

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

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**Inquiry Regarding the Commission’s )  
Policy for Determining Return on Equity )  
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**Docket No. PL19-4-000**

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**COMMENTS OF JOINT CONSUMER ADVOCATES SERVED BY  
TRANSMISSION OWNER MEMBERS OF THE MIDCONTINENT  
INDEPENDENT SYSTEM OPERATOR**

On March 21, 2019, the Federal Energy Regulatory Commission (“Commission”) issued a Notice of Inquiry (“NOI”) seeking information and stakeholder views regarding whether, and if so how, it should modify its policies concerning the determination of the return on equity (“ROE”) to be used in designing jurisdictional rates charged by public utilities.<sup>1</sup> The Joint Consumer Advocates (“JCA”)<sup>2</sup> appreciate the opportunity to provide their views on these important issues and hereby provide the following Comments to assist the Commission in fulfilling its fundamental obligation to protect consumers in the footprint of the Midcontinent Independent System Operator, Inc. (“MISO”) from unjust and unreasonable wholesale transmission rates.

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<sup>1</sup> *Inquiry Regarding the Commission’s Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019).

<sup>2</sup> The JCA are the Indiana Office of Utility Consumer Counselor (“Indiana OUCC”), the Iowa Office of Consumer Advocate (“Iowa OCA”), the Michigan Citizens Against Rate Excess (“MICH-CARE”), the Minnesota Department of Commerce (“Minnesota DOC”), and the Citizens Utility Board of Wisconsin (“Wisconsin CUB”).

## I. INTRODUCTION

The Federal Power Act (“FPA”) is a consumer-protection statute.<sup>3</sup> It “aim[s] to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable, and nondiscriminatory.”<sup>4</sup> ROE is often a major component of a Transmission Owners’ (“TOs”) annual transmission revenue requirements. Thus, it is critical that ROEs be set at appropriate levels. Otherwise, consumers will be subjected to the very unjust and unreasonable rates that Congress enacted the FPA to avoid.

Though the JCA members lack the resource levels of the TOs, they help the Commission fulfill its core obligation to protect consumers by actively participating in Commission proceedings on behalf of the interests of electric consumers served by MISO TOs. The JCA are parties to and active participants in Docket Nos. EL14-12 and EL15-45,<sup>5</sup> two complaint proceedings where the Commission is addressing issues similar to those implicated by the NOI.<sup>6</sup> The JCA devoted significant time and resources to the development of the record evidence in the MISO I and II Complaint proceedings both before issuance of, and in response to, the Commission’s November 15, 2018 MISO Briefing Order in Docket Nos. EL14-12 and EL15-45. In the interests of conserving

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<sup>3</sup> See, e.g., *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (“A major purpose of the whole [FPA] is to protect power consumers against excessive prices.”); *New England Power Generators Ass’n v. ISO New England Inc.*, 146 FERC ¶ 61,038 at P 26 & n.33 (2014) (the Commission’s “statutory mandate under the FPA entails protecting consumer interests”).

<sup>4</sup> *Pub. Sys. v. FERC*, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979).

<sup>5</sup> *Ass’n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Complaint of the Association of Businesses Advocating Tariff Equity, *et al.*, Docket No. EL14-12-000 (Nov. 12, 2013) (“MISO I Complaint”); *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, Complaint Requesting Fast Track Processing and Motion to Consolidate, Docket No. EL15-45-000 (Feb. 2, 2015) (“MISO II Complaint”).

<sup>6</sup> *Ass’n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018) (“MISO Briefing Order”).

resources, the JCA request that the Commission consider the arguments and record evidence developed in those cases, inclusive of the positions and supporting evidence submitted in the paper hearing process, which are identified in Section III below.

## **II. STATEMENT OF INTERESTS**

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 name address, phone number, facsimile number, and email address of the designated recipient for service are as follows:

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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 proceedings before federal administrative agencies concerning matters that may impact electric utility service or rates regulated by the IUB.<sup>7</sup> The name, address, phone number, facsimile number, and email address of the designated recipient for service are as follows:

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<sup>7</sup> Iowa Code §§ 476A.2(2), 475A.2(5).

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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.<sup>8</sup> MICH-CARE has members that are residential ratepayers of many of the investor owned utilities that operate in Michigan including members that are served by MISO. MICH-CARE maintains a website at [www.utilityratewatch.org](http://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 name, address, phone number, facsimile number, and email address of the designated recipient for service are as follows:

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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

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<sup>8</sup> MICH-CARE is a grantee of the Utility Consumer Representation Fund, created under the laws of Michigan (1982 PA 304).

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. The names, address, phone numbers, facsimile number, and email addresses of the designated recipients for service are:

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The Wisconsin CUB is a nonprofit organization with more than 2,000 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. The name, address, phone number, facsimile number, and email address of the designated recipient for service are as follows:

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### III. COMMENTS

The FPA is a consumer protection statute.<sup>9</sup> FPA Section 205 protects consumers by obligating the Commission to ensure, in the first instance, that rates for wholesale transmission service are just and reasonable.<sup>10</sup> FPA Section 206 protects consumers should changed circumstances render an existing rate to be unjust and unreasonable.<sup>11</sup> In such instances, Section 206 obligates the Commission to “determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force . . . .”<sup>12</sup>

Entities representing the interests of consumers regularly exercise their Section 206 rights to protect against base ROEs that have become unjust and unreasonable over time. Relevant here, on June 19, 2014, the Commission issued Opinion No. 531 in a Section 206 proceeding against TOs in the ISO-New England, Inc. (“ISO-NE”). Opinion No. 531 replaced the Commission’s traditional approach for establishing base ROEs—*i.e.*, the one-step Discounted Cash Flow (“DCF”) model—with a two-step DCF methodology for determining the base ROE for TOs in ISO-NE.<sup>13</sup> It also departed from the Commission’s traditional approach of using the midpoint of the zone of reasonableness to establish region-wide base ROEs, instead establishing the base ROE at the upper midpoint of the range produced by its two-step DCF model, *i.e.*, the 75th

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<sup>9</sup> See, e.g., *Pa. Water & Power Co. v. FPC*, 343 U.S. at 418; *New England Power Generators Ass’n v. ISO New England Inc.*, 146 FERC ¶ 61,038 at P 26 & n.33.

<sup>10</sup> 16 U.S.C. § 824d(a).

<sup>11</sup> 16 U.S.C. § 824e(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Coakley Mass. Attorney Gen. 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 (2014), *order on reh’g*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), vacated by *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (“*Emera Maine*”).

percentile.<sup>14</sup> To validate its decision to establish the base ROE at the 75th percentile of the zone of reasonableness, the Commission relied on three “alternative benchmark methodologies,” *i.e.*, a capital asset pricing model (“CAPM”), a risk premium model, and an expected earnings approach.<sup>15</sup> Opinion No. 531 was appealed to the United States Court of Appeals for the District of Columbia Circuit (“DC Circuit”).

Prior to Opinion No. 531’s issuance, the MISO I Complaint proceeding had been initiated. The Complaint in that proceeding challenged the continuing justness and reasonableness of the MISO TOs’ 12.38% base ROEs.<sup>16</sup> The MISO II Complaint was filed on February 12, 2015. It also challenged the continuing justness and reasonableness of the MISO TOs’ then-existing 12.38% base ROEs. JCA intervened in the MISO I and II Complaint proceedings, submitted testimony demonstrating that a reduction in the MISO TOs’ existing base ROEs was warranted, and actively participated in all phases of those proceedings.<sup>17</sup> The MISO I Initial Decision, issued on December 22, 2015, found that the MISO TOs’ existing base ROEs authorized the MISO TOs “to collect more than is necessary,” “would exploit consumers,” and “therefore, would be unjust and unreasonable.”<sup>18</sup> Relying on the approach set forth in Opinion No. 531, the MISO I Initial Decision recommended that the MISO TOs’ base ROE be reduced from 12.38% to

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<sup>14</sup> Opinion No. 531 at P 9.

<sup>15</sup> *Id.* at P 145. The Commission made clear it was not using the alternative benchmark methodologies to establish the base ROE. *Id.* at P 146; *see also* Opinion 531-B at PP 49, 56; *Emera Maine*, 854 F.3d at 18.

<sup>16</sup> As explained below, all MISO TOs except for one had been authorized to collect a region-wide base ROE of 12.38%.

<sup>17</sup> *See Ass’n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027 at PP 9, 12-13, 15 (2015) (“MISO I Initial Decision”) (corrected Dec. 29, 2015); *see also Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 155 FERC ¶ 63,030 at PP 7, 10, 12 (2016), 155 FERC ¶ 63,030 (Errata), 156 FERC ¶ 63,004 (Second Errata), 165 FERC ¶ 63,021 (Third Errata) (“MISO II Initial Decision”).

<sup>18</sup> MISO I Initial Decision at P 24.

10.32%.<sup>19</sup> The Commission affirmed the MISO I Initial Decision in Opinion No. 551, issued on September 28, 2016.<sup>20</sup> The MISO II Initial Decision reached similar conclusions and, relying again on the approach set forth in Opinion No. 531, recommended reducing the MISO TOs' then-existing base ROEs to 9.7%.<sup>21</sup> If affirmed, Opinion No. 551 and the MISO II Initial Decision would protect consumers in MISO from millions of dollars of wholesale transmission charges that are excessive and unjust and unreasonable.

On April 14, 2017, the DC Circuit issued its *Emera Maine* decision, vacating Opinion No. 531 and remanding that proceeding back to the Commission. On October 16, 2018, the Commission issued an order on remand in the ISO-New England Inc. complaint proceedings, proposing new frameworks for (i) determining whether existing base ROEs are no longer just and reasonable and (ii) establishing new base ROEs.<sup>22</sup> Those frameworks employ alternative benchmark methodologies the Commission consulted, but did not rely upon, in Opinion No. 531.<sup>23</sup>

Given that Opinion No. 551 and the MISO II Initial Decision relied heavily on Opinion No. 531, which had been vacated, the Commission issued its MISO Briefing Order on November 15, 2018, directing parties to submit Initial and Reply Paper Hearing

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<sup>19</sup> *Id.* at P 2. With one exception, all MISO TOs had been authorized to collect a region-wide base ROE of 12.38%. *Id.*

<sup>20</sup> *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016). Requests for rehearing in this matter remain pending. *See* MISO Briefing Order at P 11.

<sup>21</sup> MISO II Initial Decision at PP 2, 21, 135 & n.135. The parties filed briefs on and opposing exceptions, which remain pending. *See* MISO Briefing Order at P 11.

<sup>22</sup> *Coakley Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 at PP 1, 22-37 (2018) ("Coakley Briefing Order").

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



Briefs in the MISO I and II Complaint proceedings to address the same proposals identified in the Coakley Briefing Order. To protect consumers from excessive rates and charges, JCA joined in the “MISO Complainant-Aligned Parties” in filing Initial and Reply Briefs and supporting affidavits and exhibits on February 13, 2019 and April 10, 2019 in the paper hearing process established by the MISO Briefing Order. Among other points, the MISO Complainant-Aligned Parties reached the following evidence-based conclusions on questions posed in this inquiry proceeding:

1. The DCF Analysis should remain the primary, if not the exclusive method to identify the MISO TOs’ cost of equity.<sup>24</sup>
2. The risk premium and expected earnings approaches to establishing base ROEs are deficient and should not be given significant weight in setting a just and reasonable base ROE for MISO TOs.<sup>25</sup>
3. The Commission’s methodology for establishing base ROEs could be improved by:

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<sup>24</sup> See Docket No. EL14-12-003, MISO Complainant-Aligned Parties Initial Brief at 12-25 (citing Exhibit JCI-100 at 25-26, 50; Exhibit OMS-100 at PP 13, 23; Exhibit MTO-15 at 26:1-7); *see also* Docket No. EL14-12-003, MISO Complainant-Aligned Parties Reply Brief at 6-21 (rebutting the MISO TOs’ allegations of flaws with the DCF methodology); *see generally* Docket No. EL15-45-000, MISO Complainant-Aligned Parties Initial Brief at 11-22, 25-27; *see generally* Docket No. EL15-45-000, MISO Complainant-Aligned Parties Reply Brief at 21-40.

<sup>25</sup> See Docket No. EL14-12-003, MISO Complainant-Aligned Parties Initial Brief at 15-16, 27-44; *see generally* Docket No. EL14-12-003, MISO Complainant-Aligned Parties Reply Brief at 26-38 (identifying flaws with the risk premium and expected earnings approaches); Docket No. EL15-45-000, MISO Complainant-Aligned Parties Initial Brief at 27-44 (same); Docket No. EL15-45-000, MISO Complainant-Aligned Parties Reply Brief at 45-58 (same).

- a. Use of the median as a better measure of central tendency;<sup>26</sup> and
  - b. The adoption of clear, objective and symmetrical standards in implementing the “natural break” screen for proxy companies.<sup>27</sup>
4. The Commission’s proposed presumptive immunity zone is unwarranted based on the record presented in the MISO I and II Complaint proceeding and is contrary to law.<sup>28</sup>

The Commission’s NOI implicates each of the foregoing issues. JCA devoted significant time and resources to the development of the record evidence in the MISO I and II Complaint proceedings. In the interest of administrative efficiency and conservation of resources, JCA’s Comments in response to the NOI (i) emphasize the

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<sup>26</sup> See Docket No. EL14-12-003, MISO Complainant-Aligned Parties Initial Brief at 53-54 (citing Exhibits OMS-100 at PP 6-11); *see also* Docket No. EL14-12-003, MISO Complainant-Aligned Parties Reply Brief at 40-42 (rebutting the MISO TOs’ contentions regarding the alleged validity of the midpoint); Docket No. EL15-45-000, MISO Complainant-Aligned Parties Initial Brief at 53-54; Docket No. EL15-45-000, MISO Complainant-Aligned Parties Reply Brief at 60-63 (rebutting the MISO TOs’ contentions regarding the alleged validity of the midpoint).

<sup>27</sup> See Docket No. EL14-12-003, MISO Complainant-Aligned Parties Initial Brief at 63-65 (citing Exhibit JCI-100 at 13-16; Exhibit MTO-31); *see also* Docket No. EL14-12-003, MISO Complainant-Aligned Parties Reply Brief at 74-76 (rebutting the MISO TOs’ proposed natural break); Docket No. EL15-45-000, MISO Complainant-Aligned Parties Initial Brief at 61-65; Docket No. EL15-45-000, MISO Complainant-Aligned Parties Reply Brief at 93-96 (rebutting the MISO TOs’ proposed natural break).

<sup>28</sup> See Docket No. EL14-12-003, MISO Complainant-Aligned Parties Initial Brief at 66-83 (citing, *inter alia*, 16 U.S.C. §§ 824d, 824e; *Atl. Refining Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 388 (1959); *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955); *Consumers Fed’n of Am.*, 515 F.2d 347, 358, n.64 (D.C. Cir. 1975) (citation omitted); *Farmers Union Cent. Exchange v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir. 1984) (citation omitted); *New England Power Generators Ass’n v. ISO New England Inc.*, 146 FERC ¶ 61,038 at P 26 & n.33 (2014); Exhibit OMS-100 at P 24; Exhibit MTO-4 at 2; Exhibit MTO-16 at 11-12; Exhibit MTO-39 at 41-44; Exhibit JCA-1 at 2-3, 40-42; Exhibit JCA-11 at 44-47, 60-62; Exhibit JC-1 at 19-21; Exhibit JCI-1 at 32-33); *see generally* Docket No. EL15-45-000, MISO Complainant-Aligned Parties Initial Brief at 66-83; Docket No. EL15-45-000, MISO Complainant-Aligned Parties Reply Brief at 67 (“[T]he proposed zone of immunity is an unlawful concept that leads to protection of unjust and unreasonable rates.”).

foregoing arguments and supporting evidence, and (ii) ask the Commission to consider those points in evaluating what action to take in this NOI proceeding.

**WHEREFORE**, the Joint Consumer Advocates respectfully request that the Federal Energy Regulatory Commission fully consider the evidence and arguments identified above, which were submitted in Briefs and Supporting Affidavits and Exhibits in the MISO I and II paper hearing process. DATED at Des Moines, Iowa, this 26th day of June, 2019.

Respectfully submitted,

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#### **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 in this proceeding.

Dated at Des Moines, Iowa, this 26th day of June, 2019.

/s/ Jennifer Easler