UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Arkansas Electric Cooperative Corporation, *et al.*	)	
Complainants,	)	
	)	
v.	)	**Docket No. EL15-45-000**
	)	
ALLETE, Inc., *et al.*,	)	
Respondents.	)	

ANSWER OF COMPLAINANT-ALIGNED PARTIES TO MOTION OF MISO TRANSMISSION OWNERS TO DISMISS COMPLAINT

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[1] the Complainant-Aligned Parties ("CAPs")[2] submit this Answer to the Motion to Dismiss filed in this docket by the Respondent MISO Transmission Owners ("MISO TOs") on September 29, 2017, as corrected on October 2, 2107 ("Motion to Dismiss").

I. INTRODUCTION

On February 12, 2015, Complainants[3] filed a complaint pursuant to sections 206[4] and 306[5] of the Federal Power Act ("FPA") alleging that the then-current base returns on equity

---

1 18 C.F.R. § 385.213.

2 For purposes of this pleading, the Complainant-Aligned Parties consist of Hoosier Energy Rural Electric Cooperative, Inc.; Organization of MISO States; the Missouri-Mississippi Parties; Resale Power Group of Iowa; Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Indiana Industrial Energy Consumers, Inc., Minnesota Large Industrial Group, and Wisconsin Industrial Energy Group (collectively, "Industrial Consumer Groups"); Joint Consumer Advocates; and Cooperative Energy (formerly, South Mississippi Electric Power Association).

3 "Complainants" in this docket consisted of Arkansas Electric Cooperative Corporation, 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.

4 16 U.S.C. § 824e.

("Base ROEs") included in the transmission rates of the MISO TOs were unjust and unreasonable ("Complaint").[6] The MISO TOs submitted their Answer to the Complaint on March 11, 2015 ("Answer").[7] As discussed in more detail below (see Section II.A), the Answer sought dismissal of the Complaint based on arguments that are now being revived in the Motion to Dismiss.

On June 18, 2015, the Commission issued an order ("Complaint Order") rejecting the MISO TOs' arguments, opening an investigation into the justness and reasonableness of the 12.38% Base ROE, and setting the case for a trial-type evidentiary hearing.[8] The MISO TOs filed a request for rehearing of the Complaint Order ("Rehearing Request") on July 20, 2015.[9]

An evidentiary hearing on the Complaint was held from February 16, 2016, through February 22, 2016. At the hearing, J. Bertram Solomon testified on behalf of Complainants, urging that the just and reasonable ROE for the MISO TOs be set in accordance with his discounted cash flow ("DCF") analysis that he supported with other evidence. Five additional DCF analyses were also presented by Stephen G. Hill on behalf of the Joint Consumer Advocates, Michael P. Gorman on behalf of the Industrial Consumer Groups, David C. Parcell on behalf of the Resale Power Group of Iowa, Robert Keyton on behalf of FERC Trial Staff, and

---

5 16 U.S.C. § 825e.

6 Each MISO TO was then authorized to earn a Base ROE of 12.38% percent, except for American Transmission Company, which was authorized to earn a Base ROE of 12.2%. *See Arkansas Elec. Coop. Corp. v. ALLETE, Inc*., 151 FERC ¶ 61,219, at P 1 (2015) ("Complaint Order"). References in this pleading to the 12.38% Base ROE are shorthand for both of these Base ROEs.

7 Answer to Complaint of the MISO Transmission Owners, *Arkansas Elec. Coop. Corp. v. ALLETE, Inc*., Docket No. EL15-45-000 (filed Mar. 11, 2015) ("Answer to Complaint").

8 *Arkansas Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219 (2015).

9 Request for Rehearing of the MISO Transmission Owners, *Arkansas Elec. Coop. Corp. v. ALLETE, Inc*., Docket No. EL15-45-000 (filed July 20, 2015)("Request for Rehearing").

Adrien M. McKenzie on behalf of the MISO TOs. These witnesses also testified regarding other non-DCF analyses.[10]

On June 30, 2016, the Presiding Administrative Law Judge issued his Initial Decision in which he determined that, based on analyses for the six-month study period of July 1, 2015 through December 31, 2015, "[t]he MISO TOs' Base ROE is unjust and unreasonable"[11] and that the just and reasonable ROE for the MISO TOs was 9.70%.[12] He also found that the top of the DCF zone had fallen to 10.68%[13]—well below both the 15.96% value that represented the top of the zone of reasonableness prior to the Complaint's filing,[14] and the 11.35% that was adopted in Opinion No. 551.[15] Exceptions to the Initial Decision, including those filed by the MISO TOs,[16] are still pending before the Commission.

On July 21, 2016, the Commission issued an order granting rehearing of the Complaint Order in part and rejecting rehearing in part.[17] As relevant to the Motion to Dismiss, the Rehearing Order affirmed the conclusion of the Complaint Order that the Complaint had made out a *prima facie* case, and that the Commission therefore had not erred in setting the matter for hearing. Thereafter, the MISO TOs sought review in the United States Court of Appeals for the

---

[10] *See, e.g., Arkansas Elec. Coop. Corp. v. ALLETE, Inc.,* Initial Decision 155 FERC ¶ 63,030, at PP 346 *et seq.* (2016) ("Initial Decision").

[11] Initial Decision at P 59.

[12] *Id*. at P 698.

[13] *Id*. at P 57.

[14] *Midwest Indep. Transmission System Operator, Inc.*, 100 FERC ¶ 61,292, at P 22, n.20 (2002) (identifying DCF range; for subsequent history, *see* n.54 *infra*).

[15] *Association of Bus. Advocating Tariff Equity, et al. v. Midcontinent Indep. System Operator, Inc., et al.,* Order on Initial Decision, 156 FERC ¶ 61,234, at P 65 (2016) ("Opinion No. 551").

[16] Brief on Exceptions of the MISO Transmission Owners, *Arkansas Elec. Coop. Corp. v. ALLETE, Inc.*, Docket No. EL15-45-000 (filed Aug.t 9, 2016).

[17] *Arkansas Elec. Coop. Corp. v. ALLETE, Inc.,* 156 FERC ¶ 61,061 (2016) ("Rehearing Order").

District of Columbia Circuit ("D.C. Circuit") of the two issues they raised on rehearing.[18] The first issue ("The Commission erred by failing to find that an existing ROE, as a matter of law, cannot be unjust and unreasonable so long as it remains within the zone of reasonableness") was flatly rejected by the D.C. Circuit only recently in *Emera Maine v. FERC*.[19] The other issue, which challenged what they disparagingly referred to as the "stacking" of complaints, remains pending before the D.C. Circuit.[20]

II. ARGUMENT

The Motion to Dismiss is riddled with factual and legal errors, which are specifically addressed below. At the outset, however, it should be placed in perspective. The MISO TOs seek dismissal of a complaint, on which the Commission has already received an Initial Decision by the same Presiding Judge whose Initial Decision was affirmed in Opinion No. 551. That pending Initial Decision largely tracks the reasoning that was affirmed in Opinion No. 551. On updated facts, however, it finds that the updated cost of equity has fallen by 62 basis points below the Base ROE that was adopted in Opinion No. 551.[21] In revenue requirement effect, that difference amounts to tens of millions of dollars annually. Stepping back, therefore, the Motion to Dismiss raises the "end result" question whether, if an evidence-based update produces a

---

[18] *MISO Transmission Owners v. FERC*, Case No. 16-1325 (D.C. Cir. Sept. 19, 2016).

[19] "The crux of Transmission Owners' argument appears to be that in a section 206 proceeding, the established zone of reasonableness is 'coextensive' with the statutory just-and-reasonableness standard, and therefore, FERC must accept as just and reasonable all ROEs within the discounted cash flow zone of reasonableness. FERC rejected that argument and so do we." *Emera Maine v. FERC*, 854 F.3d 9, 23 (D.C. Cir. 2017).

[20] On October 24, 2016, the D.C. Circuit granted the MISO TOs' unopposed request to hold the case in abeyance.

[21] *See* Initial Decision, at PP 241, 698. CAPs have asserted (on rehearing of Opinion No. 551 and on exceptions herein) that the final outcome in each case should be lower than the Presiding Judge recommended. CAPs expressly do not waive those claims. For purposes of evaluating the Motion to Dismiss, however, the Commission must consider, among other things, whether it would be fair to dismiss this case if both Initial Decisions' findings as to the cost of equity over time are correct.

materially lower finding as to the cost of equity over time, that finding can fairly be dismissed in setting the rates consumers must pay. As explained below, the answer is "no."

A. The Motion to Dismiss Should Be Denied for Impermissibly Attempting To Resurrect Arguments Twice Rejected by the Commission.

The Motion to Dismiss, which comes at an advanced stage of this proceeding, is both procedurally and substantively infirm for numerous reasons. CAPs explain in Sections II.B-II.D, below, why the substance of the Motion to Dismiss is in error. The Motion to Dismiss, however, fails at the outset for procedural reasons.

The Motion to Dismiss is largely a rehash of the arguments the MISO TOs previously made in their Answer to Complaint. Specifically, the Answer argued that the Complaint had failed to establish a *prima facie* case and that the Commission should therefore decline even to examine whether the existing ROE was unjust and unreasonable.[22] In support of this argument, the Answer alleged that the Complaint was defective because, among other reasons, Complainants' witness Mr. Solomon "relie[d] exclusively on a single ROE value produced from his mechanical application of a flawed [DCF] model, and undert[ook] no alternative cost of capital studies."[23] The MISO TOs now argue, similarly, that the Complaint should be dismissed because it "premised its claim for relief exclusively on a single DCF analysis sponsored by [Mr. Solomon]."[24] The Answer also argued that the Complaint was insufficient because Mr. Solomon's analysis allegedly contained departures and omissions from the Commission's standard DCF analysis[25] and failed to consider cost-of-capital models other than the DCF.[26] In

---

22 Answer to Complaint at 2.

23 *Id*. at 4, 13-17.

24 Motion to Dismiss at 7.

25 Answer to Complaint at 4.

26 *Id.* at 10.

addition, the MISO TOs argued that because a separate complaint challenging the MISO TOs' ROE was already pending in Docket No. EL14-12,[27] filing of the Complaint in this docket was inconsistent with FPA section 206.[28]

Rejecting the MISO TOs' arguments, the Commission found the Complaint's allegations sufficient to raise investigation-worthy questions as to whether the MISO TOs' transmission rates remained just and reasonable: "We find that the Complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing ordered below."[29] The Complaint Order also explicitly rejected the argument that the Complaint was improper because the earlier ROE complaint was still pending: "[T]he fact that the record in the ABATE Complaint proceeding is still open is irrelevant. Complainants were free to file a complaint requesting a rate decrease based on later common equity cost data without regard to the status of the ABATE Complaint proceeding."[30]

The MISO TOs sought rehearing of the Complaint Order, alleging two particular errors. First, the MISO TOs alleged that "[t]he Commission erred by failing to find that an existing ROE, as a matter of law, cannot be unjust and unreasonable so long as it remains within the zone of reasonableness."[31] Second, they renewed their claim that "[t]he Commission erred by rejecting the MISO Transmission Owners' argument that the relief requested by the Joint Customer Complainants should be denied because the instant Complaint seeks to stack successive

---

[27] Complaint of the Ass'n of Bus. Advocating Tariff Equity, et al., *Association of Bus. Advocating Tariff Equity, et al. v. Midcontinent Indep. System Operator, Inc.*, Docket No. EL14-12 (filed Nov. 12, 2013) ("ABATE Complaint").

[28] Answer to Complaint at 44-45.

[29] Complaint Order at P 45.

[30] *Id*. at P 49.

[31] Request for Rehearing at 5.

complaints to extend the refund period in the EL14-12 Complaint Proceeding beyond the statutory fifteen-month limit for complaints."[32]

The Commission denied the MISO TOs' request for rehearing on both issues. The Commission affirmed the Complaint's legal sufficiency, explaining that "an ROE may be both within the DCF zone of reasonableness and be unjust and unreasonable."[33] The Commission also explained why its treatment in this case of the Complaint "is consistent with both the FPA and long-standing Commission policy on ROE complaints."[34]

Although the *Emera Maine* decision neither upsets these findings nor warrants that they be revisited, the Motion to Dismiss challenges the Complaint's legal sufficiency for a third time, and does so largely by reiterating the arguments MISO TOs made previously. For example, in their Answer and again on rehearing, the MISO TOs contended that since their existing Base ROE fell within the zone of reasonableness produced by their expert's DCF study (albeit outside the zone of reasonableness of the Complainants' expert), the Commission should deny the Complaint.[35] Appropriately, the Commission rejected that contention. The Motion to Dismiss once again raises this same question. This time, however, the MISO TOs focus on the zone of reasonableness determined by the Complainants' expert and argue that since 10.32% is within that zone, the Complaint "did not make, and could not have made, a valid *prima facie* showing that the 10.32 percent Base ROE . . . was unlawful . . . ."[36]

---

[32] *Id*.

[33] Rehearing Order at P 12.

[34] *Id*. at P 30; *see also id.* at PP 31-37.

[35] Request for Rehearing at 7.

[36] Motion to Dismiss at 11.

The MISO TOs' underlying premise, in making that argument as in their prior pleadings, continues to be an erroneous belief that all ROEs within the range of DCF proxy results are perforce just and reasonable.[37] The issuance of *Emera Maine* provides no grounds for entertaining that premise yet again. To the contrary, the Court, like the Commission, recognized that a zone of reasonableness may contain unjust and unreasonable rates: "Whether a rate, even one within the zone of reasonableness, is unlawful depends on the particular circumstances of the case. As the Supreme Court has held, 'one rate in its relation to another rate may be discriminatory, although each rate [p]er se, if considered independently, might fall within the zone of reasonableness.'"[38]

The Motion to Dismiss further argues that because the Complaint as originally filed did not address the currently effective Base ROE of 10.32% set in Opinion No. 551, it is legally insufficient under *Emera Maine*.[39] This argument is both substantively wrong (*see* Sections II.C-II.D), and a collateral attack on the Complaint Order and Rehearing Order. As such, it is nothing more than a transparent attempt by the MISO TOs to seek rehearing of these orders while the same issues it raises remain pending before the D.C. Circuit, in a proceeding they themselves initiated. The MISO TOs cannot obtain with the Motion to Dismiss what they could not obtain on rehearing.[40] The Commission "does not allow parties to seek rehearing of an order denying rehearing. Any other result would lead to never-ending litigation as every response by the

---

[37] *See id.* (arguing that the Complaint must be invalid because "the 10.32 percent 'existing rate' is not outside the DCF range relied upon in the Complaint").

[38] *Emera Maine*, 854 F.3d at 23 (quoting *FPC v. Conway Corp.,* 426 U.S. 271, 278 (1976)).

[39] Motion to Dismiss at 4 (citing *Emera Maine*).

[40] *TransSource, LLC v. PJM Interconnection, LLC*, 155 FERC ¶ 61,154, at P 40 (2016) (PJM's motion to dismiss denied since purpose of motion was to seek the Commission's review of an order setting case for evidentiary hearing after the statutory time had run); *cf. Stowers Oil and Gas Co. and N. Natural Gas Co.*, 27 FERC ¶ 61,001, at p. 61,002, n.3 (1984) (stating that the style in which an entity frames a document does not dictate how the Commission must treat the document).

Commission to a party's arguments would allow yet another opportunity for rehearing."[41] According to the Commission, "the successive rehearing of an order on rehearing lies only when the order on rehearing modifies the original order's result in a manner that gives rise to a wholly new objection."[42] Neither of these is the case here.

Nor is reconsideration of the Commission's Rehearing Order appropriate, if the Commission were to treat the Motion to Dismiss as a request for reconsideration. "The purpose of reconsideration is to provide an aggrieved party with an opportunity to alert the Commission to a situation in which the Commission may not have fully grasped the facts presented on rehearing."[43] In this case, the Commission has not yet issued an Opinion on the Initial Decision. The Commission is well aware of the *Emera Maine* opinion, and if the MISO TOs do not like the forthcoming Opinion that the Commission will issue at some point in the future, they will have the opportunity to seek rehearing of that Opinion, within 30 days after its issuance.[44]

The procedural inappropriateness of the Motion to Dismiss is further highlighted by the fact these very issues are pending at the D.C. Circuit. A party cannot "'simultaneously seek both agency reconsideration and judicial review of an agency's order.'"[45] The D.C. Circuit has emphasized that it "will not hear a case if the petitioner has a rehearing petition pending before the Commission at the time of filing in this court . . . .[A] party must choose whether to seek an

---

41 *Midwest Indep. Transmission System Operator, Inc.*, 136 FERC ¶ 61,235, at P 9 (2011) (citing *Key-Span Ravenswood, LLC*, 112 FERC ¶ 61,153, at P 6 (2005), among others).

42 *Appalachian Power Co.*, 149 FERC ¶ 61,137, at P 6 (2014) (citations omitted).

43 *Appalachian Power Co.*, 148 FERC ¶ 61,190, at p. 1 (2014) (citations omitted).

44 For the same reason, to the extent that the Motion to Dismiss were viewed as a motion to reopen the record, it should be rejected. While the Commission may reopen the record in its discretion where there is good cause, "[t]he Commission views good cause as consisting of extraordinary circumstances, that is, a change in circumstances that is more than just material, but goes to the very heart of the case." *San Diego Gas & Electric Co*., 133 FERC ¶ 61,014, at P 24 (2010).

45 *Smith Lake Improvement and Stakeholders Ass'n v. FERC*, 768 F.3d 1, 3 (D.C. Cir. 2014) (quoting *Clifton Power Corp v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002)).

optional petition for rehearing before the Commission, or a petition for review to our court; it cannot proceed simultaneously."[46] By seeking judicial review of the Complaint Order and the Rehearing Order, the MISO TOs made their choice. Even if the Motion to Dismiss were otherwise procedurally and substantively sound, this choice gives the Commission no alternative but to deny the Motion.

B. Granting the Motion to Dismiss at this Late Procedural Stage Based on Arguments Previously Rejected by the Commission Would Be Profoundly Unjust to Customers.

The Motion to Dismiss contends that a proceeding that began two and a half years ago and has advanced through discovery, pre-filing of testimony, hearing, post-hearing briefing, issuance of an Initial Decision, and briefing on exceptions, is void *ab initio* because the evidence on which Complainants' *prima facie* case was based did not directly and specifically address a Base ROE that the Commission did not set until three weeks after the last of these steps was taken. Granting the Motion to Dismiss would force customers to file a new complaint to challenge the MISO TOs' Base ROE. Requiring customers to do so, however, would harm them by denying them the just and reasonable rates to which they are entitled under the FPA.

The Initial Decision concluded, based on the evidentiary record, that the MISO TOs' just and reasonable Base ROE for the fifteen-month refund period in this case (February 11, 2015 – May 10, 2015) and going forward from the date of the Commission's order herein is 9.70%, well below both the pre-Complaint Base ROE of 12.38% and the 10.32% Base ROE set in Opinion No. 551.[47] It also found that the top of the DCF zone had fallen substantially, to 10.68%, well below both the pre-Complaint ceiling ROE of 15.96% and the 11.35% ceiling ROE set in

---

[46] *Id*.

[47] *See supra* at 3.

Opinion No. 551.[48] Returning to square one would discard those findings without good cause, and require that representatives of over-charged customers begin the complaint process again with a different refund date and a different study period. The end result would be to eliminate any prospect of retroactive relief during the fifteen-month refund period that was set for this case and to at best postpone forward-looking rate reduction.

The Motion to Dismiss conveniently does not mention these consequences. It also fails to mention that the currently effective 10.32% Base ROE applies only during the fifteen-month refund period in EL14-12 (November 12, 2013–February 11, 2015) and going forward from the date of Opinion No. 551's issuance (September 26, 2016). Granting the Motion to Dismiss would set in stone the 12.38% Base ROE—a rate originally set in 2002, and found by the Commission to be unjust and unreasonable during the study period for this docket—for the entire interim period (February 11, 2015–September 25, 2016), which spans most of the refund effective period established for the present Complaint.[49]

Given these serious negative consequences for consumers, the MISO TOs should have supported the Motion to Dismiss with compelling arguments they could not have raised previously. They did not. Their arguments are both old (as shown above), and to the extent they are new, patently erroneous (as shown below).

Balancing the interests of consumers and investors lies at the heart of the Commission's responsibilities.[50] Allowing the MISO TOs to retain a 12.38% Base ROE that the Commission

---

48 *See id.*

49 The Base ROE for the period from the expiration of the test period in the case at hand (May 11 through September 25, 2016) would be 12.38%.

50 *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591,603 (1943). *Bluefield Waterworks & Imp. Co. v. Public Serv. Comm'n*, 262 U.S. 679, 693 (1923). See also *Federal Power Comm'n v. Memphis Light, Gas, & Power,* 411 U.S. 458, 474 (1973) ("[U]nder *Hope Natural Gas*, rates are 'just and reasonable' only if consumer interests are protected and if the financial health of the [utility] in our economic system remains strong.").

determined to be unjust and unreasonable in Opinion No. 551 would greatly skew this balance toward investors to the serious detriment of consumers for no valid reason. The Motion to Dismiss should be denied.

C. *Emera Maine* Does Not Require Dismissal of the Complaint.

1. The MISO TOs Err in Claiming that the DCF Analysis Submitted with the Complaint Was Insufficient To Challenge the Existing Base ROE as a Matter of Law.

The MISO TOs claim that *Emera Maine* requires dismissal of the Complaint in the instant case. Their arguments in support of this claim are based on a mischaracterization of *Emera Maine* and a misunderstanding of other relevant precedent.

a. A Single DCF Study Can Provide the Evidentiary Basis for a Rationale that Satisfies Emera Maine.

The MISO TOs characterize *Emera Maine* as holding that "reliance on a 'single ROE analysis' *without corroborating evidence* and 'further explanation' did not satisfy the section 206 burden to justify a finding that the . . . existing ROE was unjust and unreasonable . . . ."[51] By using the phrase "single ROE analysis" together with a reference to "corroborating evidence," and by doing so shortly after characterizing the Complaint as "premised . . . exclusively on a single DCF analysis sponsored by the Joint Customer Complainants' witness,"[52] the MISO TOs suggest that the D.C. Circuit required consideration of multiple empirical cost-of-capital studies, such that the expert affidavit that accompanied the present Complaint was fatally deficient in relying principally on a single DCF analysis. But that suggestion is wrong. The phrase "without corroborating evidence" is not a quotation from *Emera Maine*, unlike the other phrases

[51] Motion to Dismiss at 9 (emphasis added).

[52] *Id*. at 7.

surrounding it that purport to paraphrase the D.C. Circuit's holding. Neither those words nor that concept appears anywhere in *Emera Maine*.

Far from holding that non-DCF methodologies must be considered, the Court made clear that its role was limited to ensuring "that the Commission's judgment is supported by substantial evidence and that the methodology used in arriving at that judgment is either consistent with past practice or adequately justified."[53] A DCF study is substantial evidence, and reliance on a DCF analysis as the sole empirical technique for determining the cost of equity is consistent with past practice. That is why a single DCF analysis, alone, has provided the basis of innumerable Commission decisions—many of them judicially-affirmed—including the 2002 decision that granted MISO TOs a Base ROE increase to 12.38%.[54] Indeed, *Emera Maine* itself noted that FERC typically sets regional Base ROEs at the midpoint of the DCF zone.[55] Thus, while *Emera Maine* does not preclude the Commission from considering alternative methodologies, neither does it require such consideration.

Emera Maine used the phrase "single ROE analysis," but not to reference a DCF analysis as distinct from other modes of equity cost empirical analysis. In context, the phrase refers to the holding, rejected in *Emera Maine*, that only one ROE value can be just and reasonable, such that any other ROE value is *ipso facto* unjust and unreasonable.[56] Nothing in *Emera Maine* forbids the Commission from relying on a single DCF analysis to both find the existing ROE

---

53 *Emera Maine* at 22 (quoting *Cities of Batavia, Naperville, etc. v. FERC*, 672 F.2d 64, 1351 (D.C. Cir. 1982)).

54 *See, e.g., So. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013); *Midwest Indep. Transmission Sys. Operator, Inc.*, 99 FERC ¶ 63,011, P 24-25, *aff'd*, 100 FERC ¶ 61,292 (2002), *reh'g denied*, 102 FERC ¶ 61,143 (2003), *on remand*, 106 FERC ¶ 61,302 (2004), *aff'd in relevant part sub nom. Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004 (D.C. Cir.), *on remand*, 111 FERC ¶ 61,355 (2005) (exclusive reliance on DCF to set MISO TOs' ROE); *Boston Edison Co. v. FERC*, 885 F.2d 962 (1st Cir. 1989) (affirming Commission's exclusive reliance on DCF).

55 *Emera Maine*, 854 F.3d at 26-27.

56 *Id.* at 27.

unreasonable and set a new reasonable ROE. To the contrary, *Emera Maine* was clear that the Commission's error lay not in what evidence it considered, but in its failure to make the requisite finding and explanation. "Because FERC's single ROE analysis failed to include an actual finding as to the lawfulness of Transmission Owners' existing base ROE, FERC acted arbitrarily and outside of its statutory authority in setting a new base ROE for Transmission Owners."[57] In rejecting the Commission's reasoning that only a single point in the zone of reasonableness can be considered just and reasonable, such that the existing ROE, being higher, would automatically be unjust and unreasonable, the Court merely demanded "further explanation" of how the Commission arrived at its conclusion that the prior ROE's exceedance of the newly-determined one unjust and unreasonable.[58]

The Court did not, however, go on to dictate how the Commission should go about determining whether the existing ROE was unjust and reasonable or remains just and reasonable, or the type of evidence that could support a finding on these issues. The precise question that will be before the Commission on remand is the Commission's ability to provide a reasoned finding that the New England Transmission Owners' Base ROE was unjust and unreasonable. CAPs fully expect that the Commission will be able to reach a reasoned conclusion on that issue in this case, based on its review of the record and Initial Decision herein.

This expectation is bolstered by two directly relevant Commission rulings. First, in Opinion No. 551,[59] the Commission affirmed the Presiding Judge's determination that "[a] Base ROE that authorized a utility to collect more than is necessary to satisfy the requirements of *Hope* and *Bluefield* would exploit consumers and, therefore, would be unjust and

---

[57] *Id.* at 27.

[58] *Id*. at 26.

[59] Opinion No. 551 at P 10.

unreasonable."[60] This explanation of what makes an existing ROE greater than a newly-determined one unreasonable was missing from Opinion No. 531, and it provides at least the kernel of an explanation that would satisfy the Commission's explanatory burden required by *Emera Maine*. Essentially this same explanation was provided in the Initial Decision herein,[61] and is there for the Commission to review on exceptions.

Second, less than two weeks ago, the Commission made clear that:

> In making its determinations in [the EL14-12] proceeding, the Commission relied extensively on its conclusions in Opinion No. 531. Rehearing of Opinion No. 551 is now pending before the Commission. As a result of *Emera Maine*, the Commission will not be able to rely on Opinion No. 531 as precedent in addressing those rehearing requests, at least absent a further order on remand from *Emera Maine*.[62]

This same point applies to the Initial Decision herein. Like Opinion No. 551, it relied on aspects of Opinion No. 531 in finding its updated Base ROE. To that extent, and for the same reasons quoted above, it must be reviewed in light of *Emera Maine*.[63] But just as the Commission can and will (as quoted above) consider *Emera Maine* in addressing the pending requests for rehearing of Opinion No. 551, the Commission can and should review the Initial Decision for conformance with *Emera Maine* as part of the review of exceptions to the Initial Decision.

---

60 *Association of Bus. Advocating Tariff Equity, et al. v. Midcontinent Indep. System Operator, Inc.*, 153 FERC ¶ 63,027 P 24 & n.27 (2015) (citing "*Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1180 (D.C. Cir. 1987) (*en banc*) ('In addition to prohibiting rates so low as to be confiscatory, the holding of [*Hope*] makes clear that exploitative rates are illegal as well.'); *see also Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)").

61 *See* Initial Decision at P 135 & n.135.

62 *ISO New England Inc*., 161 FERC ¶ 61,031, at P 28 (2017) (citation omitted).

63 For example, the Initial Decision relied on Opinion No. 531 in selecting a Base ROE placement at the DCF upper midpoint and in treating the MISO TOs' non-DCF analyses as presumptively reliable rather than scrutinizing them *de novo*.

The MISO TOs nevertheless argue that granting relief under the Complaint "would require supplanting a rate recently confirmed as just and reasonable without first determining that rate to be unlawful."[64] But nothing in *Emera Maine* prevents the Commission from determining in its final order that the 10.32% Base Rate *has* become unlawful. A final order in this case will not be legally deficient if the Commission makes that finding, bases it on substantial evidence, and provides a reasoned explanation. The Commission can make and explain that required finding, should it so determine on the merits, when it resolves the pending exceptions. *Emera Maine* provides no reason to dismiss the Complaint, to customers' great detriment, instead of proceeding to that resolution.

b. Emera Maine Did Not Address, Let Alone Change, the Commission's Standard for Setting a Section 206 Complaint for Hearing.

Building on the erroneous speculation that the final Commission order on review of exceptions to the Initial Decision would be fatally deficient if it relied on a single DCF analysis alone, the MISO TOs then cantilever out further to argue that a complaint that relies primarily on a single DCF analysis as evidence that the prior rate was unreasonable cannot, as a matter of law, suffice to create the *prima facie* case necessary to warrant setting the complaint for hearing.[65] Here too, the MISO TOs mistake the law.

Nothing in *Emera Maine* addressed the sufficiency of the complaint that had been filed in that case, and no question regarding the complaint's sufficiency was presented to the Court. Rather, the Court's entire focus was on the Commission's *final* order (Opinion No. 531, as completed by Opinion No. 531-A) and rehearing thereof (Opinion No. 531-B). Ultimately, the

---

[64] Motion to Dismiss at 11.

[65] *Id*. at 9.

Court determined that these end-of-case rulings were inadequately explained, because they "never actually explained how the existing ROE was unjust and unreasonable."[66] The Court therefore remanded for further explanation.[67] However, the Court did not direct the Commission to dismiss the complaint, nor did the Court direct the Commission to reconsider whether the complaint should have been set for hearing—the logical dispositions if the Court had in fact thought that the complaint's allegations might have been insufficient and that such insufficiency mattered after a case had been tried.

Moreover, even since the issuance of the Court's opinion in *Emera Maine,* the Commission itself has made clear that submission of a single DCF analysis in support of a complaint is sufficient to make a *prima facie* case that a regulated public utility's ROE is no longer just and reasonable. As recently as September 29 of this year, the Commission set for hearing the complaint of the Arkansas Public Service Commission and Mississippi Public Service Commission, supported by a single DCF analysis performed by Dr. S. Keith Berry, alleging that the ROE embedded in the formula rate of System Energy Resources, Inc. ("SERI"), an Entergy Corporation subsidiary, was no longer just and reasonable.[68] Indeed, the Commission cited *Emera Maine* in denying SERI's motion to dismiss the complaint.[69]

---

66 854 F.3d at 26.

67 Although the MISO TOs do not mention it, the Court's opinion also rejected the Commission's refusal (followed by the Initial Decision in this docket) to consider any alternative placement other than the midpoint of the upper half of the DCF zone of reasonableness (referred to by the Commission as the "upper midpoint"), upon rejecting placement of the ROE at the midpoint of the zone of reasonableness. *Id.* at 27-30.

68 *Arkansas Pub. Serv. Comm'n. v. System Energy Resources, Inc*., 160 FERC ¶ 61,141 (2017).

69 *Id*. at P 16 & n.34 ("Although the Court ultimately vacated and remanded the order at issue in that proceeding, the Court's conclusion on the question whether an ROE can be unjust and unreasonable if it is within the DCF-produced zone of reasonableness is sufficient to refute SERI's argument here.").

c. Neither the Complaint nor the Initial Decision Relied Solely on the DCF Study Performed by Complainants' Expert.

The MISO TOs are incorrect in their factual assertion that the Complaint relied solely on Mr. Solomon's DCF analysis for the conclusion that the existing ROE had become unjust and unreasonable. To the contrary, Mr. Solomon testified to a number of other factors that contributed to his conclusion that the existing ROE was no longer just and reasonable. Those reasons included the significant decline in capital costs in general and capital costs for electric utilities in particular since the MISO TOs' Base ROE and incentive cap were first determined;[70] changes in the Commission's preferred DCF methodology;[71] substantial reductions in public utility bond yield;[72] and comparisons to the lower ROEs allowed by state commissions.[73]

Beyond that, even if the MISO TOs were correct in claiming that Mr. Solomon's DCF analysis (which he conducted in accordance with then-existing Commission precedent) was the sole basis for the Complaint's allegations that the existing ROE was no longer just and reasonable, and even if the MISO TOs were also correct in interpreting *Emera Maine* as requiring consideration of evidence other than a single DCF analysis, dismissal of the Complaint would still not be justified. As noted earlier, at the hearing in this matter, six different DCF analyses were presented, and MISO TOs' witness Mr. McKenzie also presented no fewer than nine other benchmark ROE analyses.[74] All of these various analyses were discussed and analyzed in the Initial Decision, which is what is now before the Commission. Thus, there can be no credible claim that the Initial Decision's conclusion that the existing ROE had been

---

70 Exhibit JCI-1 at 11:6-16.

71 *Id*. at 11:21-12:8.

72 *Id*. at 13:18-23.

73 *Id*. at 31:9-33:25.

74 Exhibit MTO-1 at 92-121.

demonstrated to be unjust and unreasonable was based on a single DCF analysis. Moreover, as demonstrated above, *Emera Maine* spoke only to the Commission's final decision in an ROE complaint case, not the earlier decision of whether to set a complaint for hearing, and not to an Initial Decision that had not yet been adopted by the Commission.

2. The Base ROE "Then in Force" for Purposes of Establishing a *Prima Facie* Case under FPA Section 206 is the Base ROE in Effect When the Complaint Is Filed.

The MISO TOs argue that the Complaint was fatally deficient, and that this case therefore should be dismissed, because that Complaint "did not make, and could not have made, a valid *prima facie* showing that the 10.32 % Base ROE established in Opinion No. 551 was unlawful, given that Opinion No. 551 had not yet been issued and the only rate the Complaint contested was 12.38 percent."[75] This argument is meritless.

Section 206 of the FPA provides that: "[a]ny complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract ***then in force***, and the reasons for any proposed change or changes therein."[76] The language in the statute, "***then in force***," makes clear that the relevant rate for purposes of establishing a *prima facie* case under section 206 of the FPA is the effective rate at the time a complaint is filed, not the effective rate at the later time the Commission renders a decision on such complaint. The MISO TOs' position is that the Complaint in this proceeding should be dismissed because Complainants failed to address the justness and reasonableness of the later-established 10.32% Base ROE. Such an approach

---

[75] Motion to Dismiss at 11.

[76] 16 U.S.C. § 824e(a) (emphasis added).

imposes a patently unreasonable burden on section 206 complainants, given that it is impossible to predict, let alone challenge, unknown future rates.

As the Commission explained in its Rehearing Order, the Regulatory Fairness Act was "intended to add symmetry" between the Commission's treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases. The Commission explained:

> Utilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints.[77]

The MISO TOs' position is not tenable when considered in this context. If they were correct, utilities seeking to increase their rates pursuant to FPA section 205 could do so at any time, but customers seeking an order to decrease these rates pursuant to FPA section 206 would need to wait until the "existing" rate was finalized. That result would be inconsistent with the Regulatory Fairness Act, Commission precedent, and the FPA. Public utilities that file a section 205 rate increase while a prior rate case remains under consideration are not obliged to predict and identify in their opening filing the ultimate outcome of the pending earlier proceeding. For example, the MISO TOs filed for, and received, a 50-basis-point ROE adder without having to identify the Base ROE to which it would be applied.[78] Symmetrically, complainants need not have such clairvoyance in order to file for a section 206 rate decrease while a prior rate case remains under consideration.

---

77 Rehearing Order at P 33 (quoting *Consumer Advocate Div. of the Pub. Serv. Of West Virginia v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at p. 62,000 (1994)).

78 *Midcontinent Indep. System Operator, Inc.*, 150 FERC ¶ 61,004, at P 2 (2015) (allowing adder "subject to it being applied to a base ROE that has been shown to be just and reasonable based on an updated discounted cash-flow analysis").

Moreover, according to the MISO TOs' logic, if a public utility were to file to increase its rates pursuant to FPA section 205, until that rate is finalized, no one—including the Commission—could successfully initiate an FPA section 206 complaint against the rate thereby made subject to rate review. Indeed, respondents could defeat any rate-reduction complaint by the simple expedient of filing under section 205 to alter their existing rates, such as by filing a one-basis-point ROE reduction upon receiving a complaint seeking larger relief. Such a tactical section 205 filing would supersede the rate that was identified in the complaint as being in effect at the time it was filed, and create indeterminacy as to the existing rate that section 206 relief would change. Under the MISO TOs' position, a section 206 complaint could not proceed in the face of such indeterminacy. The Commission has rejected the MISO TOs' view of the law on this point myriad times: every time it has initiated a section 206 proceeding on its own motion upon reviewing a utility-filed section 205 rate increase or decrease,[79] it has necessarily held that a section 206 proceeding may address a prior rate that has not been finally determined. Under positions that MISO TOs are taking both here and in the case before the D.C. Circuit, the Base ROE in effect until the present case is concluded *would* be the same 12.38% Base ROE that was in force when the Complaint was filed.[80] MISO TOs therefore should not be heard to maintain that the Complaint's identification of 12.38% as the Base ROE then in force makes it void. In

[79] *See, e.g., System Energy Res., Inc.,* 160 FERC ¶ 61,140 (2017) (*sua sponte* initiating Docket No. EL17-83 section 206 complaint, while Docket No. ER17-2219 section 205 rate change remains under review).

[80] As the MISO TOs recognize, the 10.32% Base ROE established in Opinion No. 551 is not even the final rate because rehearing thereof remains pending. Motion to Dismiss at 10. Moreover, the MISO Transmission Owners still seek restoration of the 12.38% Base ROE, based on arguments that (i) any existing rate within the range of DCF results is per se just and reasonable and, (ii) an excessive ROE does not affect the ABATE complainants. *See* Non-Binding Statement of Issues To Be Raised of the MISO Transmission Owners, *MISO Transmission Owners v. FERC*, D.C. Cir. Case No. 16-1326 (Oct. 20, 2016). However meritless those arguments may be, MISO TOs have not withdrawn them and they remain pending at the D.C. Circuit.

short, it would be plainly unlawful to dismiss the Complaint on the basis that the Base ROE it identified as "then in force" is no longer in force.

Contrary to MISO TOs' suggestion,[81] the fact that Opinion No. 551 found the current 10.32% Base ROE to be just and reasonable using data from a different time period is not a basis for dismissing this Complaint. Market conditions change, and returns that are reasonable at one point in time may become unreasonable later. Notably, the Supreme Court in *Bluefield* so held explicitly: "[a] rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."[82] Consistent with *Bluefield*, the Commission has rejected motions to dismiss premised on the argument that Commission approval of a rate at one point somehow shielded the utility from subsequent challenges to that rate under section 206 of the FPA.[83] As the courts have recognized, section 206 relief inherently involves changes to rates previously found just and reasonable, and such prior reasonableness therefore cannot defeat section 206 review of whether the prior rate *remains* reasonable under changed circumstances.[84]

In fact, as explained above, the Commission already rejected an argument advanced by the MISO TOs in this case that the then-pending ABATE complaint proceeding (and potential

---

[81] *See* Motion to Dismiss at 11 (suggesting that the Complaint should be dismissed because "the Commission has specifically determined that the present, 10.32 percent Base ROE *is* just and reasonable," and that granting the Complaint therefore "would require supplanting a rate recently confirmed as just and reasonable" (emphasis in original)).

[82] *Bluefield*, 262 U.S. 679, 693 (1923).

[83] *See, e.g., Massachusetts Mun. Wholesale Electric Co. v. Ne. Util. Service Co.*, 57 FERC ¶ 61,306, at p. 61,997 (1991) ("Northeast's arguments fail to provide a basis for dismissing MMWEC's complaint. Section 206 of the FPA clearly permits challenges to the justness and reasonableness of existing rates. Because various circumstances may change over time, rates which have been accepted for filing under section 205 of the FPA later may be shown to be unjust and unreasonable. In this regard, section 206 operates to ensure that a utility's current rates are just and reasonable by permitting the Commission and others to challenge such current rates."), *reh'g denied*, 58 FERC ¶ 61,202 (1992).

[84] *See, e.g., Peoples Gas Light & Coke Co. v. FERC*, 742 F.2d 1109, 1112 (7th Cir. 1984).

new Base ROE to be established therein) was a sufficient basis for dismissing this Complaint.[85] The Commission found the MISO TOs' argument to be "irrelevant" because Complainants "were free to file a complaint requesting a rate decrease based on later common equity cost data without regard to the status of the ABATE Complaint proceeding."[86] Allowing the MISO TOs to cling to a Base ROE that the Commission determined to be unjust and unreasonable in Opinion No. 531 places the interests of the MISO TOs above those of consumers, an outcome that contravenes *Hope*[87] and *Bluefield* and offends fundamental principles of justice.[88]

Additionally, the MISO TOs are seeking to impose on Complainants a standard that neither the Commission nor the courts require. According to the MISO TOs, a complaint that challenges a specific Base ROE cannot trigger section 206 hearing procedures if that Base ROE changes in any way during the pendency of the proceeding. To survive dismissal, a complainant either would have to plead with a particularity that would anticipate all possible changes (an impossible task) or amend its complaint each time such a change occurred, even if that change occurred, as here, at a late stage of the proceeding.

The Federal Rules of Civil Procedure, which, MISO TOs have conceded,[89] provide a useful guidance for Commission proceedings,[90] do not impose any such requirements. Federal

---

85 Complaint Order at P 49.

86 *Id*.

87 *Hope*, 320 U.S. 591, 603.

88 The FPA is a *consumer*-protection statute. *Public Sys. v. FERC*, 606 F.2d 973, 979 n.27 (D.C. Cir. 1979).

89 *Association of Bus. Advocating Tariff Equity v. Midcontinent Indep. System Operator, Inc.*, 149 FERC ¶ 61,049, at P 44 (2014) ("MISO TOs . . . do not dispute that the Federal Rules of Civil Procedure may provide guidance to the Commission . . . .").

90 The Commission's rules do not establish a legal standard by which to judge motions to dismiss for legal insufficiency. When an issue is not addressed by the Commission's Rules of Practice and Procedure, the Federal Rules of Civil Procedure provide useful guidance. *Northwest Cent. Pipeline Corp.*, 29 FERC 61,333 at p. 61.693 (1984). *See also BP America Inc.,* 147 FERC ¶ 61,130, at P 21 n.46 (2014) (The Commission is permitted to use the Federal Rules for guidance when the circumstances are "sufficiently analogous . . . to serve as a guideline.") (quoting *Corpus Christi Mgmt. Co.,* 28 FERC ¶ 62,284, at p. 63,506 (1984)).

Rule 15(b)(2) provides that "when an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." In fact, "a party may move—at any time, ***even after judgment***—to amend the pleadings to conform them to the evidence and ***raise an unpleaded issue***."[91] The purpose of Federal Rule 15 is to assist disposition of litigation on the merits rather than have pleadings become ends in themselves, and to provide parties opportunity to assert new matters that may not have been known to them at the time they filed their original pleadings.[92]

The Commission has long recognized that evidence introduced during a hearing may be the basis for setting just and reasonable rates, regardless of the party sponsoring such evidence.[93] It is the evidentiary record as a whole that is relevant, not whether the complaint anticipated and addressed each and every issue that might arise.

The Commission should also consider the practical effect of accepting the MISO TOs' argument that any change to a public utility's Base ROE serves to prohibit the filing of a section 206 challenge to the Base ROE until the changed Base ROE becomes final.[94] The original complaint that led to the *Emera Maine* decision was filed more than six years ago, on September

---

[91] Fed. R. Civ. P. 15(b)(2) (emphasis added); *see also C&E Servs. v. Ashland, Inc.*, 601 F. Supp. 2d 262, 274 (D.D.C. 2009) (stating that "court[s] should be liberal in allowing amendments to conform the pleadings to the evidence.") (quoting 3 James Wm. Moore, Moore's Federal Practice 15.18 (3d ed. 1997); *First Nat'l Bank v. Continental Ill. Nat'l Bank & Trust Co.*, 933 F.2d 466, 468-469 (7th Cir. 1991) (explaining that the courts freely grant motions to amend complaints to conform to the evidence because it results in pleadings that are more informative).

[92] *See Summit Off. Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278, 1284 (5th Cir. 1981); *Johnson v. Helicopter & Airplane Servs. Corp.*, 389 F. Supp. 509, 514 (D. MD 1974); *see also Rosden v. Leuthold*, 274 F.2d 747, 750 (D.C. Cir. 1960) (providing that the purpose of Federal Rule 15(b) is to "avoid the tyranny of formalism.").

[93] *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (section 205 proceeding in which evidence supporting a rate increase was sponsored by a party other than the utility).

[94] Of course, the MISO TOs' statutory interpretation would permit the filing of a section 205 application to increase the Base ROE at any time.

30, 2011.[95] Under the MISO TOs' interpretation of the statutory scheme, refund protection for customers would end after fifteen months, and thereafter the transmission owners would be entitled to charge the pre-existing 11.14% for as long as the case remained pending, including on appeal, regardless of whether changes in financial conditions rendered the 11.14% Base ROE unjust and unreasonable. This theory flies in the face of the FPA's explicit requirement that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."[96]

D. *Emera Maine* Does Not Compel Reexamination of the Commission's "Policy" of Permitting Successive Complaints.

The MISO TOs' argument that the *Emera Maine* decision "compels re-examination of the Commission's policy regarding complaint stacking"[97] should be readily rejected. FPA section 206 provides a statutory right to file complaints, and the MISO TOs are essentially demanding that the Commission rewrite that section. As each party affected by the ROEs allowed in the MISO region has the right to file its own complaint,[98] the two distinct groups of Complainants in the ABATE Complaint proceeding and the present proceeding were each exercising their own statutory rights. The Commission has already rejected an argument advanced by the MISO TOs in this case that the earlier ABATE Complaint proceeding (and potential new Base ROE to be established therein) was a sufficient basis for dismissing this

---

95 *See* Complaint of the Attorney General of the Commonwealth of Mass, *et al*, *Martha Coakley, Attorney General, et al. v. Bangor-Hydro-Electric Co., et al*., Docket EL11-66-000 (filed Sept. 30, 2011).

96 FPA section 205(a), 16 U.S.C. § 824d(a).

97 Motion to Dismiss at 11.

98 *See American Elec. Power Serv. Corp.*, 153 FERC ¶ 61,167, at PP 12-14 (2015); *Public Serv. Elec. and Gas Co.*, 124 FERC ¶ 61,303, at PP 16-18 (2008).

Complaint.[99] The Commission found the MISO TOs' argument to be "irrelevant" because Complainants "were free to file a complaint requesting a rate decrease based on later common equity cost data without regard to the status of the ABATE Complaint proceeding."[100]

Emera Maine provides no basis for the Commission to reconsider this ruling or to upend its long-standing policies, especially in response to a motion to dismiss a complaint two and a half years after it was filed and after full hearing of the case and issuance of an Initial Decision. In an attempt to rationalize their position, the MISO TOs contend that the Rehearing Order's statement that their argument that "pancaked complaints violate the statutory, fifteen-month refund limitation was 'premature'"[101] is no longer valid. This contention is mistaken. The MISO TOs argue that such arguments are no longer premature because "the Commission now finds itself 'at the conclusion of' this proceeding."[102] However, the Commission has not yet issued an opinion addressing the Initial Decision in this proceeding and therefore, clearly is ***not*** yet at the conclusion of the proceeding. By contrast, in the Docket No. EL14-12 proceeding, the Commission has issued an Opinion and ordered refunds to be provided.[103]

The MISO TOs further argue that reexamination of Commission policy allowing for successive complaints is appropriate because it is unlikely that the "existing rate" for purposes of a subsequent, pancaked complaint—the rate resulting from the initial complaint—will be known (and therefore amenable to examination under section 206 in accordance with *Emera Maine*) at the time the second complaint is filed.[104] As explained above, the existing rate for purposes of

---

[99] Complaint Order at P 49.

[100] *Id.*

[101] Motion to Dismiss at 12 n.27 (quoting Rehearing Order at P 37).

[102] *Id.*

[103] Opinion No. 551 at P 298.

[104] Motion to Dismiss at 12.

testing whether a section 206 complaint presents a *prima facie* case is the rate in force when the complaint is filed, not when the Commission renders its final order. *Emera Maine* did not change what constitutes an "existing" rate for this purpose. Furthermore, nothing in the *Emera Maine* opinion speaks to the issue raised by the MISO TOs regarding "stacking" of complaints or affects in any way the Commission long-standing precedent allowing for successive of complaints as long as based on different period data. The Commission was correct in denying the MISO TOs' rehearing on the successive complaints issue and should defend its decision before the D.C. Circuit pending appeal brought by the MISO TOs.

Among other grounds for that policy, it should not be forgotten that the 1988 Regulatory Fairness Act, in adding provisions for refunds upon complaint, was in large and relevant part a substitute for triennial section 205 review of ROEs embedded in formula rates.[105] The Commission had required that all formula rates include triennial ROE review, but rescinded that policy following the 1988 legislation, finding that the provision for refunds upon complaint provided consumers with an adequate substitute.[106] Had that policy remained in place, the Base ROE at issue here would have been subject to five triennial reviews over the 15 years that have passed since the 2002 order that set it at 12.38%.[107] Instead, MISO TOs have faced only two complaints over that long interval. Given how much each basis point of the region-wide Base ROE costs consumers as it flows through charges that apply throughout the extensive MISO region, such review is certainly *not* unduly burdensome.

---

[105] *See, e.g., Louisiana Pub. Serv. Comm'n v. System Energy Res., Inc.*, 323, 46 FERC ¶ 61,182, at p. 61,603 (1989).

[106] *See id.*

[107] *See supra* at 11.

III. CONCLUSION

For the foregoing reasons, CAPs respectfully request that the Commission deny the MISO TOs' Motion to Dismiss and proceed to complete its review of the Initial Decision already issued herein.

Respectfully Submitted,

For Hoosier Energy Rural Electric Cooperative, Inc.
McCARTER & ENGLISH, LLP By: */s/* _____ Sean T. Beeny Barry Cohen Phyllis G. Kimmel 1015 15th St., NW, 12th Floor Washington, D.C. 20005 (202) 753-3400 (202) 296-0166 (facsimile) sbeeny@mccarter.com bcohen@mccarter.com Counsel for Hoosier Energy Rural Electric Cooperative, Inc.
For Resale Power Group of Iowa
BETTS & HOLT LLP By: */s/ David E. Crawford* _____ David E. Crawford James H. Holt David E. Crawford Betts & Holt LLP 1100 17th St., N.W. Suite 901 Washington, D.C. 20036 (202) 530-3380 (voice) (202) 530-3389 (facsimile) jhh@bettsandholt.com dcrawford@bettsandholt.com Counsel for Resale Power Group of Iowa

For Organization of MISO States, Inc.	
	JENNINGS STROUSS */s/ Andrea I. Sarmentero Garzón* Andrea I. Sarmentero Garzón 1350 I Street, NW Suite 810 Washington, DC 20005-3305 P: (202) 370-4128 asarmentero@jsslaw.com Counsel for the Organization of MISO States, Inc.

For Industrial Consumer Groups	
	McNEES WALLACE & NURICK LLC By: */s/ Robert A. Weishaar, Jr.* _____ Robert A. Weishaar, Jr. McNees Wallace & Nurick LLC 1200 G Street, NW, Suite 800 Washington, DC 20005 Phone: (202) 898-5700 Fax: (717) 260-1765 E-mail: bweishaar@mcneeslaw.com Vasiliki Karandrikas McNees Wallace & Nurick LLC 100 Pine Street Harrisburg, PA 17101 Phone: (717) 237-5274 Fax: (717) 260-1707 E-mail: vkarandrikas@mcneeslaw.com Counsel for Coalition of MISO Transmission Customers, and on behalf of the Industrial Consumer Groups

For Missouri-Mississippi Parties

SPIEGEL & McDIARMID LLP

By: */s/ David E. Pomper*

_____

David E. Pomper
1875 Eye Street NW
Suite 700
Washington, DC 20006
Phone: (202) 879-4000
Fax: (202) 393-2866
david.pomper@spiegelmcd.com

Counsel for MS PSC, MO PSC, and MJMEUC

FOR THE MISSISSIPPI PSC:

Chad Reynolds, General Counsel
MISSISSIPPI PUBLIC UTILITIES STAFF
Post Office Box 1174
Jackson, Mississippi 39215-1174
Telephone: (601) 961-5471
Facsimile: (601) 961-5804
chad.reynolds@psc.state.ms.us

Frank Farmer, General Counsel
MISSISSIPPI PUBLIC SERVICE COMMISSION
Post Office Box 1174
Jackson, Mississippi 39215-1174
Telephone: (601) 961-5821
Facsimile: (601) 961-5469
frank.farmer@psc.state.ms.us

FOR THE MISSOURI PSC:

Shelley Brueggemann
General Counsel
MISSOURI PUBLIC SERVICE COMMISSION
P. O. Box 360
Jefferson City, Missouri 65102
(573) 526-7393
shelley.brueggemann@psc.mo.gov

FOR MJMEUC:

Douglas L. Healy
HEALY LAW OFFICES
3010 E. Battlefield, Suite A
Springfield, MO 65804
Phone: (417) 864-7018
doug@healylawoffices.com

For Joint Consumer Advocates	
	/s/ Jennifer C. Easler Jennifer C. Easler Iowa Office of Consumer Advocate 1375 East Court Avenue Des Moines, IA 50319-0063 Phone: (515) 725-7224 Fax (515) 725-7221 Jennifer.easler@oca.iowa.gov Counsel for Joint Consumer Advocates

For Cooperative Energy	
	DUNCAN, WEINBERG, GENZER & PEMBROKE, PC By: */s/* Robert Weinberg Matthew R. Rudolphi 1615 M Street, NW, Suite 800 Washington, DC 20036 (202) 467-6370 (202) 467-6379 rw@dwgp.com mrr@dwgp.com Counsel for Cooperative Energy

Dated: October 16, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon each of the parties shown on the official service list compiled by the Secretary of the Commission by U.S. Mail and/or by electronic service, as required by Commission regulations.

Dated at Washington, D.C. this 16th day of October, 2017.

/s/ Phyllis G. Kimmel

Phyllis G. Kimmel
McCarter & English, LLP
1015 15th Street, NW, Twelfth Floor
Washington, D.C. 20005
(202) 753-3400
(202) 296-0166 (facsimile)
Email: pkimmel@mccarter.com