifth).

<sup>14</sup> Briefing Order, 165 FERC ¶ 61,118 at P 54 (proposing a high-end outlier screen that would apply to “any proxy company whose cost of equity estimated with a given model is more than 150 percent of the median result of all of the potential proxy group members in that model”); Opinion No. 569, 169 FERC ¶ 61,129 at P 375 (adopting the proposed high-end outlier screen).

<sup>15</sup> See, e.g., Opinion No. 569-A, 171 FERC ¶ 61,154 at P 154 (increasing the threshold for the high-end outlier test from 150 percent of the median of the zone of reasonableness to 200 percent of the median of the zone of reasonableness).

<sup>16</sup> See, e.g., *id.* P 193 (changing the start points for setting ROEs for above- and below-average ROEs); Opinion No. 551, 156 FERC ¶ 61,234 at P 275 (setting the MISO-wide ROE at the midpoint of the upper half of the zone of reasonableness).

new twist, it becomes harder to buy that the Commission is genuinely reassessing the mechanics of each model rather than disagreeing with the ROE numbers those models produce.<sup>17</sup>

8. Today's order is the culmination of all that. Not long after completing a year-long process to re-evaluate our approach to setting ROEs following the D.C. Circuit's decision in *Emera Maine*, the Commission is now once again charting a major change of course. In so doing, the Commission is again portraying its change of heart as a technical matter based on its reassessment of a handful of discrete issues rather than what it is: A determination that the old number was too low and now we need a higher one.

9. To be fair, I am sympathetic to the impulse to consider subjective factors. The Commission's approach to setting a just and reasonable ROE will often implicate broader policy considerations, equity, and other factors that cannot be captured in, for example, a discussion of dividend yields or the appropriate sources of growth rate calculations. But while ROE policy will always be as much art as science, that is no excuse to pretend that art is science.

10. If broader considerations, including policy goals, are preventing the Commission from settling on or consistently applying an ROE methodology, then we must acknowledge those goals and give the interested entities the chance to weigh in on them just as they do for the intricacies of dividend yields, growth rates, and the like. All approaches to setting ROEs have their shortcomings, but the worst result by far is to continually fiddle with those approaches, undermining the certainty and predictability that help transmission owners make long-term investments. If the Commission is going to purport to rely entirely on financial models to evaluate and set ROEs, it has to take those models at face value without second-guessing them when it does not like the results.

11. In addition, today's order illustrates the problems with disguising subjective policy considerations as technical determinations. In a number of instances, the Commission is reversing determinations made in Opinion No. 569 using rationales that are far less convincing than those that supported the opposite outcome in Opinion No. 569. Shifting

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<sup>17</sup> It is also worth noting that, today, the Commission is adding even more complexity to its approach to setting ROE methodologies by also issuing a policy statement regarding oil and natural gas pipelines that largely follows the approach outlined in Opinion No. 569 rather than this order. In particular, that policy statement does not use the risk premium model, adjust the weighting of long- and short-term growth rates for the two-step DCF model, or adopt a particular high-end outlier screen. *See Policy Statement on Determining Return on Equity for Natural Gas and Oil Pipelines*, 171 FERC ¶ 61,155 at PP 2, 87 (2020). The Commission, it seems, just cannot settle on an analytically consistent approach to this important issue.



from such strong arguments to such suspect ones underscores the extent to which subjective factors seem to be operating in the background while also opening the Commission up to considerable risk on judicial review, creating even more of the uncertainty we ought to be trying to minimize.

12. Take the example of the risk premium model. Although Opinion No. 569 declined to utilize the risk premium model based on a long list of shortcomings, today's order reverses course, adding it to the DCF and CAPM on which the Commission previously relied. The record before us does not support that choice.

13. As an initial matter, and as explained in Opinion No. 569, the risk premium model does essentially the same thing as the CAPM by attempting to calculate the "premium that investors require over the risk-free rate of return."<sup>18</sup> Opinion No. 569 rightly pointed out that nothing in the record supports having two thirds of the Commission's ROE methodology composed of such analytically redundant approaches.<sup>19</sup> Today's order tersely responds to that concern by asserting that the two models are "sufficiently distinct" since they use different inputs.<sup>20</sup> But that ignores the point in Opinion No. 569 that the problem with relying on both models is that they replicate the same basic methodology, irrespective of their inputs.<sup>21</sup>

14. Opinion No. 569 also explained how the risk premium model is, in most respects, just an inferior version of the CAPM in so far as it does not consider market-based cost-of-equity estimates<sup>22</sup> and introduces significant circularity concerns by relying on *past*

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<sup>18</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 341.

<sup>19</sup> *Id.*

<sup>20</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 105.

<sup>21</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 341 ("We find that using the Risk Premium model in conjunction with the CAPM model would confer too much weight towards risk premium methodologies. The Commission has long used and, over time, refined the DCF model and we find that it would be inappropriate for variations of the risk premium model to receive twice its weight.").

<sup>22</sup> *Id.* P 342 ("[T]he Risk Premium model is likely to provide a less accurate current cost of equity estimate than the DCF model or CAPM because it relies on previous ROE determinations, whose resulting ROE may not necessarily be directly determined by a market-based method, whereas the DCF and CAPM methods apply a market-based method to primary data."). In addition, as the Commission noted, many of the ROEs included in the risk premium analyses in the record were never determined to be just and reasonable. For example, many of the ROEs were set through uncontested settlements, which involve compromise across a host of issues of which ROE is just one.

judgments, which may not reflect the appropriate risk premium under current conditions.<sup>23</sup> The Commission responds to those circularity concerns by contending that they are “mitigate[d]” by the fact that the Commission will average the results of the risk premium with the DCF and the CAPM, which do not present the same concerns.<sup>24</sup> But observing that the Commission will *also* use models without significant circularity concerns is not a reasoned response to the argument that you should not use circular models in the first place.

15. In addition, the Commission convincingly explained in Opinion No. 569 how “the record contains insufficient evidence to conclude that investors rely on risk premium analyses utilizing historic Commission ROE determinations or settlement approvals to determine the cost of capital and make investment decisions.”<sup>25</sup> The Commission noted that, while allowed ROEs are certainly important to investors’ decisionmaking, that does not suggest that investors’ perform anything remotely close to the analysis contemplated by the risk premium model—*i.e.*, a backward looking comparison between riskless assets and allowed ROEs—when making their investment decisions.<sup>26</sup> Today’s order now takes the opposite position, observing only that investors in regulated utilities expect to earn a return above a risk-free asset (which is obviously true) and that “investors . . . observe regulatory ROEs and how changes in authorized ROE levels could affect utility earnings” (which is equally obvious).<sup>27</sup> It should go without saying that investors pay attention to ROEs earned by public utilities and expect them to be higher than debt backed by the U.S. government. But neither of those self-evident statements provides *any* reason—much less substantial evidence—to believe that investors perform a risk premium analysis comparing past differences between risk free assets and Commission-allowed ROEs when evaluating whether to invest in Commission-regulated public utilities.

16. And, finally, the risk premium model does not at all fit with the Commission’s new approach for evaluating whether an existing ROE is just and reasonable. Opinion No. 569 established a framework for evaluating whether an existing ROE is just and

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The Commission frequently approves uncontested without directly passing on whether the individual terms are just and reasonable. *See id.*

<sup>23</sup> *See id.* P 343 (explaining that the circularity concerns with the risk premium model are “particularly direct and acute”).

<sup>24</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 106.

<sup>25</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 345.

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

<sup>27</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 112.

reasonable based on ranges of presumptively just and reasonable results derived from the financial models used by the Commission.<sup>28</sup> Unlike every other financial model used, or even considered by the Commission in Opinion No. 569,<sup>29</sup> the risk premium model produces a single point estimate of the just and reasonable ROE, not a zone of reasonableness.<sup>30</sup>

17. Recognizing this “serious concern,” but nevertheless determined to fit a square peg into a round hole, today’s order resolves to “impute” the average width of the zone of reasonableness created by the DCF and CAPM methodologies to the risk premium model.<sup>31</sup> For example, if the DCF and CAPM produce an average zone of 200 basis points, it seems that the Commission will just assume that the risk premium model does too. Today’s order, however, does not point to any evidence suggesting that such imputation is appropriate or that any investors or financial experts have sanctioned the Commission’s method. Presumably that is because the record lacks any evidence supporting such an odd repurposing of the risk premium model.<sup>32</sup> After all, the Commission’s approach to using the risk premium in evaluating whether an existing ROE is just and reasonable is the equivalent of making someone a “custom” suit based on their siblings’ measurements: Maybe it will fit, but there is no reason to believe that it will and, in any case, it misses the point of the exercise.

18. In addition, today’s order adopts a series of equally unreasoned modifications to Opinion No. 569’s framework for conducting the first step of the section 206 inquiry. As noted, Opinion No. 569 established a practice of dividing the zone of reasonableness into ranges of presumptively just and reasonable ROEs within the broader zone of reasonableness.<sup>33</sup> In particular, the Commission created risk-adjusted “quartiles” of the

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<sup>28</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 57.

<sup>29</sup> The Commission also considered, but rejected, relying upon an expected earnings model as well. *Id.* P 200.

<sup>30</sup> *Id.* P 351.

<sup>31</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 107.

<sup>32</sup> That become especially clear when compared with the Commission’s thorough and well-reasoned rejection of the risk premium on this basis, among others, in Opinion No. 569. *Compare id* P 107 *with* Opinion No. 569, 169 FERC ¶ 61,129 at P 351.

<sup>33</sup> That change responded to the D.C. Circuit’s holding that the FPA contemplates “a ‘broad’ range of potentially just and reasonable ROEs, ‘not an exact dollar figure.’” *Emera Maine v. FERC*, 854 F.3d 9, 23 (D.C. Cir. 2017) (quoting *Panhandle E. Pipe Line Co. v. FERC*, 777 F.2d 739, 746 (D.C. Cir. 1985)).

zone of reasonableness centered on the three points that the Commission uses as the starting point for setting ROEs for utilities of different risk profiles<sup>34</sup>—the midpoint of the entire zone of reasonableness for average-risk utilities, the midpoint of the lower half of the zone of reasonableness for below-average risk utilities, and the midpoint of the upper half of the zone of reasonableness for above-average risk utilities.<sup>35</sup>

19. The Commission justified the end points of each quartile by explaining that “[l]ogic dictates that the end points of those ranges should not be closer to the starting points for the ranges of utilities with different risk profiles than they are to their own starting point.”<sup>36</sup> In other words, it would not make sense to presume that an existing ROE is just and reasonable if it was closer to the starting point used to set the ROE for a utility of a different risk profile than the starting point for a utility of the same risk profile. The Commission’s quartile-based approach made sense given the emphasis that the Commission has historically placed on relative risk profiles when placing ROEs within the zone of reasonableness<sup>37</sup> and it ensured that the ranges of presumptively just and reasonable results were not just arbitrary sub-sections of the zone of reasonableness.

20. Today’s order abandons that well-reasoned approach and arbitrarily divides the entire zone of reasonableness into thirds, with each third providing a presumptively just and reasonable range of ROEs for certain utilities. The Commission appears to suggest<sup>38</sup> that this maneuver is necessary to comply with the D.C. Circuit’s statement in *Emera Maine* that “the zone of reasonableness creates a broad range of *potentially* lawful

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<sup>34</sup> Opinion No. 569, 169 FERC ¶ 61,129 at P 57.

<sup>35</sup> *Id.* The midpoint is the measure of central tendency that the Commission uses when setting the ROE for a diverse range of utilities. *Id.* PP 398, 409. By contrast, the Commission uses the median as the measure of central tendency when setting the ROE for a single utility. *Id.* P 398.

<sup>36</sup> *Id.* P 63.

<sup>37</sup> See Opinion No. 569, 169 FERC ¶ 61,129 at P 62 (“We also find that the circumstance most relevant to determining that range is the utility’s risk profile.”); see also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (“[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”); *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 6-99700 (D.C. Cir. 2007) (explaining the emphasis that the Commission and courts have placed on the role of risk in setting ROEs).

<sup>38</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 190.

ROEs.”<sup>39</sup> But *Emera Maine* requires nothing of the sort. Read in context, the quoted language stands only for the proposition that the Commission cannot prove that an existing rate is unjust and unreasonable simply by showing that its ROE methodology would produce a different number using current data.<sup>40</sup> The court certainly did not suggest that every point within the zone of reasonableness must be *presumptively* just and reasonable for some utility, which is how today’s order appears to understand that language. In any case, the quartile-based approach in Opinion No. 569 easily complied with even the Commission’s reading of the language in *Emera Maine*. Because the ranges only represented presumptive findings, a public utility could still argue that an ROE outside those ranges was nevertheless just and reasonable based on other considerations,<sup>41</sup> making every ROE within the zone of reasonableness at least “potentially” just and reasonable.

21. And that’s just the start of it. Recognizing that the decision to divide the zone of reasonableness into thirds obliterates the rationale for the ranges outlined in Opinion No. 569,<sup>42</sup> the Commission announces, without any explanation, that it will change the starting points it uses when setting the ROE for below- and above-average risk utilities to the midpoint of the lower third of the zone of reasonableness and the midpoint of the upper third of the zone of reasonableness, respectively.<sup>43</sup> Now the tail is truly wagging the dog. In Opinion No. 569, the Commission justified the ranges of presumptively just and reasonable ROEs based on the Commission’s longstanding approach to handling companies’ relative risk profiles, namely the use of the upper and lower midpoints for utilities of above- and below-average risk, respectively.<sup>44</sup> In today’s order, the Commission uproots that longstanding approach, selecting entirely new starting points for placing ROEs within the zone of reasonableness in order to support its new ranges of

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<sup>39</sup> *Emera Maine*, 854 F.3d at 26 (emphasis added).

<sup>40</sup> *Id.* (“But, as we have explained, the zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE, meaning that FERC’s finding that 10.57 percent was a just and reasonable ROE, standing alone, did not amount to a finding that every other rate of return was not.” (internal quotation marks omitted)).

<sup>41</sup> Opinion No. 569, 169 FERC ¶ 61,129 at PP 60-64, 68 (discussing how the Commission would apply the new framework, including what other factors it would consider).

<sup>42</sup> *See supra* P 20 & note 37.

<sup>43</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at 194.

<sup>44</sup> Opinion No. 569, 169 FERC ¶ 61,129 at PP 62-64.

presumptively just and reasonable results. That gets it entirely backwards; the ranges of presumptively just and reasonable results should reflect how we set ROEs, not the other way around. In any case, at no point in today's order does the Commission explain why the new starting points themselves are an appropriate place to begin the process of placing the ROE for an above- or below-average risk utility within the zone of reasonableness.<sup>45</sup>

22. Suffice it to say, the Commission has not justified its change of course with respect to either the risk premium model or its approach to step one of the section 206 inquiry. Nevertheless, while I believe that Opinion No. 569 was a superior approach to setting ROEs, I also recognize that the roughly 10 percent ROE established in today's order may well be a just and reasonable end result.<sup>46</sup> In addition, for the reasons explained above, I firmly believe that the Commission must finally bring some certainty and predictability to how it sets transmission owner ROEs.

## **II. The Commission Should Order Refunds for Unjust and Unreasonable Rates Paid by Consumers**

23. I continue to disagree with the Commission's refusal to order refunds for the fifteen-month refund period established pursuant to the Second Complaint.<sup>47</sup> Throughout that period, customers within MISO paid an unjust and unreasonable ROE. Nevertheless, the Commission refuses to order refunds on the specious basis that the FPA requires it to act as if the 10.02 percent ROE set in today's order was in effect throughout that fifteen-month period. In reality, however, customers actually paid a 12.38 percent ROE—a difference worth tens of millions of dollars—and nothing in the law requires us to pretend otherwise.

24. The facts relevant to the issue of refunds are straightforward. On November 12, 2013, multiple parties filed a complaint (First Complaint) alleging that the MISO Transmission Owners' 12.38 percent ROE was unjust and unreasonable.<sup>48</sup> The

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<sup>45</sup> That failure is particularly glaring because the new starting points will be closer to either the top or bottom of the zone of reasonableness than the midpoint. Nothing in today's order—or the record before us—explains why those starting points should be biased towards the most extreme costs of equity in the zone of reasonableness.

<sup>46</sup> *Cf. Hope*, 320 U.S. 591, 602 (1944) (“Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling.”).

<sup>47</sup> *See* Opinion No. 569, 169 FERC ¶ 61,129 (Glick, Comm’r, dissenting in part).

<sup>48</sup> *Id.* P 3. The authorized base ROE for the ATCLLC zone was 12.20 percent, but I will follow the underlying order's practice of referring to the MISO-wide ROE as 12.38.

Commission set the matter for hearing and established a refund effective date of November 12, 2013 (the date the First Complaint was filed),<sup>49</sup> meaning that the 15-month refund period for the First Complaint lasted until February 12, 2015.<sup>50</sup> On February 12, 2015, a different set of parties filed another complaint (Second Complaint) against the MISO Transmission Owners' ROE. The Commission again set the matter for hearing and established a refund effective date of February 12, 2015,<sup>51</sup> meaning that the 15-month refund period for the Second Complaint lasted until May 12, 2016. Both proceedings were fully litigated and produced initial decisions by Administrative Law Judges.<sup>52</sup> And, in both cases, the Commission did not get around to issuing orders on the initial decisions until well after both refund periods expired, meaning that customers paid rates reflecting a 12.38 percent ROE throughout both refund periods.<sup>53</sup>

25. In today's order, the Commission affirms its conclusion in Opinion No. 569 that the 12.38 percent ROE was unjust and unreasonable and it establishes a new just and reasonable ROE of 10.02 percent. That is sufficient to order refunds for the refund

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*Id.* P 3 & n.11.

<sup>49</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 188 (2014), *order on reh'g*, 156 FERC ¶ 61,060 (2016).

<sup>50</sup> As discussed further below, pursuant to the Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat 2299 (1988) (codified at 16 U.S.C. § 824e(b)), as part of any proceeding under section 206 of the FPA, the Commission shall establish a refund effective date and, at the conclusion of that proceeding, it may order refunds for the difference between an unjust and unreasonable rate in effect during the period up to 15 months following the refund effective date and the new just and reasonable rate fixed by the Commission.

<sup>51</sup> *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, at P 1 (2015), *order on reh'g*, 156 FERC ¶ 61,061 (2016) (Second Complaint Rehearing Order).

<sup>52</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 (2015); *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 (2016).

<sup>53</sup> The Commission originally issued an order on the First Complaint in September 2016. See *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234, at P 9 (2016). But, shortly thereafter, the D.C. Circuit issued its opinion in *Emera Maine*, 854 F.3d 9, which vacated the precedent on which Opinion No. 551 relied. Following briefing on remand, the Commission issued Opinion No. 569, which elicited the rehearing requests addressed in today's order.

periods established pursuant to *both* the First and Second Complaints. To see why, let's start with the text of section 206(b), which provides that

At the conclusion of any proceeding under this section [i.e., section 206], the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force.<sup>54</sup>

All that text requires is that the Commission find that customers paid an unjust and unreasonable rate during the refund period and that the Commission have set a just and reasonable replacement rate, so that it can calculate refunds equal to the difference between those two rates. Both conditions are satisfied here: Customers paid 12.38 percent through the Second Complaint refund period and the Commission has determined that they should have paid 10.02 percent. That is sufficient to order refunds pursuant to section 206(b).

26. Contrary to the suggestion in today's order,<sup>55</sup> the text of section 206(b) does not limit the Commission's refund authority to only those individual proceedings in which it sets a new rate. Instead, it provides the Commission with the authority to order refunds "[a]t the *conclusion* of *any* proceeding under this section"—*i.e.*, section 206."<sup>56</sup> Congress surely understood that not every section 206 proceeding would be resolved against the public utility and, had it so desired, it could have conditioned the Commission's refund authority accordingly. But by pairing the word "conclusion"—which would seem to contemplate proceedings in which the public utility prevailed as well as those in which it did not—with the phrase "any proceeding"—which is equally unlimited—Congress rejected such a narrow interpretation of the Commission's refund authority. Instead, as noted, the plain text of section 206 indicates that the Commission's refund authority turns on the presence of a difference between the unjust and unreasonable rate that customers paid during the refund period and the just and reasonable rate that they should have paid, not whether the Commission set a new rate in every complaint it resolves.

27. Recognizing that Congress did not explicitly limit the Commission's refund authority, the Commission responds that it did so implicitly when it inserted the phrase

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<sup>54</sup> 16 U.S.C. § 824e(b) (emphasis added).

<sup>55</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at PP 260-262.

<sup>56</sup> 16 U.S.C. § 824e(b) (emphasis added).



“thereafter observed and in force” in section 206(b).<sup>57</sup> The idea, as I understand it, is that “thereafter observed and in force” is supposed to reflect Congress’ understanding that the Commission would be setting a new rate in each complaint prior to ordering any refunds.<sup>58</sup> Thus, the argument appears to go, the Commission cannot order refunds unless it sets a new rate in the complaint corresponding to each individual refund period.

28. As an initial matter, that would be a remarkably convoluted way of limiting the Commission’s refund authority under section 206. It envisions that, instead of limiting the Commission’s refund authority in the statutory text that establishes the proceedings in which the Commission can order refunds, Congress elected to do so through an opaque reference in the discussion of how the Commission should calculate any refunds that it may order. That is a bizarre—and overly complicated—way to read an otherwise straightforward statute.<sup>59</sup>

29. In any case, the “thereafter observed and in force” language is better read as a reference to the identical language in section 206(a).<sup>60</sup> Under that reading, all that “thereafter observed and in force” does is clarify that the ceiling on the Commission’s refund authority under section 206(b) is the difference between the rate in effect during the refund period and the just and reasonable rate that the Commission established pursuant to subsection 206(a).<sup>61</sup> In other words, that language specifies *how* the Commission should calculate any refunds it orders, not *when* it may order refunds. As noted, my reading makes far more sense given the fact that the “thereafter observed and in force” language appears in the portion of 206(b) that defines how the Commission should calculate refunds, not when it should order them. I see no reason to abandon that

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<sup>57</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 262.

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

<sup>59</sup> *Cf. City of Anaheim v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009) (“declin[ing] FERC’s invitation to mangle the statute”).

<sup>60</sup> *See* 16 U.S.C. § 824e(a) (requiring the Commission to establish a new just and reasonable rate to be “thereafter observed and in force” whenever it finds that an existing rate is unjust and unreasonable or unduly discriminatory or preferential).

<sup>61</sup> That interpretation makes even more sense when you consider that section 206(b) was added more than 50 years after section 206(a), which was part of the original FPA, and so it would have been necessary to clarify how the amendment worked in conjunction with the pre-existing language.

straightforward reading of the statute, which protects customers from paying unjust and unreasonable rates, in favor of a convoluted one that does not.<sup>62</sup>

30. The Commission's next argument is even more of a head scratcher. The Louisiana Public Service Commission argues that it is irrational to use the ROE set in Opinion No. 569 as the baseline for evaluating whether to order refunds for the Second Complaint refund period because that ROE was never "demanded, observed, charged, or collected," as section 206 requires. The Commission responds with what might charitably be called a regulatory fiction. It argues that Opinion No. 569 made the new just and reasonable ROE set in the First Complaint proceeding effective as of the beginning of the First Complaint refund period, which, the Commission argues, means that we must pretend that that lower ROE was in effect throughout the refund period for the Second Complaint as well. The Commission seems to be suggesting that it must pretend that the 10.02 ROE established today was "demanded, observed, charged, or collected" during the second refund period.<sup>63</sup>

31. But that interpretation is both demonstrably false and squarely foreclosed by section 206. First and foremost, the ROE that the MISO Transmission Owners collected during the refund period for the Second Complaint was 12.38 percent, no ifs, ands, or buts. In addition, the FPA flatly prohibited the MISO Transmission Owners from collecting any other ROE during that period. As noted, section 206 is forward looking in that it gives the Commission the ability to set a new just and reasonable rate as of the date on which the Commission makes the findings required by section 206.<sup>64</sup> The only exception to that rule is for the refund period, during which time the Commission is

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<sup>62</sup> Cf., e.g., *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004) (rejecting "an interpretation [that] comports neither with the statutory text nor with the Act's 'primary purpose' of protecting consumers"); *City of Chicago, Ill. v. FPC*, 458 F.2d 731, 751 (D.C. Cir. 1971) ("[T]he primary purpose of the Natural Gas Act is to protect consumers." (citing, *inter alia*, *City of Detroit v. FPC*, 230 F.2d 810, 815 (D.C. Cir. 1955)); S. Rep. 100-491, 5-6 (1988) ("The Committee intends the Commission to exercise its refund authority under section 206 in a manner that furthers the long-term objective of achieving the lowest cost for consumers consistent with the maintenance of safe and reliable service.").

<sup>63</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 264.

<sup>64</sup> See, e.g., *Louisiana Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1299 (D.C. Cir. 2014) (explaining that section 206 provides for prospective relief only with the exception of the refund period).

permitted to act as if the new rate were in effect when ordering refunds.<sup>65</sup> The refund period for the Second Complaint, however, fell *after* the conclusion of the refund period for the First Complaint and *before* the date on which the Commission issued Opinion No. 569. Suffice it to say, it is arbitrary and capricious for the Commission to assume that it did that which it is legally prohibited from doing.

32. The Commission's next argument is that ordering refunds for the Second Complaint would represent an end-run around the 15-month limitation on refunds enshrined in section 206(b).<sup>66</sup> That argument appears to have both a legal dimension and a policy dimension. Beginning with the former, the Commission seems to be taking the position that ordering refunds in the Second Complaint period would effectively extend the refund period established for the First Complaint. But the Commission has repeatedly held that the FPA permits such successive or "pancaked" complaints, which are "entirely new proceeding[s]" and not "duplicative proceeding[s] intended solely to expand the amount of refund protection beyond 15 months,"<sup>67</sup> provided that they raise new facts or arguments,<sup>68</sup> which the Commission held that the Second Complaint did.<sup>69</sup> Accordingly, rather than extending the refund period for the First Complaint, ordering refunds pursuant to the Second Complaint would simply reflect the fact that the MISO Transmission Owners collected an unjust and unreasonable ROE during a period when all parties were on notice that the Commission might order refunds of such excessive rates.<sup>70</sup>

33. From the perspective of public policy, I recognize that permitting pancaked complaints with multiple refund periods may be sub-optimal. After all, pancaked complaints can create significant uncertainty in an area where certainty is especially

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<sup>65</sup> *Id.*

<sup>66</sup> Opinion No. 569-A, 171 FERC ¶ 61,154 at P 259.

<sup>67</sup> Second Complaint Rehearing Order, 156 FERC ¶ 61,061 at P 33 (quoting *Southern Co. Servs. Inc.*, 83 FERC ¶ 61,079, 61,386 (1998)).

<sup>68</sup> *Id.* P 33 ("[T]he Commission has allowed multiple complaints regarding the same ROE, where the subsequent complaints are based on new, more current data, explaining that this is particularly critical given that what is at issue is return on equity, which, in contrast to other cost of service issues can be particularly volatile. (internal alterations and quotation marks omitted)).

<sup>69</sup> *Id.* P 34.

<sup>70</sup> *Cf. La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) (noting that the filing of a section 206 put all parties on notice of the possibility that the Commission would order refunds).

important as transmission owners decide whether and how to invest in transmission infrastructure. But the desirability of pancaked complaints is something for Congress to consider, not a reason for us to twist the text of the FPA. So long as the FPA and the Commission's precedents permit pancaked complaints, then the Commission should not let its antipathy toward such complaints prevent customers from receiving the refunds to which they are entitled.

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

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Richard Glick  
Commissioner