UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. EL14-12-003

v.

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

Arkansas Electric Cooperative Corporation Docket No. EL15-45-000
Mississippi Delta Energy Agency
Clarksdale Public Utilities Commission
Public Service Commission of Yazoo City
Hoosier Energy Rural Electric Cooperative, Inc.

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Southern Indiana Gas & Electric Company

(Issued November 21, 2019)

GLICK, Commissioner, *dissenting in part*:

1. Although I join most of today's order, I dissent in part because I disagree with the Commission's decision not to order refunds of rates that we all agree were unjust and unreasonable. I fully support the Commission's conclusion that the MISO Transmission

Owners' (MISO TOs) pre-existing 12.38 percent ROE was unjust and unreasonable and its decision to fix the new just and reasonable ROE at 9.88 percent. Hopefully these determinations will provide some much-needed certainty to all MISO stakeholders. That being said, I disagree with the Commission's refusal to order refunds of the unjust and unreasonable rates collected during the refund period for the second of the two complaints pending before us. The law permits us to order those refunds and I see no reason to deprive customers of the full protections afforded by the Federal Power Act (FPA).

* * *

2. It helps to have the basic facts in one place. On November 12, 2013, multiple parties filed a complaint (First Complaint) alleging that the MISO TOs' 12.38 percent ROE was unjust and unreasonable.[1] The Commission set the matter for hearing and established a refund effective date of November 12, 2013 (the date the First Complaint was filed),[2] meaning that the 15-month refund period for the First Complaint lasted until February 12, 2015.[3] On February 12, 2015, a different set of parties filed another complaint (Second Complaint) against the MISO TOs' ROE. The Commission again set the matter for hearing and established a refund effective date of February 12, 2015,[4] meaning that the 15-month refund period for the Second Complaint lasted until May 12, 2016. On December 22, 2015, an Administrative Law Judge issued an initial decision recommending that the Commission grant the First Complaint and establish a new just

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[1] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,129, at P 3 (2019) (Order). The authorized base ROE for the ATCLLC zone was 12.20 percent, but I will follow the Order's practice of referring to the MISO-wide ROE as 12.38. *Id.* P 3 & n.11. The overall ROE that the MISO TOs could earn—*i.e.*, the sum of the base ROE and any incentives—was capped at 15.96. *Id.*

[2] *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).

[3] 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.

[4] *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).

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and reasonable ROE.[5] On June 30, 2016, a second Administrative Law Judge issued an initial decision, this time on the Second Complaint, again finding the MISO TOs' ROE to be unjust and unreasonable and establishing a new just and reasonable ROE.[6] And on September 28, 2016, the Commission issued Opinion No. 551, which largely affirmed the initial decision on the First Complaint, finding that the MISO TOs' 12.38 percent ROE was unjust and unreasonable and establishing a new just and reasonable ROE of 10.32 percent.[7] That is where things stood when the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Emera Maine v. FERC*,[8] which vacated the Commission's decision in Opinion No. 531—on which Opinion No. 551 was based.

3. Today's order responds to *Emera Maine* by granting rehearing of Order No. 551 and (1) establishing a new process for evaluating whether an existing ROE is unjust and unreasonable, (2) applying that process to these proceedings to find that the MISO TOs' 12.38 percent ROE was unjust and unreasonable, and then (3) setting a new just and reasonable ROE of 9.88 percent. I join my colleagues on all three determinations. Nevertheless, I dissent in part because today's order requires the MISO TOs to pay refunds only for the First Complaint, and not the Second Complaint, even though it is undisputed that the unjust and unreasonable 12.38 percent ROE was in effect for the entire refund period established for the Second Complaint. I see nothing in section 206(b) of the FPA that prevents us from providing MISO customers with relief from that unjust and unreasonable ROE.

4. Section 206(b) provides that, at the conclusion of a proceeding under section 206, "the Commission may order refunds of any amounts paid [during the 15-month refund period] 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."[9] All that text requires is that the Commission

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[5] *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 (2015).

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

[7] *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234, at P 9 (2016).

[8] 854 F.3d 9 (D.C. Cir. 2017).

[9] 16 U.S.C. § 824e(b). The full text of the relevant portion of section 206(b) is:

> At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund

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find that customers paid an unjust and unreasonable rate during the refund period and that the Commission identify a replacement just and reasonable rate, so that it can calculate refunds equal to the difference between the two rates. Both conditions are satisfied here.

5. After all, there is no dispute that all parties were on notice that the Commission would require refunds in the event that it found the existing 12.38 percent ROE unjust and reasonable.[10] And there similarly is no dispute among my colleagues that the MISO TOs' 12.38 percent ROE was unjust and unreasonable and substantially in excess of the 9.88 percent just and reasonable ROE that the Commission is establishing pursuant to section 206. Applying the plain text of section 206(b), I believe that the Commission had ample authority to order refunds pursuant to the Second Complaint and should have done so here.[11] In addition, interpreting Section 206(b) to permit refunds in this instance is both more consistent with the FPA's primary purpose of protecting consumers[12] and

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> 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: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding.

[10] *Cf. La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007).

[11] The Commission relies on its decision in *San Diego Gas & Electric* for the proposition that it can only order refunds when it grants a particular complaint. Order, 169 FERC ¶ 61,129 at P 572 (quoting *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,191 (2009)). But the quoted language merely restates the statutory text (albeit embellished with italics) without shedding any light on the Commission's authority to order refunds for subsequent pancaked complaints, which was not at issue in that decision.

[12] *See, e.g.*, *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004); *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 (1955)); *see also* 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.").
(continued ...)

more equitable given that the only reason we are faced with this question is that the Commission did not act on the First Complaint in the 15-month period before the Second Complaint was filed.

6. The Commission, by contrast, reads into the text of section 206(b) a pair of implicit limitations on its refund authority. But neither limitation is as well-founded as today's order would have you believe. First, the Commission interprets the presence of the word "thereafter" in section 206(b) "to mean that refunds may be ordered in a complaint proceeding only when the Commission grants prospective relief in that proceeding."[13] In other words, if the Commission does not fix a new just and reasonable ROE pursuant to each pancaked complaint, then it cannot order refunds of unjust and unreasonable rates collected during the relevant refund periods. I believe that the "thereafter observed and in force" language is better read as a reference to the identical language in section 206(a).[14] Under my reading, all the "thereafter observed and in force" language does is clarify that the ceiling on the Commission's refund authority pursuant to section 206(b) is the difference between the rate in effect during the refund period and the just and reasonable rate that the Commission subsequently established pursuant to subsection 206(a).[15] Accordingly, where the Commission finds that the rate that prevailed in the refund period exceeded the just and reasonable rate, the Commission has the authority to order refunds for the difference. That straightforward interpretation has the unremarkable result of allowing the Commission to protect customers by ordering refunds for any duly established refund period in which a public utility collected a rate in excess of the just and reasonable rate.

7. That brings us to the Commission's second limitation. The Commission contends that ordering refunds for the Second Complaint would, in essence, be an end run around the 15-month limit on refunds established in section 206(b).[16] But the Commission has repeatedly held that the FPA permits successive or "pancaked" complaints and those complaints are "'entirely new proceeding[s]'" and not "'duplicative proceeding[s]

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[13] Order, 169 FERC ¶ 61,129 at P 568.

[14] *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).

[15] 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.

[16] Order, 169 FERC ¶ 61,129 at P 569.

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intended solely to expand the amount of refund protection beyond 15 months.'"[17] Accordingly, under the Commission's own interpretation of section 206, ordering refunds for the Second Complaint is not an end run around the 15-month limit on the refund period, but rather is consistent with customers' right under the FPA to file multiple complaints under section 206.

8. It may be that allowing refunds for pancaked complaints creates undue and unfair uncertainty for public utilities. But those policy considerations should not—and, in my opinion, do not—control our interpretation of the text of section 206(b). Perhaps Congress should consider revising section 206 to prohibit pancaked complaints. But it is not our job to do Congress' work for it. Unless and until Congress amends the FPA to prohibit pancaked complaints, the Commission should not permit its dislike of pancaked complaints to deprive customers of the full protections provided by the FPA.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner

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