UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Association of Businesses Advocating Tariff Equity, *et al.*

v. Docket Nos. EL14-12-000, *et al.*

Midcontinent Independent System Operator, Inc., *et al.*

Arkansas Electric Cooperative Corporation, *et al.*

v. Docket Nos. EL15-45-000, *et al.*

ALLETE, Inc., *et al.*

ANSWER OF THE MISO COMPLAINANT-ALIGNED PARTIES TO THE MISO TRANSMISSION OWNERS' MOTION FOR LEAVE TO ANSWER MISO CAPS' REQUEST FOR REHEARING

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2019), the MISO Complainant-Aligned Parties ("MISO CAPs")[1] respectfully submit this answer to the MISO

[1] The MISO CAPs are: American Municipal Power, Inc. ("AMP"); Association of Businesses Advocating Tariff Equity ("ABATE"), Coalition of MISO Transmission Customers ("CMTC"), Illinois Industrial Energy Consumers ("IIEC"), Indiana Industrial Energy Consumers, Inc. ("INDIEC"), Minnesota Large Industrial Group ("MLIG"), and Wisconsin Industrial Energy Group ("WIEG") (collectively, "Joint Complainants" or Industrial Consumer Groups ("ICG")); Joint Consumer Advocates ("JCA"), 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 Corporation ("AECC"), Cooperative Energy, and Hoosier Energy Rural Electric Cooperative, Inc. ("Hoosier"); 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"); Southwestern Electric Cooperative, Inc. ("SWEC"); and Wabash Valley Power Association, Inc. ("WVPA").

OMS participates in this answer where it is consistent with the policy positions approved by a majority of its Board of Directors. Nothing in OMS's participation in this answer should be read as assertions or arguments by state commission members of OMS applicable to state return on equity proceedings. Individual state commissions have their own proceedings and applicable precedent guiding state return on equity determinations.

AMP intervened in the first complaint proceeding (Docket No. EL14-12) only.

Transmission Owners' ("MISO TOs") motion for leave to answer and answer filed February 12, 2020 ("Motion"). In that filing, the MISO TOs seek leave to submit a response to MISO CAPs' December 23, 2019 request for rehearing of Opinion No. 569.[2] As explained below, the MISO TOs' Motion fails to meet the standard for exceptional admission of answers to rehearing requests and should be rejected.

I. THE COMMISSION SHOULD REJECT THE MISO TOS' MOTION

Answers to requests for rehearing are prohibited under Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure.[3] The Commission exceptionally admits answers to requests for rehearing when they help clarify the issues, complete the record, or aid the Commission in its decision-making. However, the MISO TOs' Motion fails to meet this high standard for exceptional admission because, as further explained below, it either reiterates positions already in the record or promotes new erroneous theories based on the mischaracterization of MISO CAPs' positions.

A. The MISO TOs' Motion is Repetitive

The Motion repeats the same positions that the MISO TOs have advanced throughout this long litigation proceeding about the appropriate Capital Asset Pricing Model ("CAPM") methodology to use in return on equity ("ROE") proceedings. Furthermore, the MISO CAPs have consistently advocated for changes to the CAPM methodology throughout these proceedings, and the MISO TOs have had multiple opportunities to respond to the MISO CAPs' arguments in their reply briefs to the Presiding Judge, their briefs opposing exceptions to the

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

3 18 C.F.R. §§ 385.213(a)(2), 385.713(d)(1) (2019).

initial decisions, and their reply brief in response to the MISO Briefing Order.[4] In fact, the MISO TOs used all of these opportunities to advocate for their views on how the CAPM methodology should be applied.[5] Allowing the MISO TOs to argue again in favor of their preferred CAPM method at the rehearing stage through a prohibited answer is inappropriate and unjustified. The Motion does not clarify the record with respect to the CAPM methodology; it simply expands through repetition an already lengthy and complete record.

B. The MISO TOs' *Chevron* Arguments are Erroneous

The Motion promotes erroneous theories regarding what constitutes an "existing" rate under the Federal Power Act ("FPA") and the application of *Chevron*[6] deference. The MISO TOs argue that because section 206 of the FPA "is silent or ambiguous with respect to defining the effective rate for purposes of the Commission's review of the second of successive, pancaked complaints"[7] the first step of the *Chevron* analysis is met and "a reviewing court would move on to the second step of the *Chevron* analysis, and would examine whether the Commission's interpretation of the statute is reasonable."[8] The MISO TOs confuse their concerns regarding the Commission's longstanding policy allowing successive complaints,[9] with the legal issue concerning determination of the appropriate rate to use in a first prong analysis under section 206 of the FPA.

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4 *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Order Directing Briefs, 165 FERC ¶ 61,118 (2018) ("MISO Briefing Order").

5 *See* MISO TOs Reply Br. (I), Accession No. 20151013-5724 at 64-65 (October 13, 2015); MISO TOs Brief Opposing Exceptions (I), Accession No. 20160210-5166, at 27-31 (February 10, 2016); MISO TOs Supplemental Reply Br. (I), Accession No. 20190410-5235, at 20-30, 52-53, 76-79 (April 10, 2019); MISO TOs Reply Br. (II), Accession No. 20160418-5288, at 77-79, 85-90 (April 18, 2016); MISO TOs Brief Opposing Exceptions (II), Accession No. 20160908-5288, at 60-62 (September 8, 2016); and MISO TOs Supplemental Reply Br. (II), Accession No. 20190410-5239, at 20-30, 51-52 (April 10, 2019).

6 *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837 (1984) ("*Chevron*").

7 Motion at 28.

8 *Id.*

The relevant rate for purposes of a first prong analysis under FPA section 206 is "any rate, charge, or classification, *demanded, observed, charged, or collected* by any public utility."[10] This statutory language is unambiguous. And it is undisputed that the ROE "collected" by the MISO TOs during the entire refund period of the second complaint was 12.38 percent, not 9.88 percent. The fact that the FPA does not specifically address the filing of successive complaints does not render ambiguous the plain language of the statute regarding the rate that should be used in a section 206 first prong analysis. As the Commission is aware, the courts do not give deference to an agency's interpretation of a statute that is contrary to the plain, unambiguous language of the statute.[11] The MISO TOs' argument regarding *Chevron* deference misunderstands the legal issue raised by MISO CAPs and, therefore, does not help to clarify the record.

Furthermore, even if the Commission had used the correct ROE in its first prong analysis of the second complaint (which it did not), nothing in section 206(b) of the FPA restricts the Commission's refund authority to protect customers that paid unjust and unreasonable rates. As Commissioner Glick explained, "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

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9 MISO CAPs have consistently argued that the Commission lawfully allowed the second complaint to proceed to hearing even though there was no final FERC order ruling on the first complaint proceeding.

10 16 U.S.C. § 824e(a) (2020) (emphasis added).

11 *See e.g.*, *Chevron*, 467 U.S. at 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Cal. Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004) (explaining that in the first step of a Chevron analysis "we begin with a 'plain language' analysis of the statutory text. That is, we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'" (citing *Sec. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 137, 149, (1984))); *City of Tacoma v. F.E.R.C.*, 331 F.3d 106, 114 (D.C. Cir. 2003) (explaining that in deciding whether the plain meaning of the text resolves the issue under the first *Chevron* step "the court considers 'the particular statutory language at issue, as well as the language and design of the statute as a whole'" (citing *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997))).

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."[12] Here, the MISO TOs' Motion erroneously states that Commissioner Glick's dissent amounts merely to a difference of opinion, but is no grounds for a court reversal because he did not "suggest that the decision constituted error that could or should be reversed on appeal."[13] However, whether the dissent raised the possibility of appellate reversal is irrelevant to the merits of the MISO CAPs' rehearing request.

Because the Motion promotes erroneous arguments regarding the refund authority of the Commission based on its mischaracterization of MISO CAPs' legal arguments, it does not help clarify the record and should be rejected consistent with Commission precedent.[14] Admitting the Motion will only serve to unnecessarily lengthen and confuse the record.

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12 Opinion No. 569, Commissioner Glick dissent at P 6.

13 Motion at 31.

14 *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,238, at P 12 (2019); *PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,047, at P 8 (2018); *Tenn. Gas Pipeline Co., L.L.C.*, 160 FERC ¶ 61,027, at P 3 (2017); *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,060, at P 7 (2017); *Cal. ex rel. Lockyer v. B.C. Power Exch. Corp.*, 157 FERC ¶ 61,023, at P 8 (2016); *Pub. Serv. Comm'n of Wis.*, 150 FERC ¶ 61,104, at P 71 (2015); *Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, Order No. 773-A, 143 FERC ¶ 61,053, at P 12 (2013).

II. CONCLUSION

For the foregoing reasons, MISO CAPs respectfully request that the Commission reject the MISO TOs' Motion.

Respectfully submitted,

/s/ Marcus Hawkins
Marcus Hawkins
Ben Sloan
Organization of MISO States, Inc.
699 Walnut St. 4th Floor, Suite 468
Des Moines, IA 50309
515-207-3550
marcus@misostates.org
ben@misostates.org

/s/ Nathan Brown
Nathan Brown
Chief Operating Officer
Nathan Bellville
Regulatory Affairs Specialist
Cooperative Energy
7037 Highway 49
P.O. Box 15849
Hattiesburg, MS 39404-5849
601-261-2303
nbrown@cooperativeenergy.com
nbellville@cooperativeenergy.com

/s/ Jennifer Easler
Jennifer Easler, Attorney
Iowa Office of Consumer Advocate
1375 East court Avenue
Des Moines, IA 50319-0063
515-725-7200
Jennifer.easler@oca.iowa.gov

Counsel for Joint Consumer Advocates

/s/ Andrea I. Sarmentero Garzón
Andrea I. Sarmentero Garzón
Jennings, Strouss & Salmon, PLC
1350 I Street, NW – Suite 810
Washington, DC 20005-3305
202-370-4128
asarmentero@jsslaw.com

Counsel to the Organization of MISO States, Inc.

/s/ Matthew R. Rudolphi
Matthew R. Rudolphi
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1667 K Street NW, Suite 700
Washington, DC 20006
202-467-6370
mrr@dwgp.com

Attorney for Cooperative Energy

/s/ Barry Cohen
Sean T. Beeny
Barry Cohen
McCarter & English, LLP
1301 K Street, N.W., Suite 1000 West
Washington, DC 20005
202-753-3400
bcohen@mccarter.com
sbeeny@mccarter.com

Counsel for Hoosier Energy Rural Electric Cooperative, Inc.

/s/ Lisa G. McAlister
Lisa G. McAlister
Senior Vice President and General Counsel
for Regulatory Affairs
Gerit F. Hull
Deputy General Counsel
for Regulatory Affairs
American Municipal Power, Inc.
1111 Schrock Road, Suite 100
Columbus, OH 43229
614-540-1111
lmcalister@amppartners.org
ghull@amppartners.org

Counsel for American Municipal Power, Inc.

/s/ John T. Elkins
John T. Elkins
Associate General Counsel
Arkansas Electric Cooperative
Corporation
1 Cooperative Way
Little Rock, AR 72209
501-570-2146
John.Elkins@aecc.com

/s/ John Michael Adragna
John Michael Adragna
Kevin J. Conoscenti
McCarter & English, LLP
1301 K Street, N.W., Suite 1000 West
Washington, DC 20005
202-753-3400
jadragna@mccarter.com
kconcoscenti@mccarter.com

Counsel for Wabash Valley Power
Association, Inc.

/s/ David E. Pomper
David E. Pomper
Spiegel & McDiarmid LLP
1875 Eye Street NW, Suite 700
Washington, DC 20006
202-879-4000
david.pomper@spiegelmcd.com

Counsel for Mississippi Public Service Commission,
Missouri Public Service Commission and Missouri
Joint Municipal Electric Utility Commission

/s/ Robert A. Weishaar, Jr.
Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
1200 G. Street, NW, Suite 800
Washington, DC 20005
202-898-5700
bweishaar@mcneeslaw.com

Vasiliki Karandrikas
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17101
717-237-5274
vkarandrikas@mcneeslaw.com

Counsel for Coalition of MISO Transmission
Customers and on behalf of the Joint Complainants

/s/ Michael Postar
Michael Postar
Joshua E. Adrian
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1667 K Street NW, Suite 700
Washington, DC 20006
mrp@dwgp.com
jea@dwgp.com

Counsel for Southwestern Electric Cooperative, Inc.

Dated: February 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C. this 27th day of February, 2020.

/s/ *Rachel Bernard*
Rachel Bernard
Administrative Legal Assistant
Jennings, Strouss & Salmon, P.L.C.
1350 I Street, NW – Suite 810
Washington, DC 20005-3305
202-370-4121
rbernard@jsslaw.com