

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

Martha Coakley, Massachusetts Attorney)	Docket Nos. EL11-66-001
General, <i>et al.</i>)	EL11-66-004
v.)	EL11-66-005
Bangor Hydro-Electric Company, <i>et al.</i>)	

**MOTION FOR LEAVE TO INTERVENE OUT-OF-TIME AND
ALTERNATIVE PETITION FOR RULEMAKING OF
THE ORGANIZATION OF MISO STATES, COOPERATIVE ENERGY,
HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
AMERICAN MUNICIPAL POWER, INC.,
JOINT CONSUMER ADVOCATES, AND
COALITION OF MIDWEST TRANSMISSION CUSTOMERS**

Pursuant to Rules 207, 212 and 214 of the Rules of Practice and Procedure¹ of the Federal Energy Regulatory Commission (“FERC” or “Commission”), the Organization of MISO States, Inc. (“OMS”), Cooperative Energy, Hoosier Energy Rural Electric Cooperative, Inc. (“Hoosier”), American Municipal Power, Inc. (“AMP”), Joint Consumer Advocates,² and Coalition of Midwest Transmission Customers (“CMTC”) (hereinafter referred to as the MISO Complainant-Aligned Parties or “MISO CAPs”), respectfully submit this motion for leave to intervene out-of-time for the purpose of participating in the briefing initiated in the above captioned proceedings concerning return on equity (“ROE”) policies of general applicability.³ MISO CAPs do not intend to submit briefs addressing the issue of how a new ROE approach should apply to the ROE complaint proceedings in New England. They only seek leave to file briefs on the policy questions of general applicability raised in the Briefing Order. In the

¹ 18 C.F.R. §§ 385.207, 385.212, & 385.214.

² Joint Consumer Advocates include: the Illinois Citizens Utility Board, Indiana Office of Utility Consumer Counselor, Iowa Office of Consumer Advocate, Kentucky Office of the Attorney General, Michigan Citizens Against Rate Excess, Minnesota Department of Commerce, and Citizens Utility Board of Wisconsin.

³ *Coakley v. Cent. Me. Power Co.*, Order Directing Briefs, 165 FERC ¶ 61,030 (2018) (“Briefing Order”).

alternative, MISO CAPs respectfully request that the Commission initiate a generic proceeding to address the new ROE framework proposed by the Commission, which will directly affect ongoing ROE litigation in the Midcontinent Independent System Operator's ("MISO") footprint and other ROE proceedings affecting utilities and their customers across the nation.

I. BACKGROUND

On September 30, 2011, a number of New England entities⁴ filed a complaint challenging the ISO New England Inc. ("ISO-NE") transmission owners' ("New England TOs") ROE. On that same date, the Commission issued a notice of complaint indicating that the complainants sought an order reducing the 11.14% base ROE used in calculating formula rates for transmission service under the ISO-NE Tariff to 9.2%.⁵ Following the filing of interventions, answers and comments, the Commission set the matter for hearing and settlement judge procedures.⁶ The Hearing Order noted that one issue raised in the complaint was the changed capital market conditions that followed the collapse of the housing bubble and the resulting economic recession.⁷

In Opinion No. 531 *et seq.*,⁸ the Commission acted on this complaint by adopting changes to the Discounted Cash Flow ("DCF") methodology used for evaluating and setting the allowed ROE of electric utilities. In particular, the Commission elected to replace the "one-step"

⁴ The New England Complainants are: Martha Coakley, Attorney General of the Commonwealth of Massachusetts, Connecticut Public Utilities Regulatory Authority, Massachusetts Department of Public Utilities, New Hampshire Public Utilities Commission, George Jepsen, Attorney General of the State of Connecticut, Connecticut Office of Consumer Counsel, Maine Office of the Public Advocate, New Hampshire Office of the Consumer Advocate, Rhode Island Division of Public Utilities and Carriers, Vermont Department of Public Service, Massachusetts Municipal Wholesale Electric Company, Associated Industries of Massachusetts, The Energy Consortium, Power Options, Inc., and the Industrial Energy Consumer Group.

⁵ The notice of complaint was published in the Federal Register on October 7, 2011.

⁶ *Coakley v. Bangor Hydro- Elec. Co.*, Order on Complaint and Establishing Hearing and Settlement Judge Procedures, 139 FERC ¶ 61,090 (2012) ("Hearing Order").

⁷ *Id.* P 3.

⁸ *Coakley v. Bangor Hydro- Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032, *order on reh'g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015).

DCF methodology, which considers only short-term growth projections for a public utility, with a “two-step” DCF methodology. The Commission further established a new framework for placing the ROE within the DCF zone of reasonableness in instances where it found capital market conditions to be anomalous.

ROE issues similar to those addressed in Opinion No. 531 *et seq.* have been raised in complaints addressing the MISO transmission owners’ (“MISO TOs”) ROE. The first MISO ROE complaint was filed on November 12, 2013. The hearing order in this proceeding required the Presiding Judge to follow the Commission’s instructions set forth in Opinion No. 531.⁹ On February 12, 2015, the second ROE complaint was filed. On December 22, 2015, the Presiding Judge issued an initial decision addressing the issues in the first MISO ROE complaint and followed the precedent set in Opinion No. 531. On June 30, 2016, the Presiding Judge issued an initial decision addressing the issues in the second MISO ROE complaint, also following Opinion No. 531. On September 28, 2016, the Commission issued Opinion No. 551¹⁰ addressing the MISO ROE complaints and affirming the policies that the Commission established in Opinion No. 531.

A number of parties sought review of certain determinations the Commission had made in Opinion No. 531. In *Emera Maine*,¹¹ the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit” or “Court”) vacated and remanded Opinion No. 531 *et seq.* The Court found that the Commission had acted arbitrarily and capriciously by not specifically finding and explaining why the New England TOs’ ROE had become unjust and unreasonable, as required

⁹ *Ass’n of Bus. Advocating Tariff Equity v. MISO*, 148 FERC ¶ 61,049, at P 186 (2014).

¹⁰ *Ass’n of Bus. Advocating Tariff Equity v. MISO*, Opinion No. 551, 156 FERC ¶ 61,234 (2016).

¹¹ *Emera Me. v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).

under the first prong of Federal Power Act (“FPA”) section 206,¹² and by setting the replacement ROE for the New England TOs at the upper midpoint of the DCF zone of reasonableness without a reasonable explanation, as required under the second prong of FPA section 206. The Court instructed the Commission to undertake further proceedings consistent with its opinion.

On October 16, 2018, the Commission issued the Briefing Order in the proceedings addressing remand of Opinion No. 531. The Briefing Order directed participants in the New England proceedings to file briefs addressing the significant changes proposed by the Commission to the framework for determining the ROE of electric utilities. The Commission’s new approach dismantles the ROE framework established just four years ago in Opinion No. 531 *et seq.*, upon which the MISO complaint proceedings were decided.

While the Commission states in the Briefing Order that it is proposing these changes in response to the D.C. Circuit’s remand in *Emera Maine v. FERC*, the proposed changes go well beyond the issues remanded by the Court, and well beyond the scope of the complaint proceedings in Docket No. EL11-66 *et al.* For example, the Commission is seeking to depart from its long-standing precedent that relies on the DCF analysis to determine the bounds of the zone of reasonableness, and finds a new purpose for the zone in relation to meeting the burden of proof under the first prong of FPA section 206. The Commission is also proposing to change the manner in which the just and reasonable ROE is calculated and seeks input regarding improvements to the methodologies for estimating the cost of equity (*i.e.*, DCF, Capital Asset Pricing Model (“CAPM”), Expected Earnings, and Risk Premium).

Nothing in the September 30, 2011 notice of complaint of this proceeding gave MISO CAPs appropriate notice of the changes that may now apply not only in New England, but in

¹² 16 U.S.C. § 824e.

MISO and other regions across the nation. As explained below, good cause exists to grant late intervention for the limited purpose of briefing issues concerning policy changes of general applicability or, in the alternative, to institute a generic proceeding.

II. COMMUNICATIONS

Service of pleadings, documents, and communications should be made on:

Tanya Paslawski
Executive Director
Organization of MISO States, Inc.
100 Court Avenue – Suite 315
Des Moines, IA 50309
(515) 243-0742
tanya@misostates.org

Andrea I. Sarmentero Garzón
Jennings, Strouss & Salmon, PLC
1350 I Street, NW – Suite 810
Washington, DC 20005-3305
(202) 292-4738
asarmentero@jsslaw.com
Counsel to the Organization of MISO States, Inc.

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

Matthew R. Rudolphi
Adriana Vélez-León
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M Street, NW, Suite 800
Washington, DC 20036
(202) 467-6370
mrr@dwgp.com
avl@dwgp.com
Attorneys for Cooperative Energy

Christopher M. Goffinet
General Counsel
Michael Mooney
Manager, Resource Planning
Hoosier Energy Rural Electric
Cooperative, Inc.
2501 South Cooperative Way
Bloomington, IN 47403
(812) 876-2021
cgoffinet@hepn.com

Sean T. Beeny
Barry Cohen
Phyllis G. Kimmel
McCarter & English, LLP
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 753-3400
bcohen@mccarter.com
bcohen@mccarter.com

Kristin Munsch
Dir. of Policy and Senior Attorney
Citizens Utility Board
309 West Washington Street, Ste. 800
Chicago, IL 60606
(312) 263-4282 ext. 119
kmunsch@citizensutilityboard.org

Robert G. Mork
Deputy Consumer Counselor for Federal Affairs
Indiana Office of Utility Consumer Counselor
115 West Washington Street, Suite 1500 South
Indianapolis, Indiana 46204
(317) 233-3234
rmork@oucc.IN.gov

Jennifer Easler, Attorney
Iowa Office of Consumer Advocate
1375 East Court Avenue
Des Moines, Iowa 50319-0063
(515) 725-7200
jennifer.easler@oca.iowa.gov

Rebecca Goodman, Executive Director
Lawrence W. Cook, Assistant Attorney General
Kentucky Office of the Attorney General
Office of Rate Intervention
(502) 696-5453
Rebecca.Goodman@ky.gov
Larry.Cook@ky.gov

John R. Liskey
Counsel
Citizens Against Rate Excess
921 N. Washington Ave.
Lansing, MI 48906
(517) 913-5105
john@liskeypllc.com

Thomas Content
Executive Director
Citizens Utility Board of Wisconsin
6401 Odana Road
Madison, WI 53719
(608) 251-3322
content@wiscub.org

Kate O'Connell
Manager, Energy Reg. & Planning
Minnesota Department of Commerce
85 7th Place East, Suite 280
St. Paul, MN 55101-2198
(651) 539-1815
kate.oconnell@state.mn.us

Nancy A. Campbell
Analyst Coordinator – Financial
Minnesota Department of Commerce
85 7th Place East, Suite 280
St. Paul, MN 55101-2198
(651) 539-1821
nancy.campbell@state.mn.us

Lisa G. McAlister
SVP/General Counsel for Regulatory
Affairs
Kristin V. Rothey
Assistant Deputy General Counsel
American Municipal Power, Inc.
1111 Schrock Road, Suite 100
Columbus, OH 43229
(614) 540-1111
lmcAlister@amppartners.org
krothey@amppartners.org

Gary J. Newell
Gerit F. Hull
Jennings, Strouss & Salmon, PLC
1350 I Street, NW – Suite 810
Washington, DC 20005-3305
(202) 292-4738
gnewell@jsslaw.com
ghull@jsslaw.com

Attorneys for American Municipal Power, Inc.

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

*Counsel for Coalition of MISO
Transmission Customers*

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*

The MISO CAPs request, to the extent necessary, that the Commission waive the requirements of Rule 203(b)(3) to permit each person named above to be placed on the official service list in order to avoid delays in responding to official documents and communications.

III. MOTION TO INTERVENE OUT-OF-TIME

A. Identity of Intervenors

1. Organization of MISO States

OMS is a self-governing organization that includes representatives from each state regulatory body with jurisdiction over entities participating in MISO. OMS serves as the regional state committee for MISO. The purpose of OMS is to coordinate regulatory oversight among its members, to make recommendations to MISO, the MISO Board of Directors, the Commission, and other relevant government entities and state commissions, as appropriate, and to intervene in proceedings before the Commission to express the positions of OMS member agencies.

2. Cooperative Energy

Cooperative Energy is an incorporated, non-profit cooperative electric power association, organized and operating under and pursuant to Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, *et seq.*, Vol. 4A Recompiled, Mississippi Code of 1942; and is a public utility under the laws of the State of Mississippi. Cooperative Energy is owned and controlled by its members, which are distribution rural electric power associations, serving rural areas in

Mississippi at retail. The loads served by Cooperative Energy's member distribution cooperatives are predominantly domestic and include substantial farm loads. Cooperative Energy is an electric cooperative that receives financing under the Rural Electrification Act of 1936 ("REA") (7 U.S.C. § 901 *et seq.*) and is therefore not subject to the Commission's normal jurisdiction under Part II of the Federal Power Act as set forth in 16 U.S.C. § 824(f). Cooperative Energy is a transmission-owning member of MISO and its operations are integrated into MISO. Cooperative Energy participates in the wholesale markets administered by MISO and receives transmission service pursuant to the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff ("OATT"). Cooperative Energy is located in the MISO South region.

3. Hoosier Energy Rural Electric Cooperative, Inc.

Hoosier is a generation and transmission cooperative organized under the laws of the State of Indiana and is responsible for the full or partial requirements power supply of 17 member distribution electric cooperatives incorporated in the State of Indiana and one in the State of Illinois. Hoosier's power supply is devoted to serving the requirements of its members. The 18 distribution cooperatives, in turn, supply electricity to nearly 300,000 consumers. Hoosier receives funding under the REA and is therefore not subject to the Commission's plenary jurisdiction under Part II of the Federal Power Act as set forth in 16 U.S.C. § 824(f). Hoosier is a transmission-owning member of MISO and receives transmission service pursuant to the MISO OATT.

4. American Municipal Power, Inc.

AMP is a nonprofit multistate public power entity formed in 1971 that currently has 135 members in nine states. All of AMP's members are political subdivisions that own and/or

operate municipal electric utility systems, and AMP is governed by a board comprising representatives of its members. AMP's primary purpose is to assist its member communities in meeting their electric and energy needs in a reliable and economic fashion. This purpose is served in a number of ways, including through the ownership of electric generating facilities, scheduling and dispatch of member-owned generation, and through power supply and transmission arrangements that AMP makes with third-parties at the request of and on behalf of its members. AMP and its members have load and generation resources in the PJM Interconnection, L.L.C. ("PJM") and MISO regions.

5. Joint Consumer Advocates

The Illinois CUB is a statewide organization created by statute to represent the interests of utility consumers, and in particular, residential ratepayers and small business customers.¹³ Illinois CUB's purpose is to advocate for reliable, affordable and sound utility service on behalf of its members and all residential ratepayers of the state, and Illinois CUB routinely intervenes in utility rate and rate design proceedings before the Illinois Commerce Commission.

The Indiana OUCC is an agency of the State of Indiana, duly authorized to represent all Indiana ratepayers in state and federal proceedings regarding utility rates and issues. Indiana Code 8-1-1.1-9.1 specifically provides for the appointment of a deputy consumer counselor for federal affairs, who is specifically charged with the representation of Indiana ratepayers' interests before federal agencies, including this Commission.

The Iowa OCA, a division of the Iowa Department of Justice, represents consumers and the public generally in all proceedings before the Iowa Utilities Board ("IUB") and in

¹³ 220 ILCS 10/5(d) and (e).

proceedings before federal administrative agencies concerning matters that may impact electric utility service or rates regulated by the IUB.¹⁴

The Kentucky Attorney General is the state's chief law enforcement official, and pursuant to KRS 367.150 (8) is authorized to appear before both state and federal rate-making or regulatory bodies or agencies to represent and be heard on behalf of consumers' interests, and to be made a real party in interest to any action on behalf of consumer interests brought before such bodies or agencies.

MICH-CARE is a Michigan non-profit corporation organized to protect Michigan's residential ratepayers from unreasonable and unnecessary utility rates. MICH-CARE was organized for the purpose of intervening in proceedings at the state and federal level on behalf of residential utility ratepayers.¹⁵ MICH-CARE has members that are residential ratepayers of many of the investor owned utilities ("IOUs") that operate in Michigan including members that are served by MISO. MICH-CARE maintains a website at www.utilityratewatch.org, and has participated in several proceedings before the Commission in the interest of advocating for just and reasonable rates, terms, and conditions that produce the energy, transmission, and capacity charges used to pay for the electricity provided to Michigan residential ratepayers through the constructs contained in MISO's Commission approved tariffs.

The Minnesota DOC is charged with the duty to advocate for the public interest both on a state and federal level pursuant to Minn. Stat. § 216A.085. Minnesota DOC is an arm of Minnesota's Executive Branch and is one of the Energy Policy Agencies in the State of Minnesota responsible for enforcing state statutes and policies regarding evaluation of public utilities.

¹⁴ Iowa Code §§ 476A.2(2), 475A.2(5).

¹⁵ MICH-CARE is a grantee of the Utility Consumer Representation Fund, created under the laws of Michigan (1982 PA 304).

The Wisconsin CUB is a nonprofit organization with more than 2,800 members, primarily residential, farm, and small business customers of Wisconsin utilities. Wisconsin CUB's purpose is to advocate for reliable, affordable, and sound utility service on behalf of its members and all residential ratepayers of the state.

6. Coalition of Midwest Transmission Customers

CMTC is a continuing *ad hoc* association of large industrial and commercial end-users of electricity in the Midwest operated for the purposes of representing the interests of industrial energy consumers before regulatory and legislative bodies. CMTC members have facilities throughout the MISO region.

B. Interest in this Proceeding

OMS is an active party in the ongoing MISO ROE complaint proceedings that will be affected by the changes proposed in the Briefing Order.¹⁶ OMS member agencies regulate entities that purchase services under a number of arrangements that include ROE as a component of rates. The cost of these services is passed on to retail customers in OMS' member states. OMS and its members are directly affected by generally applicable changes in the Commission's ratemaking methods that determine the rates for regulated electric generation and transmission services.¹⁷

Cooperative Energy, formerly known as South Mississippi Electric Power Association, is an active party in the ongoing MISO ROE complaint proceedings that will be directly affected by changes proposed in the Briefing Order, if adopted. As a participant in the MISO wholesale markets receiving transmission service pursuant to the MISO OATT, Cooperative Energy will be

¹⁶ Docket Nos. EL14-12 and EL15-45.

¹⁷ OMS and others are providing this statement to conform to the requirement of Rule 214(b)(1).

directly affected by any generally applicable changes to the Commission’s ratemaking methodology for determining rates for regulated transmission service.

Hoosier is an intervenor and an active party in the first MISO ROE complaint, Docket No. EL14-12, and a named plaintiff and active party in the second MISO ROE complaint, Docket No. EL15-45. Hoosier will therefore be directly affected by any generally applicable changes to the Commission’s ratemaking methodology for determining rates for regulated transmission service.

As transmission customers and Load Serving Entities (“LSEs”) in the zones of dozens of transmission owners in the MISO and PJM RTO regions, AMP and its members could be affected by any changes made to the Commission’s approach to determining ROE as a result of this proceeding. For example, AMP intervened in the first MISO ROE complaint proceeding in Docket No. EL14-12 because AMP and several of its members receive services under the MISO OATT and the rates for those services may be affected by the outcome of that proceeding.¹⁸ In addition, AMP is a complainant in a proceeding in which the ROE of certain American Electric Power Company (“AEP”) subsidiaries was challenged. AMP is one of several parties that entered into a comprehensive settlement of that case, and the settlement is pending before the Commission at this time.¹⁹ AMP also is participating in other cases in which the ROE of these AEP subsidiaries is relevant in determining the rates for services provided by others.²⁰

¹⁸ AMP filed its doc-less intervention in Docket No. EL14-12-000 on Nov. 20, 2013. See *ABATE v. MISO*, 148 FERC ¶ 61,049, at P 177 (2014) (granting “timely, unopposed motions to intervene”). AMP previously sought to intervene in Docket No. EL11-66-001 on July 21, 2014. See Opinion No. 531-B at P 15 (denying AMP’s late-filed motion to intervene).

¹⁹ See *AMP v. Appalachian Power Co.*, Docket No. EL17-13-000, and the related contested settlement pending in Docket No. ER18-1202-000.

²⁰ *PJM Interconnection, L.L.C.*, Docket No. ER18-254-000; and *Headwaters Wind Farm, LLC*, Docket No. ER18-2344-000.

MISO operates the transmission system and runs wholesale electricity markets, including substantial parts of the states whose ratepayers are represented by the Joint Consumer Advocates. Ratepayers represented by the Joint Consumer Advocates will be directly affected by any generally applicable changes to the Commission's ratemaking methodology for determining rates for regulated transmission service. Further, Joint Consumer Advocates play a unique role in state and federal regulatory proceedings. The Indiana OUCC, Iowa OCA, and Minnesota DOC do not represent particular parties but instead are designated by the laws of our respective states to represent the overall interests of our states' ratepayers. Similarly, Illinois CUB and MICH-CARE represent residential customers in their respective states, and the Wisconsin CUB represents the residential, farm and small business rate class in Wisconsin. Thus, Joint Consumer Advocates' participation in their designated roles is plainly and uniquely in the public interest.

CMTC is an active party in the ongoing MISO ROE complaint proceedings.²¹ As such, CMTC's members will be directly affected by the proposed changes set forth in the Commission's Briefing Order, if adopted. The Commission's disposition of the policy questions concerning the ROE methodology applicable to electric transmission owners will have a direct impact on the cost of transmission service. Establishing a just and reasonable ROE is essential to ensuring that customers, like CMTC's members, are not substantially overpaying for transmission service. As high-volume end users of electricity, each CMTC member's cost of doing business will be directly impacted by any changes to the Commission's methodology for determining electric utilities' ROE.

MISO CAPs state that while some aspects of the Commission ROE framework may be appropriate, including for example, instituting a more granular examination of electric utilities'

²¹ CMTC participated as part of the "Industrial Customer Groups" in support of the complaint filed in Docket No. EL15-45-000 *et al.* and as one of the "Joint Complainants" in Docket No. EL14-12-000 *et al.*

individual risks, there are areas that may benefit from refinement, such as the particular methodologies used in determining the cost of equity.²²

The policies proposed in the Briefing Order will have a direct effect on the interests of customers and consumers that are represented by the MISO CAPs in the MISO ROE complaint proceedings still pending before the Commission.²³ Indeed, the proposals in the Briefing Order have already affected proceedings outside of New England where ROE is an issue.²⁴ The New England parties' perspective is framed by the facts and circumstances at issue in the New England proceedings. The MISO CAPs are not parties to the disputes underlying those proceedings and will present views reflecting broader consumer and customer interests. This demonstrates that movants' unique "interests are not adequately represented by other parties in the proceeding." For these reasons, this motion satisfies the requirements of Rule 214(b)(2)(ii) & (iii), and is consistent with Rule 214(d)(1)(iii).²⁵

C. The Commission Should Grant this Motion Because Good Cause Exists for Late Intervention and No Disruption or Prejudice Will Result

The MISO Caps submit that good cause exists to permit their interventions at this stage of the proceedings and that their late interventions are consistent with the factors the Commission may consider for such purposes pursuant to Rule 214(d)(1).²⁶ First, the MISO CAPs had good cause for not filing a motion to intervene in this case in 2011 because they had

²² The MISO CAPs are providing this statement to conform to the requirement of Rule 214(b)(1).

²³ Briefing Order at P 19 (stating that the "new approach reflects the Commission's proposed policy for addressing this issue in the future, including in the proceedings currently pending before the Commission.").

²⁴ See, e.g., *E. Tex. Elec. Coop, Inc. v. Pub. Serv. Co. of Ok.*, Order of Chief Judge Holding Procedural Schedule in Abeyance and Waiving Answer Period, Docket No. EL17-76-001, at P 2 (Oct. 18, 2018). Citing the Briefing Order in the instant New England proceeding, the Chief Administrative Law Judge recently held this complaint proceeding abeyance to "allow participants time to address the Commission's new approach and methodologies on ROE and the impact on the hearing schedule." *Id.* The abeyance will continue "until the Commission decides the ROE case or issues further guidance concerning ROE." *Id.*

²⁵ 18 C.F.R. § 385.214(b)(2)(ii), (b)(2)(iii), & (d)(1)(iii).

²⁶ 18 C.F.R. § 385.214(d)(1).

no notice that the New England proceedings could result in the broad policy changes that the Commission has proposed to apply to the MISO and other proceedings. Second, the MISO CAPs' intervention will not disrupt the New England proceedings in any way because the MISO CAPs accept the briefing schedule as established (or revised) and will not address issues outside of the scope delineated by the Briefing Order. Finally, no party will be prejudiced by MISO CAPs' intervention because MISO CAPs are not seeking to address New England-specific issues, but rather building the record on the generally applicable policy questions and issues raised by the Commission in the Briefing Order.

1. Lack of Notice Demonstrates Good Cause

The MISO CAPs were not on notice that FERC would expand the proceedings in Docket No. EL11-66 *et al.* to propose a universally applicable framework for determining whether an existing ROE is just and reasonable. This lack of notice justifies the MISO CAPs not intervening in this proceeding in 2011 when interventions were first due. Thus, granting late intervention here is consistent with FERC's policy to grant late intervention in cases where FERC expands a proceeding beyond the original filings and parties at issue,²⁷ and where the Commission has directed briefing on "new and *more generic* issues raised by the court's remand"²⁸

The *Coakley* proceeding was initiated by parties who, at the time, alleged that given changed capital market conditions, the New England TOs' existing ROE was no longer just and

²⁷ *Natural Gas Pipeline Co.*, 102 FERC ¶ 61,355 (2003); *See, e.g., PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,187 (2004) (granting late intervention where rehearing request presented factual material and policy arguments not before the parties before issuance of the Commission's order); *AEP Power Marketing Inc.*, 107 FERC ¶ 61,018 (2004) (granting late intervention where proceedings expanded beyond original filings and parties at issue); *Duke Energy Carolinas, LLC*, 147 FERC ¶ 61,241, PP 12-14 (2014).

²⁸ *See, e.g., FPL Energy Marcus Hook, L.P.*, 118 FERC ¶ 61,169, at PP 5-7 (2007) ("In this case the Commission will grant the motions for late intervention in light of the new and *more generic* issues raised by the court's remand and the Commission's subsequent March 2006 order.") (emphasis added).

reasonable.²⁹ In Opinion No. 531 *et seq.*, the Commission adopted a new ROE policy to account for the allegedly anomalous capital market conditions.³⁰ In rejecting AMP's, NRECA's, APPA's, and the Maine Public Advocate Office's out-of-time motions to intervene at the rehearing stage, the Commission stated that these entities had ample notice that the Commission might change its ROE policies in light of the changed capital market conditions raised in the complaint.³¹ Now, however, the policy changes proposed in the Briefing Order are not the result of addressing changed capital market conditions.³²

The breadth of the Commission's proposal in the Briefing Order was not a foreseeable outgrowth of the Docket No. EL11-66 *et al.* complaint proceedings at the time interventions were due, in 2011. Even taking into account the general risk that a court may vacate and remand a Commission order, the courts give great deference to the Commission on policies concerning ratemaking issues, so long as the Commission provides a reasonable explanation for its decision. Indeed, the D.C. Circuit has not directed the Commission to make any broad ROE policy changes in this case. The policy changes proposed in the Briefing Order are not a reasonably foreseeable result of the D.C. Circuit's guidance in *Emera Maine*, and were even less foreseeable at the time intervention in this proceeding was due in 2011.

2. No Disruption Will Result from Granting This Motion

Permitting the MISO CAPs to intervene at this stage of the proceeding will not disrupt the New England proceedings. The MISO CAPs agree to accept the existing briefing schedule and the record in this case as developed to date. The Commission is starting a new briefing phase

²⁹ See *Coakley v. Bangor Hydro-Elec. Co.*, Order on Complaint and Establishing Hearing and Settlement Judge Procedures, 139 FERC ¶ 61,090, at P 3 (2012) ("Hearing Order").

³⁰ The MISO ROE complaint proceedings are being litigated within this framework.

³¹ Opinion No. 531-B at P 15.

in these proceedings after remand of a final order by the D.C. Circuit. In this new briefing phase, the Commission seeks comments on generic ROE policy issues and how these policies should apply to the pending ROE complaints in New England. All parties will begin to address the Commission's new proposed framework in the initial briefs due on December 5, 2018. Hence, no disruption of the proceedings will result from allowing the MISO CAPs to intervene at this stage of the process.

3. No Prejudice Will Result from Granting this Motion

Permitting the MISO CAPs to intervene will not inflict burden or prejudice any other party. The MISO CAPs' intervention comes at an early stage in the new briefing phase of this proceeding, not at the rehearing stage. The limited purpose of this motion to intervene is to allow the MISO CAPs to submit comments on the record and inform the Commission's decision in its final order on the newly proposed generally applicable ROE framework. The MISO CAPs do not seek to comment on how particular ROE issues should be resolved in the New England complaints or to resolve MISO-specific ROE issues.³³ No party would be prejudiced by allowing the MISO CAPs to intervene because, to the extent the MISO CAPs' positions on generic ROE issues are different from those of any New England party, that party will have an opportunity to respond to the MISO CAPs' comments in its reply brief. Allowing the MISO CAPs to intervene for this limited purpose is, therefore, consistent with the factors the Commission may consider in deciding whether to grant late intervention pursuant to Rule 214(d).

³³ In the event the Commission applies the resulting new policy to the pending MISO ROE complaints, the MISO CAPs reserve the right to comment how the generic ROE policy should be applied in those proceedings.

IV. ALTERNATIVE PETITION FOR RULEMAKING

If the Commission denies the foregoing motion to intervene out-of-time, the MISO CAPs respectfully submit their alternative petition requesting that the Commission initiate a rulemaking to address the proposed generally applicable ROE policies.³⁴ The MISO CAPs recognize that the Commission has broad discretion to announce new, generally applicable principles in an adjudicative proceeding, and that the choice between rulemaking and adjudication lies in the first instance within the agency's discretion.³⁵ However, policies established in adjudicative proceedings are subject to challenge when the Commission applies them outside of the scope of that particular adjudicative case.³⁶ A rulemaking proceeding would provide greater certainty to all of the affected parties.

Because the Commission intends to apply the new ROE framework to ongoing and future ROE proceedings,³⁷ the MISO CAPs submit that the generally applicable issues raised in the Briefing Order are better suited for a rulemaking proceeding that allows parties to comment on how the new framework may be applied in New England and outside of New England. In addition, the Commission would have a more fully developed record to support its policy changes and reduce the potential for litigation that may ensue if it applies new policies adjudicated in New England in ongoing ROE proceedings outside of New England.

³⁴ See 18 C.F.R. § 207(a)(4) (“A person must file a petition when seeking . . . [a] rule of general applicability.”).

³⁵ See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *Cities of Anaheim v. FERC*, 723 F.2d 656, 659-60 (1984). Nevertheless, there may be situations where an agency's reliance on adjudication to adopt a generic policy change would amount to an abuse of discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. at 294; see also, *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009-10 (9th Cir.1981).

³⁶ *Shell Oil Co. v. FERC*, 707 F.2d 230, 236 (1983) (“*Bell Aerospace* makes clear that an agency may establish a general rule in an individual adjudication. But neither that decision nor any other precludes a later challenge to the validity of the rule by one who was not a party to the proceeding in which it was announced.”).

³⁷ Briefing Order at P 19.

V. CONCLUSION

For the aforementioned reasons, the MISO CAPs respectfully request that the Commission accept their motion to intervene out-of-time and allow the MISO CAPs to file briefs in this matter regarding generally applicable ROE policy issues. Alternatively, the MISO CAPs request that the Commission grant their petition for a rulemaking and institute a generic proceeding to address the newly proposed ROE framework.

Respectfully submitted,

/s/Tanya Paslawski

Tanya Paslawski
Executive Director
Organization of MISO States, Inc.
100 Court Avenue – Suite 315
Des Moines, IA 50309
(515) 243-0742
tanya@misostates.org

/s/Andrea I. Sarmentero Garzón

Andrea I. Sarmentero Garzón
Jennings, Strouss & Salmon, PLC
1350 I Street, NW – Suite 810
Washington, DC 20005-3305
(202) 292-4738
asarmentero@jsslaw.com
Counsel to the Organization of MISO States, Inc.

/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/Matthew R. Rudolphi

Adriana Vélez-León
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M Street, NW, Suite 800
Washington, DC 20036
(202) 467-6370
mrr@dwgp.com
avl@dwgp.com
Attorneys for Cooperative Energy

/s/ Christopher M. Goffinet

Christopher M. Goffinet
General Counsel
Michael Mooney
Manager, Resource Planning
Hoosier Energy Rural Electric
Cooperative, Inc.
2501 South Cooperative Way
Bloomington, IN 47403
(812) 876-2021
cgoffinet@hepn.com

/s/Kristin Munsch

Kristin Munsch
Dir. of Policy and Senior Attorney
Citizens Utility Board
309 West Washington Street, Ste. 800
Chicago, IL 60606
(312) 263-4282 ext. 119
kmunsch@citizensutilityboard.org

/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

/s/John R. Liskey

John R. Liskey
Counsel
Citizens Against Rate Excess
921 N. Washington Ave.
Lansing, MI 48906
(517) 913-5105
(517) 507-4357 (fax)
john@liskeypllc.com

/s/Sean T. Beeny

Sean T. Beeny
Barry Cohen
Phyllis G. Kimmel
McCarter & English, LLP
1301 K Street, N.W.
Suite 1000 West
Washington, DC 20005
(202) 753-3400
bcohen@mccarter.com
bcohen@mccarter.com

/s/ Robert G. Mork

Robert G. Mork
Deputy Consumer Counselor for Federal Affairs
Indiana Office of Utility Consumer Counselor
115 West Washington Street, Suite 1500 South
Indianapolis, IN 46204
(317) 233-3234
rmork@oucc.IN.gov

/s/ Rebecca Goodman

Rebecca Goodman, Executive Director
Lawrence W. Cook, Assistant Attorney General
Kentucky Office of the Attorney General
Office of Rate Intervention
(502) 696-5453
Rebecca.Goodman@ky.gov
Larry.Cook@ky.gov

/s/Thomas Content

Thomas Content
Executive Director
Citizens Utility Board of Wisconsin
6401 Odana Road
Madison, Wisconsin 53719
(608) 251-3322
content@wiscub.org

/s/Kate O'Connell

Kate O'Connell
Manager, Energy Reg. & Planning
Minnesota Department of Commerce
85 7th Place East, Suite 280
St. Paul, MN 55101-2198
(651) 539-1815
kate.oconnell@state.mn.us

/s/Lisa G. McAlister

Lisa G. McAlister
SVP/General Counsel for Regulatory
Affairs
Kristin V. Rothery
Assistant Deputy General Counsel
American Municipal Power, Inc.
1111 Schrock Road, Suite 100
Columbus, OH 43229
(614) 540-1111
lmcAlister@amppartners.org
krothey@amppartners.org

/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

*Counsel for Coalition of MISO
Transmission Customers*

/s/Nancy A. Campbell

Nancy A. Campbell
Analyst Coordinator – Financial
Minnesota Department of Commerce
85 7th Place East, Suite 280
St. Paul, MN 55101-2198
(651) 539-1821
nancy.campbell@state.mn.us

/s/Gerit F. Hull

Gary J. Newell
Gerit F. Hull
Jennings, Strouss & Salmon, PLC
1350 I Street, NW – Suite 810
Washington, DC 20005-3305
(202) 292-4738
gnewell@jsslaw.com
ghull@jsslaw.com

Attorneys for American Municipal Power, Inc.

/s/Vasiliki Karandrikas

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*

Dated: November 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

By: /s/Anna Williamson
Anna Williamson

Dated at Washington, D.C., this 5th day of November, 2018.