UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

American Electric Power Service Corp.	Docket No. ER07-1069-006

MOTION TO INTERVENE OUT-OF-TIME, OR IN THE ALTERNATIVE, PARTICIPATE AS *AMICUS CURIAE*, AND COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL ("ELCON") AND JOINT CONSUMERS

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.214, the Electricity Consumers Resource Council ("ELCON"), American Forest & Paper Association ("AF&PA"), Association of Businesses Advocating Tariff Equity ("ABATE"), Coalition of MISO Transmission Customers ("CMTC"), Illinois Industrial Energy Consumers ("IIEC"), Indiana Industrial Energy Consumers ("INDIEC"), Industrial Energy Consumers of America ("IECA"), Industrial Energy Consumer Group ("IECG"), Industrial Energy Users-Ohio ("IEU-Ohio"), Industrial Energy Users of Pennsylvania ("IECPA"), Minnesota Large Industrial Group ("MLIG"), PJM Industrial Customer Coalition ("PJMICC"), and Wisconsin Industrial Energy Group ("WIEG") (collectively, "ELCON and Joint Consumers") hereby file this Motion to Intervene Out-of-Time or, in the Alternative, Participate as *Amicus Curiae*, and Comments, addressing the Certification of Question Concerning Retail Ratepayer Standing to Bring a Section

205 Complaint (the "Certification") issued on October 13, 2015 (as modified by the Errata filing of October 28, 2015) in the above-captioned docket (the "AEP Proceeding").

The Certification raises issues of general applicability respecting the statutory right to standing to initiate and participate in Commission proceedings that are of critical importance to electricity consumers. The viewpoints expressed in the Certification reflect fundamental misunderstandings about the Federal Power Act ("FPA"), the Commission's jurisdiction, the federal-state partnership in electricity regulation, and how rates impact consumers. If those viewpoints were adopted, consumers such as the members of ELCON and Joint Consumers would be left without remedy to protect against FERC-jurisdictional rates that are unjust, unreasonable or unduly discriminatory or preferential and that have a direct connection to the rates ultimately paid by consumers. Indeed, the Certification seeks a determination barring the very parties who are affected by those rates from challenging them before the Commission, even though the Commission (and not the States) has exclusive jurisdiction over them. Such an outcome would overturn a comprehensive, consistent body of Commission precedents, both very recent and going back for decades, that recognize consumers' statutorily-granted rights to standing before the Commission; would reopen the very federal-state regulatory gap that the FPA was designed to remedy; and would be contrary to the regime established by Order No. 888 as affirmed by the Supreme Court in *New York v. FERC*.

In view of the extreme importance of the matter and the significance of its precedential implications, ELCON and Joint Consumers urge the Commission to

promptly respond to the Certification by reaffirming the standing of retail consumers to pursue Section 206 complaints under the Federal Power Act.

MOTION TO INTERVENE OUT-OF-TIME OR, IN THE ALTERNATIVE, PARTICIPATE AS *AMICUS CURIAE*

I. MOTION TO INTERVENE OUT OF TIME

Pursuant to Rule 214, 18 C.F.R. § 385.214, ELCON and Joint Consumers submit the following in support of its Motion to Intervene Out-of-Time.

A. Descriptions of ELCON and Joint Consumers

Each of the participants in this filing, as described below, will be directly affected by the outcome of this proceeding, and their interests cannot be represented adequately by any other party. Therefore, the participation of ELCON and Joint Consumers in the AEP Proceeding, which is solely for the limited but important purpose of addressing the jurisdictional and standing issues, is in the public interest.

The Electricity Consumers Resource Council ("ELCON") is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. ELCON member facilities are directly connected to the transmission system and FERC ratemaking policies can directly affect operation of their facilities. Accordingly, ELCON's members as significant consumers have a strong

economic interest in assuring that transmission costs, including unbundled interstate transmission costs, are just, reasonable, and not unduly discriminatory or preferential.

The American Forest & Paper Association ("AF&PA") serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - Better Practices, Better Planet 2020. AF&PA members are large consumers of electricity and many members generate significant quantities for use in manufacturing or sale.

The Association of Businesses Advocating Tariff Equity ("ABATE") is a voluntary association of large industrial businesses which are located in and doing business in the State of Michigan and in other states.[1] The purpose of ABATE is to appear before this Commission and other regulatory bodies having jurisdiction over public utilities, electric transmission companies, and natural gas pipelines to advocate the adoption of utility and energy rates, terms and conditions of service, and other tariffs or contracts governing utility and energy services, which are just and reasonable, nondiscriminatory, nonpreferential and, in some cases, are based upon market rates. ABATE has been formed for the express purpose of participating in regulatory

[1] The current members of ABATE are: AK Steel Corporation; Alcoa, Inc.; Cargill; Delphi Corporation; Dow Chemical Co.; Dow Corning Corporation; Eaton Corporation; Edward C. Levy Co.; Enbridge Energy, Limited Partnership; FCA US LLC; General Motors Company; Gerdau MacSteel; Guardian Industries Corp; J. Rettenmaier USA LP; Marathon Petroleum Corporation; Martin Marietta Magnesia Specialties, Inc.; Metal Technologies, Inc.; MPI Research; Praxair, Inc.; United States Gypsum Company, U. S. Steel Corp.; and WestRock Company.

proceedings to protect the interests of businesses in connection with energy and utility matters. Members of ABATE consume substantial quantities of electricity and natural gas and, in Michigan alone, their combined gas and electric bills are approximately $1.2 billion per year. As large electric customers, ABATE members are vitally interested in achieving increased economic efficiencies in the electric industry which will lower retail costs and allow ABATE members to more effectively compete in the worldwide economy.

The Coalition of MISO Transmission Customers ("CMTC") is an ad hoc association of large industrial end-users of electricity. All CMTC members operate one or more manufacturing facilities in the Midwest and purchase electric delivery service or bundled electric service from at least one of the transmission owners encompassed by the Midwest ISO.

The Illinois Industrial Energy Consumers ("IIEC") is an association of large industrial customers in the State of Illinois. They are eligible to choose a retail supplier other than their electric utility under Illinois law, and eligible for transmission service under the applicable RTO and ISO tariffs. They are also eligible to become, and some have become, Alternative Retail Electric Suppliers for the purpose of serving their own electrical loads or the electrical loads of their corporate affiliates in the Illinois retail electricity market. They consume approximately 13 billion kWh of electricity and employ approximately 90,000 people in the State of Illinois. They are served by Ameren Illinois, a member of the Midwest Independent System Operator, Inc., ("MISO") and by Commonwealth Edison Company, a member of PJM Interconnection, LLC ("PJM").

They have manufacturing facilities located within MISO and within PJM. Therefore, IIEC Companies are affected by FERC jurisdictional rates as purchasers of electricity within the Illinois retail market, as potential suppliers and suppliers of electricity within the Illinois retail market, and as customers of MISO and PJM and the transmission-owning utilities that are members of MISO and PJM.

The Indiana Industrial Energy Consumers, Inc. ("INDIEC") is a not-for-profit 501(c)(6) corporation incorporated and doing business in the State of Indiana. INDIEC was formed to provide large energy users an independent voice in regulatory and legislative matters that impact utility rates and energy policies. INDIEC's 25 member companies employ over 56,000 people in Indiana and their combined gas and electric bills are over $901 million annually.

The Industrial Energy Consumers of America ("IECA") is a nonpartisan association of leading manufacturing companies with $1.0 trillion in annual sales, over 2,900 facilities nationwide, and with more than 1.4 million employees worldwide. It is an organization created to promote the interests of manufacturing companies through advocacy and collaboration for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets. IECA membership represents a diverse set of industries including: chemical, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, pharmaceutical, building products, brewing, independent oil refining, and cement.

The Industrial Energy Consumer Group ("IECG") is a non-profit Maine trade association formed for the purpose of representing the interests of industrial energy consumers before regulatory and legislative bodies. The members of the IECG are large consumers of electric energy and transmission and buy directly under the OATT pursuant to TSAs with their local utility. The IECG has participated in numerous Commission proceedings with respect to market design, transmission rates, RTO governance and wholesale rates for energy and capacity.

The Industrial Energy Users-Ohio ("IEU-Ohio") is an association of large Ohio-based energy consumers. IEU-Ohio has been an active participant in state and federal regulatory proceedings involving the rates, terms, and conditions of electricity service.

The Industrial Energy Users of Pennsylvania ("IECPA") is the sole manufacturing association in the Commonwealth of Pennsylvania that regularly engages on energy-related matters, including in matters before FERC, that impact Pennsylvania manufacturers. IECPA represents 18 member companies, operating at more than 50 locations in Pennsylvania and providing over 41,000 family-sustaining jobs. IECPA members spend over $610 million on energy every year, consuming over 5 billion kWh of electricity and over 35 bcf of natural gas at Pennsylvania-based facilities.

The Minnesota Large Industrial Group ("MLIG") is a continuing ad hoc consortium of large industrial end-users of electricity in Minnesota, consuming more than 6.5 billion kWh of electricity each year and functioning to represent large industrial interests before regulatory and legislative bodies. The electric use of MLIG members is equivalent to about ten percent of total Minnesota electric retail sales. The

cost of electricity is a major factor in determining the economic competitiveness of the energy-intensive trade-exposed industries represented within MLIG.

The PJM Industrial Customer Coalition ("PJMICC") is an ad hoc association of large commercial and industrial end-users of electricity. PJMICC members operate manufacturing and institutional facilities throughout the PJM footprint, which encompasses all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.

The Wisconsin Industrial Energy Group ("WIEG") is a voluntary member association consisting of large industrial and commercial customers in the State of Wisconsin. As key drivers of economic growth and development throughout the state, WIEG members collectively employ close to 50,000 people in Wisconsin and consume 3.6 billion kWh of electricity each year. WIEG is a member of MISO. All WIEG members operate one or more manufacturing facilities in the MISO footprint.

B. The Unusual Circumstances of the AEP Proceeding and Its Newly-Arising Potential for Significant Precedential Impact Support Late Intervention

In deciding whether to grant late intervention, the Commission considers whether (i) the movant had good cause for failing to file a motion to intervene within the time prescribed; (ii) any disruption of the proceeding might result from permitting intervention; (iii) the movant's interest is not adequately represented by other parties in the proceeding; and (iv) any prejudice to, or additional burdens upon, the existing

parties might result from permitting intervention. 18 C.F.R. § 385.214(d)(1). Here, ELCON and Joint Consumers satisfy the criteria for late intervention.

Good cause exists for not intervening within the prescribed time period. Good cause exists for ELCON and Joint Consumers not intervening within the time prescribed because it was not reasonably foreseeable that the retail consumer's routine, and narrow challenge to AEP's annual update rate filings would lead to a Certification raising fundamental and unprecedented issues of the jurisdiction of the Commission. To the contrary, not even respondent AEP viewed the case as raising a standing or jurisdictional issue.

The AEP Proceeding began as a routine matter involving a complaint by an electricity consumer under FPA Section 206. The consumer challenged American Electric Power's ("AEP's") formula rate annual updates to its annual transmission requirements for 2013 and 2014.[2] AEP did not challenge the consumer's standing to pursue a Section 206 complaint. There was no indication in the public docket for the AEP Proceeding that the Commission's jurisdiction would be at issue until Administrative Law Judge Citron unexpectedly issued the Certification on October 13, 2015. The viewpoints expressed in the Certification, if affirmed by the Commission and accorded precedential effect, could leave consumers such as the members of ELCON and Joint Consumers without remedy to challenge Commission jurisdictional rates as unjust, unreasonable, or unduly discriminatory or preferential, as the Certification

[2] *See* Certification at PP 3, 4.

would have the Commission deny standing even though it is Commission-jurisdictional rates that are at issue and States have no authority over them.

Denying late intervention in a rare situation such as this, where Certification unexpectedly implicates significant policy matters, would either effectively force a broad range of parties like ELCON and Joint Consumers to intervene in a large number of ordinary matters simply to preserve their right to participate and comment on the off chance such matters later implicate industry-wide Commission policy matters or preclude them from participation. Such an approach would be needlessly burdensome and inefficient for market participants, stakeholders, and the Commission alike.

The intervention of ELCON and Joint Consumers will not disrupt the AEP Proceeding or prejudice or additionally burden existing parties. No disruption will result from permitting intervention of ELCON and Joint Consumers, nor will the existing parties be prejudiced or additionally burdened. First, ELCON and Joint Consumers accept the record in the AEP Proceeding as it stands. Second, ELCON and Joint Consumers seek to intervene for the limited purpose of addressing the fundamental and critically important policy issues unexpectedly put at issue in the Certification. Third, ELCON and Joint Consumers will bring an important industry-wide perspective to those issues. Finally, ELCON and Joint Consumers are filing its views within the prescribed time period for Commission action on the Certification, allowing "other parties the opportunity to test the basis of its positions." *Compare Northwestern Corp.*, 147 FERC ¶ 61,049, at P 13 (2014) (denying late intervention after the issuance of an Initial Decision because it was filed two months later, depriving parties of the opportunity to respond).

Therefore, the limited intervention of ELCON and Joint Consumers in the AEP Proceeding will not disrupt the proceeding or prejudice or additionally burden any existing parties, but rather will afford the Commission an important perspective as it considers the issues at hand.

The interests of ELCON and Joint Consumers are not adequately represented in the AEP Proceeding. ELCON and Joint Consumers represent the interests of their member companies, which as noted above are significant consumers of electricity and have a direct and substantial financial interest in ensuring that Commission-jurisdictional rates are just, reasonable and not unduly discriminatory or preferential. ELCON and Joint Consumers are uniquely situated to address issues relating to the consumer protections underlying the FPA and Order No. 888 and the interrelationship between wholesale power and transmission rates and the costs incurred by retail consumers. The Commission has long recognized the value of perspectives such as those of ELCON and Joint Consumers in considering such matters, noting previously that "[w]here membership associations meet the standard of Rule 214, it should encourage informed pleadings. . ." *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,265, at P 9 (2007).

The Commission has also recognized that late intervention by associations such as ELCON and Joint Consumers can be warranted when an order implicates an industry-wide policy concern, such as the case here. In *Southern Natural Gas. Co.*, the Commission granted the Interstate Natural Gas Association's ("INGAA") motion to intervene "for the limited purpose of seeking rehearing on a discrete issue." 130 FERC ¶ 61,193, at P 5 (2010). The Commission granted INGAA's motion to intervene out-of-

time based on INGAA's explanation that "the Commission's order in this proceeding . . . 'announced a policy . . . that seemingly will govern the recovery [of costs] by other INGAA members in the future.'" *Id.* at P 5. In granting intervention, the Commission "note[d] that INGAA represents jurisdictional natural gas companies and is able in this proceeding to present their common views regarding an issue of continued significance for the industry." *Id*. at P 7. This case involves substantially similar circumstances; the Certification, if affirmed, could impact the future ability of consumers to challenge unjust, unreasonable or unduly discriminatory or preferential charges. ELCON and Joint Consumers, as substantial electricity consumers, are uniquely situated to address these issues.

II. ALTERNATIVE REQUEST TO PARTICIPATE AS *AMICUS CURIAE*

If the Commission does not grant the motion to intervene, ELCON and Joint Consumers respectfully request that the Commission consider their Comments that follow in the nature of an *amicus curiae* filing. As discussed above, ELCON and Joint Consumers, whose members are substantial electricity consumers with a strong financial interest in ensuring that Commission jurisdictional rates are just, reasonable and not unduly discriminatory or preferential, would bring a unique and important perspective to the Commission's consideration of these issues. ELCON and Joint Consumers submit that its comments will provide the Commission with a more complete record and context in which to assess the important and fundamental policy issues raised by the Certification.

The Commission has found *amicus curiae* filings to be appropriate in circumstances such as this, where a proceeding raises concerns that are important to an industry as a whole. In *Texas Eastern Transmission Corp.*, the Commission accepted numerous filings at the rehearing stage when the underlying Commission order raised an issue that was "important to the natural gas industry;" the Commission did not give the movants party status to the proceeding but "treat[ed] the filings as in the nature of *amicus curiae* briefs" and "[took] notice of the arguments raised." 88 FERC ¶ 61,167, at 61,559 (1999). Likewise, in *Shell Pipeline Co. LP*, the Association of Oil Pipe Lines – also a trade association – filed an *Amicus Curiae* Brief on Exceptions addressing an issue of industry-wide concern raised by an Initial Decision. 148 FERC ¶ 61,208, at PP 8, 24 (2014).

Accordingly, should the Commission deny the motion to intervene, ELCON and Joint Consumers respectfully request that the Commission accept their Comments in the nature of an *amicus curiae* filing.

COMMENTS OF ELCON AND JOINT CONSUMERS

On October 13, 2015, the Certification posed two questions to the Commission:

> Shouldn't section 306[3] of the Federal Power Act (FPA) be interpreted *in pari materia* with section 201 of the FPA? FPA section 201 gives the

[3] The Certification variously refers to Sections 205, 206 and 306 of the FPA in connection with the complaint and the proceeding. Section 205 establishes the substantive criteria that transmission and sale of electricity subject to the Commission's jurisdiction are just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. 824d. Section 206 of the FPA authorizes the Commission, upon its own motion or upon a complaint, to issue an order correcting a rate for transmission or sale subject to the jurisdiction of the Commission found to be unjust, unreasonable or unduly discriminatory or preferential. 16 U.S.C. 824e. Section 306 of the FPA authorizes a complaint against a public utility

> Commission jurisdiction over wholesale interstate rates and interstate transmission; therefore, retail ratepayers would not have the right to file complaints against wholesale rates.
>
> Wouldn't an expansive interpretation of section 306 of the FPA (allowing retail ratepayers or end users to file complaints against interstate wholesale rates) violate the delicate balance of federalism; in other words, by giving complaint authority to retail rate consumers, is the Commission interfering with states' rights by asserting jurisdiction over retail rates?[4]

The Certification requests that, in response, the Commission reach the following determinations:

> It is recommended that the Commission answer these questions by stating retail ratepayers are not permitted to bring an FPA section 205 complaint against wholesale sellers of electricity. Additionally, it is recommended the Commission state that a different interpretation would interfere with state jurisdiction over retail rates.[5]

For the reasons set forth below, ELCON and Joint Consumers strenuously oppose the viewpoints expressed in the Certification, which would be contrary to the plain language of the FPA and Commission precedent and would establish unprecedented limitations on the Commission's jurisdiction and on the ability of consumers of electricity to challenge rates that are unjust, unreasonable or unduly discriminatory or preferential. ELCON and Joint Consumers urge that the Commission promptly respond to the Certification by reaffirming its long-standing precedent of finding that consumers have standing to initiate Section 206 complaints.

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alleging contravention of the statute to be brought by "[a]ny person, electric utility, or public utility. . . ." 16 U.S.C. 825e. The complainant in this proceeding referenced Section 206, and proceedings of this type are commonly referred to as Section 206 proceedings, which is the formulation adopted herein.

[4] Certification at P 1.

[5] Certification at P 2.

I. THE FEDERAL POWER ACT AND ESTABLISHED COMMISSION PRECEDENTS SUPPORT STANDING BY RETAIL CONSUMERS

The plain language of the FPA and the Commission's Rules, and established Commission precedents, both old and very recent, consistently affirm a retail consumer's standing to initiate a Section 206 proceeding and the Commission's jurisdiction to hear it.

A. The Federal Power Act and the Commission's Rules Support Standing

The plain language of the FPA and the Commission's rules confer standing expansively, stating that "any person" may pursue a proceeding under Sections 206 and 306, and the Supreme Court has recognized the broad scope of the statute and rules. There is no restriction on the standing of retail consumers.

FPA Section 306 echoes this breadth, stating that "[a]ny person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition . . . ."[6] Section 206 then provides that the Commission shall remedy "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential . . . ."[7] Moreover, Rule 206 of the Commission's Rules of Practice and Procedure permit "any person" to file a complaint and requires that the

[6] 16 U.S.C. 825e(a) (emphasis added).
[7] 16 U.S.C. 824e(a).

complainant to "set forth the business, commercial, economic, or other issues presented by the action or inaction as such relate to or affect the complainant."[8] The Supreme Court has highlighted the references to "[a]ny person" in FPA Section 306 and Rule 206 in observing that complainants may include "consumers, advocacy groups, state utility commissions, elected officials acting *parens patriae*." *NRG Power Marketing v. Maine Public Utilities Comm'n*, 558 U.S. 165, 176 & n.5 (2010).

It is undisputed in the AEP Proceeding that the Commission has exclusive jurisdiction over AEP's unbundled interstate transmission charges and that some portion of those charges flow through to the retail consumer. Thus, the plain language of the FPA gives the retail consumer the right to bring such an action. Moreover, if the retail consumer did not have standing, it would be left without a remedy in the event of approval of an unjust, unreasonable, discriminatory or preferential tariff as it would not be able to bring an action before the Commission, the only entity with authority to change the tariff.

B. Long-Established, Consistent Commission Precedent Supports Standing

A substantial body of Commission precedents, both long-standing and very recent, consistently have found that retail consumers have standing to initiate Section 206 proceedings. In *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229 (2012) ("*PATH*"), the Commission held that "[a] complaint regarding a transmission rate can, under Commission rules, be filed by any person, including an end-use

[8] 18 C.F.R. 385.206 (a)&(b)(3).

customer that will pay . . . some portion of that rate when flowed through its retail bill."[9] The Commission also observed that it "has consistently ruled that section 206 [of the FPA] does indeed give such 'indirect consumers' standing before this agency" and it cited seven prior cases, from 1984 to 2004, in support of the proposition that indirect consumers including the ultimate consumer have standing to pursue complaints with the Commission.[10]

More recently, the Commission found that a group of industrial consumers had standing to bring a Section 206 proceeding challenging the MISO Transmission Owners' allowed return on equity. *Association of Businesses Advocating Tariff Equity, et al., v. Midcontinent Independent System Operator, Inc. et al.*, 148 FERC ¶ 61,049 (2014) (*ABATE*) (*rehearing pending*) (excerpts attached as Exhibit 1). There, the Commission explicitly rejected the assertion made in the Certification that only direct customers of the interstate transmission provider have standing:

> As industrial customers within MISO, Complainants either directly pay wholesale transmission rates or pay for transmission through bundled retail rates, such that they are affected by MISO TOs' base ROE, capital structures, and ROE incentive adders.[11] We therefore find that Complainants have satisfied the standing requirement of Rule 206.[12]

Just six months, ago, the current Commission applied these concepts in another Section 206 proceeding, affirming *PATH* and stating that "the Commission does not

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[9] *PATH* at P 106.
[10] *PATH* at P 107.
[11] *See S. Union Gas Co. v. Natural Gas Co.*, 71 FERC ¶ 61,198, at 61,717 (1995) ("The Commission has consistently construed rule 206 to permit any person, as defined in rule 102(d) of the Commission's procedural rules, to file a complaint, even where that person is not a direct customer of the pipeline, so long as the person is adversely affected by the actions that are the subject of the complaint.").
[12] *ABATE* at P 181.

require a complainant to allege a direct pass-through of wholesale rates to retail rates as a prerequisite for standing.'' *North Carolina Waste Awareness and Reduction Network, Inc. v. Duke Energy Carolinas, LLC et al*., 151 FERC ¶ 61,079 (2015) (*NCWARN*) (*rehearing pending on other issues*) (excerpts attached as Exhibit 2) at P 15. In fact, the experience of ELCON and Joint Consumers is that Section 206 cases by retail consumers are common, and typically standing is not challenged in such cases as the ability of retail consumers to initiate and pursue such cases is viewed as well established.

The Certification fails to cite the recent *ABATE* and *NCWARN* decisions, which are directly on point, and its attempts to distinguish *PATH* are unavailing. *PATH* is very similar to the AEP Proceeding; in the former case the two complainants were individual retail consumers filing *pro se*. Likewise, in *NCWARN*, the complainant was a not-for-profit corporation comprised primarily of individual and family retail consumers of Duke Energy in North Carolina. Standing is a right granted by statute; it is not altered by circumstances that the Certification seems to view as inconvenient, such as that complainant is a single *pro se* individual rather than a group or that the Commission has not found a "necessity" to address the complainant's interests.[13]

Finally, the Certification's reaches a faulty conclusion that the AEP protocol, which stated that AEP would "afford interested parties (*e.g.*, Transmission Consumers and affected state and federal regulatory authorities) an opportunity to discuss and become better informed regarding the Annual Update,"[14] precludes standing, in

[13] Certification at P 19 (as modified by the Errata filed on October 28, 2015).
[14] *Id*.

contrast with the PATH Formula Rate Protocols, which defined the term "Interested Party" to include "any entity having standing under section 206 of the Federal Power Act." Fundamentally, as discussed above, standing is a statutory right under the FPA, and whatever is said in the AEP protocol cannot overturn the statute. Moreover, the AEP protocol does even address who may pursue a complaint and does not even exclude retail consumers from being considered an "interested party" for purposes of AEP outreach; rather it simply identifies on a non-exclusive basis two categories of entities who are an "interested party". The Certification both misreads the wording of the AEP protocol and, more significantly, misconstrues its import.

C. The Certification Ignores the Overarching Purpose of the Federal Power Act to Protect Consumers

The Certification concludes by complaining about the burdens of Section 206 proceedings on the regulated public utility and on the Commission.[15] In fact, the Certification makes almost verbatim an argument made by the utility in *PATH* that "it is unreasonable to compel PATH to respond in its Formula Rate proceedings to 'all of the millions of retail consumers in the PJM footprint that may be indirectly charged some portion of [PATH's] transmission rates.'"[16] Rejecting that argument, the Commission upheld standing in *PATH,* and ELCON and Joint Consumers certainly

[15] Certification at P 20. The Certification states in this regard: "Permitting all retail ratepayers to file these challenges could result in entities spending additional time and energy on accounts that have already been audited. Additionally, followed to its logical conclusion, if a retail ratepayer is permitted to file a complaint, any individual retail ratepayer in the United States could file a complaint. An agency the size of the Commission is not equipped to handle potentially millions of individual complainants. States are better equipped to address retail ratepayer complaints, and the FPA does not suggest otherwise." *Id*. (footnote omitted).

[16] *PATH* at P 99 (citation omitted).

agree that administrative convenience is not a basis to eviscerate a statutory right. In any event, this is a chimera – in the nearly 20 years since the Commission issued Order No. 888, there has been a stream but not a deluge of Section 206 rate challenges. It is burdensome to initiate and prosecute a Section 206 proceeding, as it can be to defend and adjudicate it, but such are the statutory rights and obligations of consumers and other market participants.

ELCON and Joint Consumers are especially troubled that the Certification would flip the fundamental purpose of the FPA on its head. The purpose of the FPA is not to protect utilities from the burden of responding to consumers; rather, as the Supreme Court and other courts have recognized, it is "to protect power consumers against excessive prices." *E.g.*, *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *Pub. Sys. v. FERC*, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979). ("[T]he Federal Power Act 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."); *Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165 at 2 (2015) (Comm'r Honorable, concurring) (citing *Morgan Stanley*, 554 U.S. 527, 564 (2008) ("Congress enacted the FPA precisely because it concluded that regulation was necessary to protect consumers from deficient markets.")). Further the Certification incorrectly states that "the interests of retail ratepayers are protected . . . at the federal level by consumer advocates, the providers of interstate energy and

transmission and the state commissions;"[17] this point is not only irrelevant to a right to standing but in addition these groups cannot be counted on to protect consumer interests as (i) not all jurisdictions (apparently including the complainant's in the AEP Proceeding) have consumer advocate groups,[18] (ii) energy and transmission providers are focused on their rate of return, not the interests of consumers, and (iii) state commissions face conflicting demands and limited resources.

Finally, the Certification incorrectly asserts that retail consumer interests "are protected in their state proceedings" and that "States are better equipped to address retail ratepayer complaints, and the FPA does not suggest otherwise."[19] In fact, as discussed below, the Commission has exclusive jurisdiction over the rates at issue in the AEP Proceeding and in similar Section 206 proceedings, and States have no authority to address them.

II. COMMISSION JURISDICTION OVER SECTION 206 PROCEEDINGS BY RETAIL CONSUMERS DOES NOT INTERFERE WITH STATE'S RIGHTS; TO THE CONTRARY, IT IS ESSENTIAL TO AVOIDING A REGULATORY GAP

The Certification's viewpoint on federalism under the FPA is utterly misplaced. FERC's Section 206 proceedings, regardless of who initiates them, do not "tend to disturb the delicate balance of state versus federal rights."[20] As the Commission has exclusive jurisdiction over rates that are set pursuant to the FPA, there are no state

[17] Certification at P 20.
[18] "Complaint filed against SWEPCO," *Carroll County News* (Feb. 11, 2014), http://www.carrollconews.com/story/2054130.html.
[19] Certification at P 20.
[20] Certification at P 21.

rights to be "disturbed." If adopted and applied generally, the Certification's novel viewpoint would reopen the *Attleboro* regulatory gap between federal and state jurisdiction that the FPA was designed to close, *New York* v. *FERC*, 535 U.S. 1, 6 (2002), undercutting the design and purpose of the statute by depriving consumers of any opportunity for redress of unlawful rates at either the federal or the state level.

The Certification focuses on FPA Section 201 and summarily asserts, without supporting citation, that a "person must implicitly possess FPA section 201 standing to file" a complaint.[21] There is no citation because there is no such concept. Section 201 represents a policy statement rather than a core grant of jurisdiction to the Commission. The circumstances referenced in the Certification -- that the complainant purchases retail rather than wholesale electricity and pays her bill to an intrastate rather than an interstate electricity provider[22] -- are irrelevant, as the retail charges are tied to wholesale rates that are exclusively within the jurisdiction of the Commission.

As the Certification appears to reflect a fundamental misunderstanding of the jurisdictional features of the FPA, which has been addressed in numerous decisions of the Supreme Court, ELCON and Joint Consumers briefly summarize below territory that will be very familiar to the Commission.

The Supreme Court has clearly rejected the Certification's misguided concept that FPA Section 201 serves some sort of overarching gatekeeping function. Rather, "the precise reserved state powers language" in Section 201(a) is "a mere policy

[21] Certification at P 15.
[22] Certification at PP 15, 16.

declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *New York v. FERC*, 535 U.S. at 22 (quoting *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (quoting *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 527 (1945)). In any event, even if it were to be viewed as binding, Section 201 only addresses the scope of the Commission's jurisdiction, not who is affected by and has standing to challenge matters within that scope, and it actually supports the Commission's ability to hear cases such as the AEP Proceeding. Sections 201(a) states that federal regulation of "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest," but that "such Federal regulation * * * extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. 824(a). That declaration is fully consistent with—indeed it supports—FERC's exercise of authority in the AEP Proceeding because the challenge is to unbundled interstate transmission charges that are not (and have never been) subject to regulation by the States. *New York v. FERC*, 535 U.S. at 21.

Instead, the Supreme Court has long held that FPA Sections 205 and 206[23] are the fundamental sources of the Commission's jurisdiction and that they confer jurisdiction over interstate transmission and wholesale rates, even when the agency's actions also

[23] Sections 205 and 206 set forth FERC's core regulatory duties. First, the Act provides that "[a]ll rates and charges" by any public utility "for or in connection with" interstate transmissions or wholesale sales, and "all rules and regulations affecting or pertaining to such rates or charges," shall be "just and reasonable." 16 U.S.C. 824d(a) and (b), 824e(a). Second, if FERC finds that "any rate, charge, or classification," or "any rule, regulation, practice, or contract affecting such rate, charge, or classification," is "unjust, unreasonable, unduly discriminatory or preferential," FERC shall determine and prescribe what is just and reasonable. 16 U.S.C. 824e(a).

impact retail consumers. *See, e.g., FPC v. Conway Corp.*, 426 U.S. 271, 276-80 (1976) (rejecting FERC's determination that Section 206 did not permit it to consider the impact on retail rates in setting just and reasonable wholesale rates); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 363-64, 372 (1988). As the Supreme Court more recently explained in *New York v FERC*, FERC's assertion of jurisdiction over unbundled transmission used to meet the needs of retail customers was part of the larger scheme (deployed through Order No. 888) to remedy an anticompetitive industry structure. Indeed, in upholding Order No. 888's industry-wide electric power restructuring initiative, the Supreme Court observed "[w]ere FERC to investigate this alleged discrimination [regarding unbundled retail transmission] and make findings concerning undue discrimination," Section 206 "would require FERC to provide a remedy for that discrimination"—even though such a remedy could also extend into retail aspects of bundled transmission. *New York v. FERC*, 535 U.S. at 27 (emphasis added).

This Commission's jurisdiction over unbundled interstate transmission rates is exclusive. The States are constitutionally incapable of regulating interstate electricity markets. *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) ("*Attleboro*"). Thus, the courts have been called on address the circumstances in which state rate-setting is preempted by and must pass through federally-approved wholesale rates. *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 972 (1986) (noting that filed rate doctrine principles preclude state regulators from ignoring FERC's determinations affecting the cost of wholesale power when they set retail rates);

Mississippi Power & Light Co. v. Mississippi et rel. Moore, 487 U.S. 354, 366-67, 376-77 (1988). This pass-through and other ways in which interstate rates affect state rate-setting is the very source of the potential harm to consumers that can only be addressed at the federal level by the Commission in a Section 206 proceeding; the States are precluded from doing so.

For consumers impacted by Commission-jurisdictional transmission rates, there is no other effective remedy. Because, as noted above, state commissions are required to respect FERC determinations that affect state rate-setting (s*ee Nantahala Power & Light*, 476 U.S. at 972; *Mississippi Power & Light*, 487 U.S. at 376-77), retail consumers have little or no recourse in state proceedings to challenge the transmission component of retail rates. Furthermore, interests of the members of ELCON and Joint Consumers and other similarly-situated consumers are not identical to those of other potential complainants and participants in FERC proceedings. Public utilities providing retail service have assurance of pass-through in state proceedings and hence do not have the same financial stakes as affected consumers. State agencies are not themselves consumers, are subject to budget and resource constraints that may or may not align with consumer priorities, and generally represent a governmental and public interest perspective distinct from that of particular ratepayers. Retail consumers have a strong financial stake in Commission-jurisdictional rates and would be denied an effective remedy if foreclosed from seeking relief before the Commission.

Indeed, Congress' motivation for enacting the FPA was to remedy the federal-state "gap" in the regulation of electricity markets that preceded it. As the Supreme

Court explained in *New York* v. *FERC*, 535 U.S. at 5-6, in *Attleboro* the Supreme Court found that the Rhode Island PUC's rate schedule for sales into Massachusetts violated the Commerce Clause, as only the federal government could regulate wholesale electricity transactions between states. Because the federal government had not yet exercised its authority over interstate transmission and sale of electricity, this created what is commonly known as the "*Attleboro* gap." Congress closed the *Attleboro* gap by enacting the FPA, giving the then-Federal Power Commission jurisdiction over interstate transmission and sale of electricity as set out in Sections 205 and 206, discussed above.

Under these well-established principles of cooperative federalism enacted in the FPA, the Commission does not intrude upon any States rights when it addresses a retail customer's complaint about interstate transmission rates, as the States do not have jurisdiction over such rates. The FPA's statutory right of standing to challenging unbundled interstate transportation rates provides consumers with their only opportunity for redress. Without the Commission's federal oversight, the very federal-state regulatory gap that Congress sought to correct when it adopted the FPA would be reopened, 80 years later.

CONCLUSION

For the reasons set forth above, ELCON and Joint Consumers strenuously oppose the viewpoints expressed in the Certification, which are inconsistent with the Federal Power Act and would establish unprecedented limitations on the Commission's

jurisdiction and on the ability of consumers of electricity to challenge rates that are unjust, unreasonable or unduly discriminatory or preferential. ELCON and Joint Consumers urge that the Commission promptly respond to the Certification by reaffirming its long-standing precedent of finding that consumers have standing statutorily granted by the FPA to initiate Section 206 complaints, as is essential under the regime established by Order No. 888 as affirmed by the Supreme Court in *New York v. FERC* to avoiding a regulatory gap.

Respectfully submitted,

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Dated: October 28, 2015

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 this proceeding.

Dated at Washington, D.C.: October 28, 2015

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup

EXHIBITS

1. *Association of Businesses Advocating Tariff Equity, et al., v. Midcontinent Independent System Operator, Inc. et al.*, 148 FERC ¶ 61,049 (2014) (excerpts).

2. *North Carolina Waste Awareness and Reduction Network, Inc. v. Duke Energy Carolinas, LLC et al.*, 151 FERC ¶ 61,079 (2015) (excerpts).

148 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

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. EL14-12-000

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

ORDER ON COMPLAINT, ESTABLISHING SETTLEMENT AND HEARING

JUDGE PROCEDURES, AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued October 16, 2014)

Paragraph Numbers

1. On November 12, 2013, pursuant to section 206 of the Federal Power Act (FPA)[1] and Rule 206 of the Commission's Rules of Practice and Procedure,[2] Complainants[3] filed

[1] 16 U.S.C. § 824e (2012).

a complaint (Complaint) against Midcontinent Independent System Operator, Inc. (MISO) and certain of its transmission-owning members (MISO TOs).[4] Complainants contend that the current 12.38 percent base return on equity (ROE) earned by MISO TOs, except ATC, which has a base ROE of 12.2 percent, through the MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) is unjust and unreasonable. Complainants contend that the ROE should be set at 9.15 percent (a reduction of 323 basis points). Additionally, Complainants argue that the capital structures of certain MISO TOs feature unreasonably high amounts of common equity such that they are unjust and unreasonable and that MISO TOs' capital structures should be capped at 50 percent common equity. Finally, Complainants contend that the ROE incentive adders received by ITC Transmission for being a member of a regional transmission organization (RTO) and by both ITC Transmission and METC for being

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[2] 18 C.F.R. § 385.206 (2014).

[3] Complainants, a group of large industrial customers, are: Association of Businesses Advocating Tariff Equity (ABATE); Coalition of MISO Transmission Customers (Coalition of MISO Customers); Illinois Industrial Energy Consumers; Indiana Industrial Energy Consumers, Inc.; Minnesota Large Industrial Group; and Wisconsin Industrial Energy Group.

[4] MISO TOs named in the Complaint are: ALLETE, Inc. (for its operating division Minnesota Power, Inc. and its wholly-owned subsidiary Superior Water Light, & Power Company (Superior Water, L&P); Ameren Illinois Company (Ameren Illinois); Union Electric Company (identified as Ameren Missouri); Ameren Transmission Company of Illinois; American Transmission Company LLC (ATC); Cleco Power LLC (Cleco); Duke Energy Business Services, LLC d/b/a Duke Energy Indiana, Inc. (Duke Energy Indiana); Entergy Arkansas, Inc. (Entergy Arkansas); Entergy Gulf States Louisiana, LLC (Entergy Gulf States); Entergy Louisiana LLC (Entergy Louisiana); Entergy Mississippi, Inc. (Entergy Mississippi); Entergy New Orleans, Inc. (Entergy New Orleans); Entergy Texas, Inc. (Entergy Texas); Indianapolis Power & Light Company (Indianapolis Power & Light); International Transmission Company d/b/a ITC Transmission (ITC Transmission), ITC Midwest LLC (ITC Midwest), and Michigan Electric Transmission Company, LLC (METC) (collectively, the ITC Subsidiaries); MidAmerican Energy Company (MidAmerican); Montana-Dakota Utilities Co. (Montana-Dakota Utilities), Northern Indiana Public Service Company (NIPSCO); Northern States Power Company-Minnesota (Northern States Minnesota); Northern States Power Company-Wisconsin (Northern States Wisconsin); Otter Tail Power Company (Otter Tail); and Southern Indiana Gas & Electric Company d/b/a Vectran Energy Delivery of Indiana, Inc. (Vectren).

independent transmission owners are unjust and unreasonable and should be eliminated. In this order, we grant in part, deny in part and dismiss in part the complaint. First, we grant in part the Complaint with respect to the ROE element. Specifically, with regard to the ROE element of the Complaint, we establish hearing and settlement judge procedures and set a refund effective date of November 12, 2013. Second, we deny in part the Complaint with respect to the transmission incentive and capital structure elements. Finally, we dismiss in part the Complaint as it relates to MISO.

I. Background

2. On December 3, 2001, MISO filed proposed changes to its Tariff to, among other things, increase the base ROE received by MISO transmission owners from 10.5 percent to 13 percent for all MISO pricing zones, except for the ATC transmission zone. The Commission set the ROE for hearing.[5] On September 23, 2003, the Commission affirmed the Initial Decision,[6] which approved a base ROE of 12.38 percent for the MISO transmission owners, but the Commission modified the Initial Decision to include an upward adjustment of 50 basis points for turning over operational control of transmission facilities.[7] On remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Commission re-affirmed its decision to use the midpoint approach for calculating the ROE for MISO transmission owners.[8] Also on remand, the Commission vacated its prior order concerning the 50 basis point adder and stated that the MISO transmission owners may make filings under section 205 of the FPA to include an incentive adder.[9] The 12.38 percent base ROE continues to be the applicable ROE under Attachment O of the MISO Tariff used by all MISO transmission owners except for ATC. ATC's base ROE of 12.2 percent was established as part of a settlement agreement that was filed with the Commission on March 26, 2004.[10]

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[5] *Midwest Indep. Transmission Sys. Operator, Inc.*, 98 FERC ¶ 61,064, *reh'g denied*, 98 FERC ¶ 61,356 (2002).

[6] *Midwest Indep. Transmission Sys. Operator, Inc.*, 99 FERC ¶ 63,011 (2002).

[7] *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292 (2003), *order denying reh'g*, 102 FERC ¶ 61,143 (2003).

[8] *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302 (2004).

[9] *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,355 (2005).

[10] In Docket No. ER04-108-000, the Commission approved the uncontested Settlement. *Am. Transmission Co. LLC and Midwest Indep. Transmission Sys. Operator*,

(continued ...)

3. The capital structures included in the MISO transmission owners' Attachment O formula rates are based on the actual common stock and long-term debt from page 112 of each MISO transmission owner's FERC Form No. 1. The Commission granted ATC a hypothetical capital structure consisting of 50 percent debt and 50 percent equity.[11] In addition, the Commission has granted some MISO transmission owners the ability to use hypothetical capital structures, as authorized by Order No. 679.[12]

4. ITC Transmission's ROE also includes a 100 basis point adder based on its independent transmission owner business model.[13] The Commission, on the same basis, also granted METC a 100 basis point adder.[14] In addition, ITC Transmission's ROE includes a 50 basis point adder for its "participation in [MISO's] RTO."[15]

II. Complaint

A. Return on Equity

5. Complainants assert that the current base ROEs of MISO TOs are unjust and unreasonable and should be adjusted to a just and reasonable ROE of 9.15 percent. Complainants explain that, until recently, under Commission precedent, when a complainant challenged a previously approved rate under section 206 of the FPA and

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Inc., 107 FERC ¶ 61,117 (2004).

[11] *Am. Transmission Co.*, 107 FERC ¶ 61,117.

[12] *See Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at PP 131-134, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007); *see also Dairyland Power Coop.*, 142 FERC ¶ 61,100 (2013); *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,121 (2012); *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131 (2011).

[13] *ITC Holdings Corp.*, 102 FERC ¶ 61,182, at P 68, *reh'g denied*, 104 FERC ¶ 61,033 (2003).

[14] *Mich. Elec. Transmission Co., LLC and Midwest Indep. Transmission Sys. Operator, Inc.*, 116 FERC ¶ 61,164, at PP 17, 20-21 (2006); *Mich. Elec. Transmission Co., LLC and Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,343, at PP 15-19 (2005).

[15] *Midwest Indep. Transmission Sys. Operator, Inc.*, 100 FERC ¶ 61,292 at P 31.

proposed a new one, the Commission needed to find that (1) the existing rate was unjust and unreasonable; and (2) a proposed replacement rate was just and reasonable.[16] However, Complainants further state that, as recently held by the United States Court of Appeals for the District of Columbia, under FPA section 206, a complainant need only demonstrate that the existing rate is unjust and unreasonable; it is the Commission's responsibility to determine a new just and reasonable rate.[17] Moreover, Complainants argue that, in order for the Commission to find that the existing base ROE is no longer just and reasonable, the Commission need not find that the current base ROE is completely outside the zone of reasonableness that was used in the initial setting of the ROE. Thus, the approved ROE is not exempt from review under section 206 simply because it falls within the zone of reasonableness.[18] As a result, Complainants argue that they do not need to show that the current base ROE falls outside of the zone of reasonableness in order to prove that the current base ROE is unjust and unreasonable.

6. To support their claim that the current base ROE is no longer just and reasonable, Complainants filed an affidavit of Michael P. Gorman, a Managing Principal of Brubaker & Associates, Inc., an energy, economic and regulatory consultant. Mr. Gorman performed a discounted cash flow (DCF) analysis to a proxy group of comparable risk companies in accordance with the Commission's policy for establishing a just and reasonable ROE for transmission service.[19] Complainants explain that the DCF analysis employed both regional and national proxy groups of comparable companies. Complainants state that each company in Mr. Gorman's national proxy group met the following criteria: (1) the company must be a domestic publicly-traded electric utility followed by the Value Line Investment Survey (Value Line); (2) the company must own transmission assets; (3) the company must have a Standard & Poor's (S&P) bond rating

[16] Complaint at 11 (citing, *e.g.*, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,003, at P 28 (2010); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002)).

[17] *Id*. at 11 (citing *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285, n.1 (D.C. Cir. 2011)).

[18] *Id*. at 11-12 (citing *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,038, at P 10 (2008)).

[19] *Id*. at 12-13 (citing *N. Pass Transmission LLC*, 134 FERC ¶ 61,095 (2011); *Potomac Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 (2010); *Atl. Path 15, LLC*, 122 FERC ¶ 61,135 (2008) (*Atlantic Path I*), *order on reh'g*, 133 FERC ¶ 61,153 (2010) (*Atlantic Path II*); *S. Cal. Edison Co.*, 131 FERC ¶ 61,020 (2010); *Golden Spread Elec. Coop.*, 123 FERC ¶ 61,047 (2008)).

in the range of BBB- to A+, which is one notch above and below the MISO TO range; (4) the company must not have been known to be a party to significant merger and acquisition activity in the past twelve months; (5) the company must have consistently paid dividends for two years without any cuts to the dividends; and (6) the company must have at least two growth rate estimates available from www.reuters.com (IBES). Each company in Mr. Gorman's regional proxy group met the same criteria, except that the company must be a transmission owner in MISO or a non-MISO investor-owned utility that directly interconnects with a MISO TO in the Eastern U.S. interconnect.[20]

7. Complainants' state that consistent with recent Commission precedent, Mr. Gorman's DCF analysis, using his national proxy group produced a zone of reasonableness with a range of median high and median low values between 7.97 percent and 10.33 percent. Complainants state that the midpoint of this median range is 9.15 percent.[21] Complainants state that Mr. Gorman's results for his regional proxy group were similar to those of his national proxy group. Accord to Complainants, excluding outliers, Mr. Gorman's regional proxy group produced a zone of reasonableness of 6.75 percent to 10.62 percent. Complainants state that the midpoint of the zone of reasonableness, based on a DCF analysis using a regional proxy group, is 8.69 percent.[22]

8. In addition to performing a DCF analysis, Complainants state that Mr. Gorman performed two risk premium studies to address the reasonableness of the DCF results and to further demonstrate that the current ROEs for MISO TOs are unjust and unreasonable. First, Mr. Gorman performed a bond yield plus risk premium study, which compares the common equity returns demanded by investors to the return on investment in U.S. Treasury bonds. Mr. Gorman's risk premium analyses produced a common equity return estimate of 8.28 percent to 10.51 percent, which Complainants allege supports the recommended 9.15 percent ROE result from the DCF analysis.[23] Second, Mr. Gorman performed a capital asset pricing model (CAPM) study. Complainants explain that the CAPM is based on the theory that the market-required rate of return for a specific security is equal to the risk-free rate (4.2 percent in Mr. Gorman's analysis, based on *Blue Chip Financial Forecasts'* projection of 30-year Treasury bond yields), a market risk premium (6.7 percent in Mr. Gorman's analysis, based on *Morningstar*'s adjusted estimates for S&P 500 companies), and a beta (which measures the systematic or non-

[20] *Id*. at 17.

[21] *Id.* at 16-23.

[22] *Id*. at 23.

[23] *Id*. at 24-28.

diversifiable risks) of 0.71 (in Mr. Gorman's analysis, the average of the companies in the national proxy group). Mr. Gorman's CAPM analysis produced a return of 8.94 percent. Complainants state that, after accounting for investment risk, the CAPM indicates a range of 7.89 percent to 10.57 percent, which Complainants state supports the recommended 9.15 percent ROE from their national proxy group DCF analysis.[24]

9. Complainants state that their DCF analysis demonstrates that, as a result of significantly changed economic circumstances since the MISO TOs' base ROEs were first established: (1) the current base ROEs are unjust and unreasonable; and (2) the just and reasonable base ROE for all assets should be set no higher than 9.15 percent. The present base ROE levels, according to Complainants, result in customers substantially overpaying MISO TOs. Specifically, Complainants allege that, based on the current rate base levels provided in MISO TOs' most recent formula rate updates, electric consumers are overcompensating MISO TOs by approximately $327 million annually under the current base ROEs, as compared to rates using Complainants' recommended base ROE of 9.15 percent. Complainants argue that these overpayments exceed what is "reasonably sufficient to assure confidence in the financial soundness of the [utilities] and should be adequate under efficient and economical management, to maintain and support its credit, and enable it to raise the money necessary for the proper discharge of its public duties."[25]

10. Complainants contend that, if the Commission does not find that the current base ROEs are unjust and unreasonable, and that a base ROE of 9.15 percent is just and reasonable, the Commission should institute a proceeding under FPA section 206 to investigate whether the base ROEs used by MISO TOs are excessive and to determine a just and reasonable base ROE. Furthermore, Complainants state that, consistent with recent Commission proceedings in which utilities' ROEs were the subject of a complaint, the procedures should consist of two phases. First, Complainants state that MISO TOs should be directed to take part in settlement procedures with a Commission settlement judge, with a prescribed deadline (e.g., 60 days). Second, if the settlement process does not yield a certified offer of settlement within a prescribed period of time, then the base ROE should be determined through an evidentiary hearing.[26]

11. Finally, Complainants argue that the Commission should establish the earliest possible refund effective date. Complainants explain that, in cases where the

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[24] *Id*. at 28-33.

[25] *Id*. at 34 (quoting *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-693 (1923) (*Bluefield*)).

[26] *Id*. at 34.

Commission institutes an investigation on a complaint under FPA section 206, section 206(b) requires the Commission to establish a refund effective date that is no earlier than the date the complaint was filed, but no later than five months after the filing date.[27] Complainants conclude that, given the Commission's policy of providing maximum protection to customers, the Commission should establish the filing date of this Complaint as the refund effective date for the relief to be afforded Complainants in this proceeding.[28]

B. Capital Structure

12. Complainants allege that the capital structures of those MISO TOs that have more than 50 percent common equity are unjust and unreasonable. Complainants argue that transmission companies have low operating risk. Thus, according to Complainants, transmission companies can finance their operations with greater amounts of debt, reflecting lower financial risk, while supporting an investment grade bond rating. Citing an S&P Ratings Direct publication, Complainants assert that utilities with stronger business profiles can have greater amounts of financial risk and still maintain an investment grade bond rating.[29] Accordingly, Complainants contend that it is unreasonable for a low-risk transmission electric utility to finance itself with relatively little financial risk, i.e., a high common equity ratio. Complainants add that transmission owners should have a common equity ratio that is in line with the electric utility industry average because of the low operating or business risk of transmission operations.[30]

13. Complainants report that even though the actual common equity ratio for most MISO TOs over the past five years has been 53 percent or less, certain MISO TOs have common equity ratios well in excess of 55 percent. By contrast, Complainants state that Mr. Gorman's national proxy group had an average common equity ratio of 48.8 percent. This common equity ratio, Complainants add, supported a national proxy group average bond rating of BBB+. Based on these figures, Complainants conclude that capital structures of the electric utility industry have supported investment grade bond ratings and provided adequate access to capital to support large capital programs. Complainants note that more balanced capital structures with more reasonable common equity ratios

[27] *Id*. at 35 (citing 16 U.S.C. § 824e(b)).

[28] *Id*. (citing *Coakley v. Bangor Hydro-Elec. Co.*, 139 FERC ¶ 61,090, at P 29 (2012) (*Coakley* Hearing Order)).

[29] *Id*. at 35-36 (citing Gorman Aff. at 9-12).

[30] *Id*.

produce lower overall cost of capital to end-use customers relative to companies that have an excessive equity weighted capital structure.[31]

14. Furthermore, Complainants contend that limiting the common equity ratio to 50 percent for ratemaking purposes would have little or no impact on the credit standing of MISO TOs whose actual common equity ratios are greater than 50 percent. Complainants assert that, even if a transmission company with an excessive equity ratio has a slightly stronger bond rating, it is likely that its overall cost of capital would be higher. To illustrate this point, Complainants use the ITC Subsidiaries as an example. Complainants explain that the ITC Subsidiaries have a bond rating of BBB+/A3 and a common equity ratio of 60 percent, which Complainants maintain is well in excess of the equity ratios of other MISO TOs and other integrated electric utility companies. Complainants aver that the ITC Subsidiaries' bond ratings are only marginally better (one or two "notches") than most other MISO TOs. According to Complainants, the interest rate advantage of this higher bond rating is currently approximately 50 basis points and, over time, has averaged about 45 basis points. Complainants allege that, by reducing the ITC Subsidiaries' common equity ratio to 50 percent for ratemaking purposes, and correspondingly decreasing their bond rating by two notches, the ITC Subsidiaries pre-tax rate of return would decrease from 12.5 percent to 12.2 percent, thereby reducing the ITC Subsidiaries' revenue requirement by $40.9 million.[32]

15. Complainants remark that there is evidence that a 50 percent common equity ratio is adequate to support a strong credit standing for MISO TOs. For example, Complainants state that ATC, which entered into a settlement of ratemaking principles for its transmission operations that included a common equity ratio of 50 percent, has an A+ and a "Stable" credit rating by S&P. Complainants add that, since the settlement went into effect, ATC has doubled the size of its gross investment in transmission plant. Moreover, Complainants note that S&P rates ATC's business risk as "Excellent," its financial risk as "Intermediate," and its outlook as "Stable." Complainants conclude that ATC's current Commission-approved common equity ratio of 50 percent, combined with ATC's strong credit rating, demonstrates that a 50 percent common equity ratio will support strong credit and access to capital for other transmission electric utilities.[33]

16. In addition, Complainants allege that, because MISO TOs are currently earning above-market returns on common equity, they have an incentive to increase their use of

[31] *Id*. at 36-37.

[32] *Id*. at 38-39.

[33] *Id*. at 39-40.

equity capital to support investment in transmission assets. Complainants contend that MISO TOs' capital structures have been overly weighted with common equity and the ROEs have been well in excess of current market rates; thus, customers of MISO TOs have not been paying just and reasonable rates for transmission service. In order to balance investor interest and the public interest against excessive rates, Complainants argue that the Commission should require MISO TOs to manage their capital structures in a manner that minimizes the overall cost of capital, while supporting an investment grade bond rating.[34]

17. Finally, Complainants aver that, due to the low business risk that MISO TOs face, the Commission should implement a target capital structure for MISO TOs that consists of a common equity ratio of 50 percent. Complainants explain that, to the extent that an individual MISO TO has a common equity ratio of 50 percent or less, the Commission should require that the transmission owner file its rates with the Commission using its actual capital structure. If, on the other hand, a MISO TO has a common equity ratio in excess of 50 percent, then the Commission should require that the company provide evidence to the Commission showing that its common equity ratio is just and reasonable and consistent with minimizing its cost of capital while preserving its investment grade bond rating. Accordingly, Complainants argue that the Commission should adopt a 50 percent common equity ratio cap for all MISO TOs, without prejudice to individual MISO TOs having the ability to justify, on the basis of substantial evidence concerning their individual circumstance, that a higher common equity ratio is just and reasonable.[35]

C. Incentives

18. Complainants allege that ITC Transmission and METC have ROE adders in place that are no longer just and reasonable. Specifically, Complainants take issue with the 50 basis point adder that ITC Transmission currently receives for RTO membership and the 100 basis point adder that ITC Transmission and METC receive for being independent transmission companies.[36] Complainants allege that these adders are no longer necessary to promote the Commission's policy goals as they relate to RTO participation and transmission independence. Complainants argue that there must be a close nexus between any basis point adders and the net benefits to customers that would not have been achieved absent the increase to the ROE.[37] Complainants add that, because "there

[34] *Id*. at 40-41.

[35] *Id*. at 41-42.

[36] *Id*. at 42.

[37] *Id*. (citing *City of Detroit v. Fed. Power Comm'n*, 230 F.2d 810, 817 (D.C. Cir.

(continued ...)

must be 'symmetry' between the funding and increase" in customer value, the Commission must protect customers from paying substantially more than necessary to achieve the desired outcome.[38]

19. According to Complainants, over the last decade, ITC Transmission and METC have recovered more than enough through their ROE adders to deliver the benefit of being independent transmission companies and, in ITC Transmission's case, the benefit of being a member of an RTO. Complainants assert that, at this point, the ROE adders simply provide ITC Transmission and METC a windfall at the expense of customers. Moreover, Complainants add that no other transmission owners in the MISO region receive these ROE adders and there is no logical justification for allowing ITC Transmission and METC to continue applying the adders. Complainants also point out that, after the Commission's acceptance of the ROE adders for ITC Transmission and METC, it denied ITC Midwest's request for similar ROE incentive adders even though its posture relative to independent transmission operations and RTO participation was substantially similar to that of the other ITC Subsidiaries.[39]

20. Complainants also contend that the Commission has recognized that ROE incentive adders are not meant to continue indefinitely. For example, Complainants note that the Commission, in its 2003 Proposed Pricing Policy for Effective Operation of the Transmission Grid (2003 Proposed Pricing Policy), stated that "[a] public utility would qualify for the [50 point adder for RTO membership] as soon as it has transferred operational control of its transmission facilities to an approved and operating RTO, and would be authorized to receive the incentive for RTO participation until December 31, 2012."[40]

21. Furthermore, Complainants assert that customers are receiving no benefit for continuing to pay incentive ROE adders to ITC Transmission and METC, for two reasons. First, Complainants state that ITC Transmission's and METC's bond ratings are generally consistent with the other transmission owners' bond ratings. Second, Complainants report that credit analyst industry reports indicate that low-risk regulated

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1955) (*City of Detroit*)).

[38] *Id*. (quoting *Pub. Serv. Comm'n of N.Y. v. FERC*, 589 F.2d 542, 552-553 (D.C. Cir. 1978) (*New York Commission v. FERC*)).

[39] *Id*. at 43.

[40] *Id*. (citing *Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid*, 102 FERC ¶ 61,032, at P 28 (2013)).

utility operations have sufficient access to low-cost capital to fund needed utility infrastructure investment. Complainants conclude from this that the ROE adders are not needed to provide MISO TOs access to ample low cost capital and serve no other purpose than to unjustifiably increase the rates charged to transmission users.[41]

22. Finally, Complainants allege that the ROE adders applied by ITC Transmission and METC do not encourage ITC Transmission and METC to manage their capital costs to reduce their overall rates of return. Complainants explain that ITC Transmission's and METC's base ROE adders, coupled with their common equity ratios of 60 percent, produce substantially higher pre-tax rates of return than those of other MISO TOs. According to Complainants, eliminating the ROE adders for these companies would produce lower pre-tax rates of return even if their cost of debt was increased to reflect a reduction in their bond ratings.[42]

III. Notice and Responsive Pleadings

23. Notice of the Complaint was published in the Federal Register, 78 *Fed. Reg.* 69,660 (2013), with protests and interventions due on or before December 2, 2013.[43] On November 18, 2013, MISO TOs and the Organization of MISO States filed a joint motion for an extension of time in this proceeding for filing comments, protests, and interventions up to and including January 6, 2014. The period for interventions and protests regarding this filing was subsequently extended to January 6, 2014.

24. The entities that filed notices of intervention, motions to intervene, protests, comments, and answers are listed in the Appendix to this order. The entity abbreviations listed in the Appendix will be used throughout this order.

25. On December 31, 2013, MISO filed a motion for dismissal of MISO as a party to this proceeding and to postpone the date by which MISO must answer the Complaint. MISO contends that it is not a beneficiary of any ROE and, instead, is simply the billing agent for MISO TOs. MISO maintains that it has a purely administrative role and will comply with any Commission decision in this proceeding. On January 15, 2014, Complainants filed an answer to MISO's motion stating that they do not object to MISO's motion to be dismissed as a party to the proceeding, subject to the Commission

[41] *Id*. at 44.

[42] *Id*. at 44-45.

[43] The Commission subsequently issued an errata notice that corrected the Docket No. to read EL14-12-000.

requiring MISO to (1) remain responsible for administering any refunds; (2) include the appropriate ROE in prospective transmission billings; and (3) waive any right to challenge the results of this proceeding. Complainants state that, in its motion for dismissal of MISO as a party, MISO indicated its willingness to commit to these conditions.[44]

A. MISO TOs Motion to Dismiss

1. Standing

a. Motion to Dismiss

26. MISO TOs argue that the Commission should dismiss the Complaint because it fails to satisfy the procedural requirements of Rule 206 of the Commission's Rules of Practice and Procedure. MISO TOs assert that Complainants have not satisfied the requirement of Rule 206 that a complainant set forth "the business, commercial, economic, or other issues presented by the action or inaction as such relate to or affect the complainant."[45] MISO TOs observe that Complainants state that they are large industrial or commercial business entities located within MISO and that they include the Coalition of MISO Customers, which is a member of MISO. However, MISO TOs aver that Complainants do not describe the relationship between MISO or MISO TOs' rates, or the effect of those rates to Complainants' businesses, individually or collectively. According to MISO TOs, the Complaint does not allege that any Complainant is a transmission customer of MISO that pays, or is adversely affected by, the rates stated in the MISO Tariff that include the base ROE, capital structures, or ROE adders challenged by the Complaint. MISO TOs argue that Complainants' statements that their member organizations are located or have facilities in the MISO region and that one of the Complainants (Coalition of MISO Customers) is a member of MISO are vague and insufficient in their description of adverse effects.[46]

b. Complainants Reply

27. Complainants contend that MISO TOs' argument that Complainants lack standing is baseless. Complainants contend that the Complaint clearly explained that each group

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[44] Complainants January 15, 2014 Reply at 2.

[45] MISO TOs January 6, 2014 Answer at 7 (citing 18 C.F.R. §§ 385.206(a), (b)(3)).

[46] *Id.* at 8-9.

that comprises Complainants is comprised of retail customers with facilities in the MISO region. They further contend that all retail customers in the MISO region pay for transmission service, which is at the heart of this proceeding. Complainants argue that to find that Complainants do not have standing would require the Commission to reach a conclusion that all of the industrial customers comprising Complainants pay nothing for transmission service, which Complainants assert is incorrect.

28. Complainants contend that all of their group members are payers of MISO TOs' revenue requirement, that they are being adversely affected by the out-of-market ROE currently being applied to MISO TOs, and that they will benefit from a realignment of the ROE to current market conditions, correction of MISO TOs' capital structures, and elimination of unjustified ROE incentive adders.[47]

c. Comments and/or Protests

29. Similarly, Iowa Group asserts that Rule 206(a) provides that "[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission."[48] It further asserts that Rule 107(d) defines "person" as including "associations and any organized group of persons whether incorporated or not."[49] Iowa Group argues that the Commission has allowed complaints filed by associations on behalf of their members to proceed through its adjudication process without any allegation of harm to the association itself, and that construing Rule 206 in the manner advanced by MISO TOs would effectively read associations and other organized groups out of the Commission's rules.[50]

d. MISO TOs Reply

30. In response, MISO TOs argue that, despite Complainants' and Iowa Group's argument to the contrary, the Complaint does not establish Complainants' standing and should be dismissed. MISO TOs state that Complainants have failed to establish standing to bring their claims because the Complaint fails to allege that any Complainant is a transmission customer of MISO that pays, or it otherwise affected by, the rates stated in

[47] Complainants January 22, 2014 Reply at 5.

[48] Iowa Group Reply at 8 (quoting 18 C.F.R. § 385.206(a)).

[49] *Id*. at 8 (quoting 18 C.F.R. § 385.107(d)).

[50] *Id*.

the MISO Tariff that include the base ROE, capital structures, and ROE incentives that the Complaint purports to challenge. MISO TOs contend that, when a complainant is not a customer of the respondent, the complainant must show that it has been adversely harmed by the actions it challenges in the complaint. MISO TOs state that, here, the Complaint does not set forth facts satisfying the applicable legal standard.[51] Furthermore, MISO TOs take issue with Iowa Group's argument that "the Commission has allowed complaints filed by associations on behalf of their members to proceed through its adjudication process without any allegation of harm to the association itself."[52] MISO TOs respond that, here, Complainants have not shown that their members pay a fully allocated portion of the base ROE and transmission revenue requirement.[53]

2. Good Faith Effort to Quantify Financial Impact

a. Motion to Dismiss

31. MISO TOs further assert that Complainants have not complied with Rule 206 because they have not made "a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction."[54] MISO TOs assert that Complainants' allegations are merely generic assertions about MISO TOs' revenues and that they do not quantify the effect on Complainants, either individually or collectively, of MISO TOs' base ROE, capital structure, or ROE adders.

b. Complainants Reply

32. Complainants assert that FPA section 206(b)(4) states that a complainant must "make a good faith effort to quantify the financial impact or burden (if any) created for the Complaint as a result of the action or inaction."[55] They further assert that, while the quantified financial impact stated in the Complaint does not represent a precise impact, it

[51] MISO TOs February 19, 2014 Reply at 6-8.

[52] *Id*. at 9 (quoting Iowa Group Reply at 8).

[53] *Id*.

[54] MISO TOs January 6, 2014 Answer at 10-12 (quoting 18 C.F.R. §§ 385.206(a), (b)(4)).

[55] Complainants January 22, 2014 Reply at 6 (quoting 18 C.F.R. § 385.206(b)(4)).

does represent a "good faith estimate" of the impact that MISO TOs' excessive transmission rates have on them.[56]

33. Complainants contend that many of the retail customers comprising Complainants' groups pay bundled retail rates, and the precise flow-through of transmission revenue requirements to retail customers would require the burdensome task of "unbundling" all retail rates to isolate the transmission revenue component and then further unbundling the transmission revenue component to isolate the ROE and capital structure impact on the transmission revenue component. Complainants conclude that the overall impact to all transmission customers in the MISO region represents, at this time, a good faith estimate of the impact that MISO TOs' excessive transmission rates have on them.[57]

34. Complainants contend that the fact that industrial customers are adversely impacted by the high ROE and capital structures should be obvious, and that MISO TOs' assertion that the Complaint should be dismissed for failure to demonstrate any quantifiable financial impact is illogical. In addition, Complainants assert that the parties that filed comments in support of the Complaint, including the Organization of MISO States, Illinois Commission, and the Missouri Commission did so because of the material impact of the claims put forth in the Complaint.[58]

c. Comments and/or Protests

35. Furthermore, Iowa Group contends that a "good faith effort" is a reasonable, intellectually honest attempt to quantify the harm caused by the challenged action, and that Complainants have made a good faith effort to quantify the financial impacts and burden created for their members as a result of MISO TOs' unjust and unreasonable rates.[59]

36. Iowa Group asserts that Complainants have shown that electric consumers are overcompensating MISO TOs as a group by $327 million annually under the current base ROE and by $377 million annually using both the recommended base ROE and a 50

[56] *Id*. at 6-7.

[57] *Id*. at 7.

[58] *Id*. at 8.

[59] Iowa Group Reply at 9-10.

percent common equity ratio.[60] Iowa Group asserts that Complainants have also shown how much each MISO TO is being overcompensated.[61] Iowa Group adds that its own comments demonstrated that implementing Complainants' recommendations for 2013 would have reduced its members' Network Integration Transmission Service rate by 22.74 percent.[62]

37. Iowa Group contends that, in *Martha Coakley Mass. Atty. Gen., et al.*, a coalition of public officials, consumer advocates, and business associations filed a complaint challenging a base ROE of 11.14 percent utilized by transmission utilities in the New England region and alleging that reducing the base ROE to 9.20 percent would reduce regional network service costs by $113 million in 2011 and $206 million in 2014.[63] Iowa Group points out that the Commission, noting this broad allocation, accepted the complaint and set it for investigation and a trial-type evidentiary hearing.[64]

d. MISO TOs Reply

38. In response, MISO TOs allege that answering parties' arguments does not refute the Complaint's failure to satisfy Rule 206(b)(4). MISO TOs argue that Complainants' Answer cites no legal basis for its contention that it has provided a satisfactory quantification of its financial impact. In response to Complainants' argument that quantifying the financial impact of MISO TOs' rates would be burdensome, MISO TOs state that Complainants should have said so in the Complaint, as called for by Rule 206(b)(4). MISO TOs add that the Complaint does not even state whether Complainants or their respective members are customers of MISO TOs or of MISO. MISO TOs further note that, unlike in the recent New England Transmission Owners' base ROE complaint, in which the complainants were a coalition of state attorneys general, public utility commissions, public advocates, and non-profit associations, Complainants here do not purport to represent consumers generally.[65]

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[60] *Id*. at 10 (citing Gorman Aff.).

[61] *Id*. (citing Gorman Aff.).

[62] *Id*. (citing Iowa Group Comments at 8).

[63] *Id*. at 10-11 (citing *Martha Coakley Mass. Atty. Gen., et al.*, 144 FERC ¶ 63,012, at P 6 (2013) (*Coakley*).

[64] *Id*. at 11 (citing *Coakley*, 144 FERC ¶ 63,012 at P 6).

[65] MISO TOs February 19, 2014 Reply at 10-12.

39. Furthermore, MISO TOs allege that neither Complainants' nor Iowa Group's answers cure the Rule 206 defects in the Complaint. MISO TOs note that nowhere does the Complaint allege that each of Complainants is comprised of retail customers with facilities in the MISO region. MISO TOs state that, even if it were true that the Complaint "clearly explained that each group that comprises . . . Complainants is comprised of retail customers with facilities in the MISO region," that still would not establish Complainants' standing in this proceeding. MISO TOs allege that there are 26 Commission-jurisdictional transmission-owning utilities within the MISO footprint, but the Complaint names only 24 of them. MISO TOs also state that there are many non-jurisdictional entities that own transmission assets within the MISO footprint and that are not named in the Complaint. Moreover, MISO TOs state that it is fairly common for large industrial customers to have negotiated rates that do not necessarily pass through all transmission costs attributable to or paid by the transmission owner that serves them.[66]

3. Burden of Motion to Dismiss

a. Motion to Dismiss

40. MISO TOs argue that Complainants have failed to meet their burden under FPA section 206 to demonstrate that the MISO TOs' existing base ROE is unjust and unreasonable. Specifically, Complainants allege that the Gorman Affidavit and accompanying DCF analysis are undermined by serious and pervasive errors, and are without probative value. MISO TOs therefore conclude that Complainants fail to make a prima facie case that MISO TOs' existing rates are unjust and unreasonable.[67]

41. Furthermore, MISO TOs contend that Complainants' allegations regarding the MISO TOs' capital structures are facially insufficient to state a claim for relief and should be dismissed with prejudice. In addition MISO TOs argue that Complainants fail to state any basis for removing ITC Transmission's ROE adders for RTO membership and independence, or METC's ROE adder for independence.[68]

b. Complainants Reply

42. Complainants argue that MISO TOs' motion to dismiss should be denied. Complainants assert that the Commission's Rules of Practice and Procedure do not

[66] *Id*. at 13-14.

[67] MISO TOs January 6, 2014 Answer at 4.

[68] *Id*.

provide the legal standard for a motion to dismiss. Instead, the Commission looks to the Federal Rules of Civil Procedure for guidance.[69] Complainants contend that under the Federal Rules of Civil Procedure, in order for a motion to dismiss to be successful, the party submitting the motion, in this case MISO TOs, must prove that there are no issues of material fact and that the complainant fails to state a claim for which relief can be granted.[70] Complainants further contend that the purpose of a motion to dismiss is to allow the respondent(s) to test whether, as matter of law, the complainant(s) is entitled to legal relief even if everything alleged in the complaint is true.[71] Complainants assert that MISO TOs fail to meet that burden.

43. Complainants contend that the issues raised in MISO TOs' motion to dismiss are issues of material fact and, therefore, not grounds for outright dismissal of the Complaint. Complainants contend that under FPA section 206, Complainants bear the "burden of proof . . . and therefore must demonstrate, on the basis of substantial evidence, [] that the rate in effect is unjust and unreasonable."[72] Complainants argue that, taking everything in the Complaint as true, they have met their burden of proof under section 206 and MISO TOs' motion to dismiss should be denied.[73]

c. MISO TOs Reply

44. In response, MISO TOs state that the Federal Rules of Civil Procedure do not relieve Complainants from meeting their FPA section 206 burden. MISO TOs contend that they do not dispute that the Federal Rules of Civil Procedure may provide guidance to the Commission, but that Complainants cannot avoid meeting their burden under FPA section 206 by resorting to the Federal Rules of Civil Procedure. According to MISO TOs, the "no issue of material fact" standard Complainants cite applies to a motion for summary judgment under the federal rules, but no one in this case has invoked the Commission's parallel Rule 217. Consequently, MISO TOs allege that, even taking as true all of the facts asserted in the Complaint regarding Complainants' members and their interests, the Complaint still fails to (1) establish Complainants' standing; (2) make a

[69] Complainants January 22, 2014 Reply at 3.

[70] *Id*. (citing Fed. R. Civ. P. Rule 12(b)(6)).

[71] *Id*. at 3-4 (citing *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993)).

[72] *Id*. at 4 (quoting *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161, at P 9 (2008) (*Ameren Services*)).

[73] *Id.*

good faith estimate of the alleged financial harm to Complainants; or (3) state a claim upon which relief may be granted.[74]

4. Return on Equity

45. MISO TOs also argue that Complainants have not made a prima facie case that MISO TOs' base ROE is unjust and unreasonable. In this regard, MISO TOs aver that Complainants bear the burden to establish by substantial evidence that the present base ROE is unjust and unreasonable.[75]

46. MISO TOs argue that the selection criteria in Complainants' national proxy group are inconsistent with Commission precedent. First, MISO TOs argue that the Commission has rejected the requirement used in Complainants' DCF analysis that proxy group companies must own transmission. MISO TOs cite *Atl. Grid Operations A LLC*,[76] in which, according to MISO TOs, the Commission rejected the contention that companies that are not "electric transmission-owning companies" should be excluded from the national proxy group, allowing inclusion of companies that are classified as electric companies by independent investor services. Second, MISO TOs argue that the Commission requires the inclusion of companies within one rating notch above and below MISO TOs' bond rating range. Given use of this criterion, MISO TOs' expert witnesses, Dr. Avera and Mr. McKenzie, contend that a properly screened national proxy group should include companies with S&P credit ratings as high as AA- (which, in their analysis, would include MGE Energy), rather than as high as A.[77]

47. Third, MISO TOs question Complainants' proxy group screen element that eliminates companies involved in recent merger and acquisition activity. They aver that the Commission has no per se requirement to eliminate such companies from DCF analysis proxy groups. MISO TOs state that in *Bangor Hydro-Electric Co.*[78] the

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[74] MISO TOs February 19, 2014 Reply at 15-18.

[75] MISO TOs January 6, 2014 Answer at 12 (citing, *e.g.*, *Ameren Services*, 125 FERC ¶ 61,161 at P 9).

[76] *Id.* at 14 (citing *Atl. Grid Operations A LLC*, 135 FERC ¶ 61,144, at P 96 (2011) (*Atlantic Grid*)).

[77] *Id.* at 15-16; Avera/McKenzie Test. at 33; Ex. MTO-5.

[78] *Id.* at 16 (citing *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129, at P 68 (2006) (*Bangor I*), *order on reh'g*, 122 FERC ¶ 61,265 (2008) (*Bangor II*), *order granting clarification*, 124 FERC ¶ 61,136 (2008), *petition denied, Conn. Dep't of Pub.*

(continued ...)

IV. Discussion

A. Procedural Matters

177. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that file them parties to this proceeding. Notwithstanding Complainants' opposition to Trans Bay's and Powerlink's interventions, we find that good cause exists to grant their motions. We are satisfied that they have expressed interests in the outcome of this proceeding that are not represented by any other party, and that their participation may be in the public interest.[355] Accordingly, we shall grant their motions to intervene.

178. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant Wabash Valley's late-filed motion to intervene given its interest in the proceeding, the early state of the proceeding, and the absence of undue prejudice or delay.

179. Rule 213(a)(2) of the Commission's Rule of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers in this case because they provided information that assisted us in our decision-making process.

180. We will grant MISO's motion for dismissal as a party to this proceeding. In doing so, we note that Complainants do not protest the motion,[356] and, we agree with MISO that, with regard to the ROE at issue, MISO is the billing agent for the MISO TOs, not the beneficiary. The MISO TOs are the true parties in interest for purposes of this proceeding.

B. Substantive Matters

1. Standing

181. We find that Complainants have standing to dispute the current 12.38 percent ROE for MISO TOs, the capital structure of those MISO TOs that include more than 50 percent equity, and the ROE incentive adders received by ITC Transmission and METC. Rule 206(a) states that "[a]ny person may file a complaint seeking Commission

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[355] *See Commonwealth Edison Co.*, 34 FERC ¶ 61,115, at 61,167-61,168 (1986).

[356] Complainants January 15, 2014 Reply at 2.

action against any other person alleged to be in contravention or violation of any statute, rule, order or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction."[357] Rule 206(b)(3) requires the complaint to "set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant."[358] As industrial customers within MISO, Complainants either directly pay wholesale transmission rates or pay for transmission through bundled retail rates, such that they are affected by MISO TOs' base ROE, capital structures, and ROE incentive adders.[359] We therefore find that Complainants have satisfied the standing requirement of Rule 206.

2. Good Faith Estimate of Financial Impact

182. We find that Complainants have satisfied the requirement of Rule 206 to "[m]ake a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction." Complainants' estimate of $347 million of additional costs paid by MISO TOs' customers based on their 12.38 percent base ROE as compared to the 9.15 percent base ROE that Complainants propose represents a good faith effort to quantify the claimed financial burdens. We disagree with MISO TOs' contention that Complainants need to more precisely quantify the specific harms to their members. As described by Complainants, many of them pay bundled rates, rendering such precision difficult.

3. Return on Equity

183. We find that, with respect to whether MISO TOs' base ROE has been shown to be unjust and unreasonable, 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 and settlement judge procedures ordered below. Accordingly, we will set this element of the Complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA.

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[357] 18 C.F.R. § 385.206(a).

[358] *Id.* § 385.206(b)(3).

[359] *See S. Union Gas Co. v. Natural Gas Co.*, 71 FERC ¶ 61,198, at 61,717 (1995) ("The Commission has consistently construed rule 206 to permit any person, as defined in rule 102(d) of the Commission's procedural rules, to file a complaint, even where that person is not a direct customer of the pipeline, so long as the person is adversely affected by the actions that are the subject of the complaint.").

transmission company business model. In that regard, Complainants and other commenters have not provided any evidence that transmission incentives are no longer necessary. The Commission has provided such incentives numerous times to utilities with cost of service rates and section 219 of the FPA directs the Commission to provide transmission incentives without specifying what types of utilities should be eligible. Finally, nothing in the Commission's transmission incentive policy requires periodic reexamination of whether incentives are needed, as suggested by Arkansas Energy Customers.

205. We note, however, that a utility's total ROE, including any incentive ROE, is limited to the zone of reasonableness, and an incentive ROE may not be implemented in full by the utility if the total ROE exceeds the zone of reasonableness.[377] Because we are setting the MISO TOs' base ROE for hearing and settlement judge procedures, as discussed above, it is possible that the MISO TOs' total ROE and zone of reasonableness may change as a result of this proceeding. Therefore, it is possible that the MISO TOs' ability to implement the full amount of incentive ROE the Commission previously granted may be affected by this proceeding.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the base ROE element of this Complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2014), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

[377] *E.g.*, Opinion No. 531, 147 FERC ¶ 61,234 at P 164, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date in Docket No. EL14-12-000, established pursuant to section 206(b) of the FPA, is November 12, 2013, as discussed in the body of this order.

(F) We deny MISO TOs' motion to dismiss, as discussed in the body of this order.

(G) We deny the capital structure and transmission incentive elements of the Complaint, as discussed in the body of this order.

(H) We grant MISO's motion for dismissal of MISO as a party to this proceeding.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

151 FERC ¶ 61,079
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

North Carolina Waste Awareness
and Reduction Network, Inc.

v. Docket No. EL15-32-000

Duke Energy Carolinas, LLC
Duke Energy Progress, Inc.

ORDER ON COMPLAINT

(Issued April 30, 2015)

1. On December 16, 2014, pursuant to Rule 206 of the Commission's Rules of Practice and Procedure,[1] the North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed a complaint and petition for investigation of the practices of Duke Energy Carolinas, LLC (Duke Energy Carolinas) and Duke Energy Progress, Inc. (Duke Energy Progress) (together, Duke Energy) that NC WARN alleges lead to "excess capacity and waste."[2] Specifically, NC WARN asks the Commission to hold an investigative hearing in Raleigh, North Carolina concerning the issues raised in the complaint, fund an independent study to evaluate the potential benefits of Duke Energy entering into a regional transmission organization (RTO), and require Duke Energy to purchase power from other utilities in lieu of constructing its own power plants. The Commission denies the complaint, as explained below.

[1] 18 C.F.R. § 385.206 (2014).

[2] Complaint at 1.

I. Background

A. The Parties

2. NC WARN states that it is a not-for-profit corporation under North Carolina law. According to NC WARN, it is comprised of approximately 1,000 individual members and families across North Carolina, most of which are Duke Energy customers in North Carolina.[3] NC WARN states that its purpose is to "confront the accelerating crisis posed by climate change by challenging Duke Energy practices" and work for a swift transition to energy efficiency and clean power generation in North Carolina.[4] NC WARN adds that it partners with other citizen groups and uses scientific research to inform the public about important energy matters.[5]

3. Duke Energy Carolinas and Duke Energy Progress are affiliated, vertically-integrated electric utilities operating generation, transmission, and distribution facilities in North Carolina and South Carolina service territories. They serve both retail and wholesale requirements customers in North Carolina and South Carolina.

B. Summary of Complaint and Response

4. NC WARN raises essentially three issues in its complaint. First, the core of NC WARN's complaint is its allegation that there is excess generating capacity in the Southeast generally and that Duke Energy in particular has built and continues to seek authority to build "unnecessary" and "expensive" generation resources.[6] NC WARN explains that Duke Energy Carolinas and Duke Energy Progress merged in 2012 and their holding company also has service territories in Florida, Ohio, Indiana, and Kentucky.[7] NC WARN states that after the merger of Duke Energy and Progress Energy in 2012, the combined Duke Energy provides more than 95 percent of the electricity in North Carolina, either directly or through municipalities and electric cooperatives.[8] NC WARN alleges that Duke Energy's

[3] *Id*. at 2-3.

[4] *Id.* at 3.

[5] *Id.*

[6] *Id*. at 1-2.

[7] *Id*. at 3.

[8] *Id*. at 1.

failure to purchase power from neighboring utilities leads to unjust and unreasonable rates.[9] Second, NC WARN alleges that Duke Energy manipulates the electricity market by constructing "costly and unneeded generation facilities above what is reasonable or necessary to meet demand,"[10] resulting in unjust and unreasonable rates.[11] Third, NC WARN alleges that Duke Energy has failed to comply adequately with Order No. 1000[12] and related orders and policies by not effectively connecting its transmission system with neighboring utilities, such as Dominion Power, the Southern Company (Southern),[13] and the Tennessee Valley Authority (TVA). These neighboring utilities, NC WARN alleges, also have capacity in excess of planned reserve margins.[14]

5. In response, Duke Energy contends that the complaint fails on procedural grounds and lacks substantive merit. Duke Energy states that NC WARN routinely intervenes and participates in retail rate cases in North Carolina, mainly to oppose Duke Energy's use of nuclear power, natural gas, and coal to generate electricity.[15] Duke Energy argues that the complaint raises issues that are not subject to the Commission's jurisdiction. Duke Energy asserts that virtually all of the allegedly improper actions pertain to Duke Energy's capacity procurement policies, retail load forecasting, and reserve margins. These matters, Duke Energy emphasizes, are directly regulated by the North Carolina Utilities Commission (North Carolina Commission) and the South Carolina Public Service Commission (South Carolina Commission). While Duke Energy acknowledges that the Commission may

[9] *Id*. at 2, 4-5.

[10] *Id*. at 1-2.

[11] *Id*. at 2.

[12] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[13] While NC WARN refers to "Southern Company," we note that Southern Company Services, Inc. intervened in this proceeding as agent on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Company Services, Inc., which are collectively generally referred to as "Southern Companies."

[14] Complaint at 2.

[15] Answer at 1, 7 & n.11.

address matters involving resource adequacy and reserve margins when they directly affect wholesale rates,[16] Duke Energy states that NC WARN does not identify any of Duke Energy's wholesale rates or rate schedules that have been rendered unjust and unreasonable by the alleged conduct.[17]

6. Next, Duke Energy asserts that NC WARN lacks standing to bring claims against Duke Energy's wholesale rates. Duke Energy states that NC WARN is not a wholesale requirements customer and, even if its members are retail customers, NC WARN has not alleged that there is a direct pass-through of wholesale rates approved by the Commission to retail rates.[18] Additionally, Duke Energy argues that the complaint is deficient on its face because it does not meet the requirements of Rule 203 (Contents of pleadings and tariff and rate filings) and Rule 206 (Complaints) of the Commission's Rules of Practice and Procedure.[19] Specifically, Duke Energy argues that NC WARN fails to: identify sufficiently how Duke Energy's alleged actions or inactions violate any applicable statute or regulation; make a good faith effort to quantify the financial impact of the alleged actions or inactions on NC WARN or its members; and discuss practical, operational, or any other non-financial impacts that would result from ruling in NC WARN's favor.[20]

7. Duke Energy states that NC WARN requests what will be a "lengthy and costly" investigatory hearing into Duke Energy's procurement practices to determine if RTO membership would be beneficial and whether Duke Energy should be forced "to purchase power from other utilities rather than construct wasteful and redundant power plants."[21] Duke Energy asserts that this relief is inappropriate or outside the Commission's jurisdiction. Duke Energy adds that NC WARN cites no case law demonstrating that the Commission has

[16] *Id.* at 5-6 & nn.6-8 (citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 40 (2007); *Conn. Dep't. of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009)).

[17] *Id.* at 6.

[18] Answer at 9-10 & nn.15-16 (citing *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229, at P 106 (2012) (noting that the complainants were challenging a transmission rate that flowed directly to their retail bill) (*PATH*); *North Star Steel Co., LLC v. Arizona Public Serv. Co.*, 116 FERC ¶ 61,022 (2006) (dismissing complaint filed by retail customer of Arizona Electric Power Company that had purchased power from various entities named as respondent)).

[19] *Id.* at 19 (citing 18 C.F.R. §§ 385.203 and 385.206 (2014)).

[20] *Id.* at 11-21.

[21] *Id.* at 39 & n.79 (quoting Complaint at 2).

the power to force Duke Energy to purchase power from other utilities.[22] Duke Energy asks the Commission to dismiss the complaint.

II. Notice of Filing and Responsive Pleadings

8. Notice of the complaint was published in the *Federal Register*, 79 Fed. Reg. 76,996 (2014), with interventions and protests due on or before January 5, 2015.

9. On December 18, 2014, Duke Energy filed a motion for extension of time and waiver of period for responses. The same day, NC WARN filed a response to the motion, stating that it did not object to the extension of time. On December 19, 2014, a notice issued granting Duke Energy an extension of time until January 26, 2015 to file an answer to the complaint. On January 26, 2015, Duke Energy timely filed its answer.

10. A timely notice of intervention was filed by the North Carolina Commission. Timely motions to intervene were filed by the American Public Power Association; Blue Ridge Electric Membership Corporation, Haywood Electric Membership Corporation, Piedmont Electric Membership Corporation, and Rutherford Electric Membership Corporation; Brookfield Energy Marketing LP; Energy United Electric Membership Corporation; Fayetteville Public Works Commission; Louisville Gas and Electric Co./Kentucky Utilities Co.; North Carolina Eastern Municipal Power Agency; North Carolina Electric Membership Corporation; North Carolina Municipal Power Agency Number 1; Southern Company Services, Inc.; and TVA.

11. Motions to intervene-out-of time were filed by the Alabama Municipal Electric Authority; Central Electric Power Cooperative, Inc.; South Carolina Electric & Gas Company; and the South Carolina Office of Regulatory Staff.

12. On February 9, 2015, NC WARN filed a motion for leave to reply to Duke Energy and reply. On February 19, 2015, North Carolina Eastern Municipal Power Agency and North Carolina Municipal Power Agency Number 1 (North Carolina Eastern Municipal Power Agency/North Carolina Municipal Power Agency Number 1) filed a motion to respond and limited response to NC WARN's reply.

[22] *Id.* at 40.

III. Discussion

A. Procedural Matters

1. General

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), we will grant the late-filed motions to intervene of Alabama Municipal Electric Authority, Central Electric Power Cooperative, Inc., South Carolina Electric & Gas Company, and the South Carolina Office of Regulatory Staff, given their interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by NC WARN and North Carolina Eastern Municipal Power Agency/North Carolina Municipal Power Agency Number 1 and will, therefore, reject them.

2. Other Matters

15. We first address Duke Energy's contention that the complaint raises issues that are not within the Commission's jurisdiction and that NC WARN lacks standing to bring the complaint because it does not mention wholesale rates and it has not adequately shown how NC WARN or its members will be adversely affected by the actions underlying the complaint. We disagree. Contrary to Duke Energy's interpretation of our precedent, the Commission does not require a complainant to allege a direct pass-through of wholesale rates to retail rates as a prerequisite for standing. A complaint "can be filed by any person, including an end-use customer that will pay . . . some portion of that rate when flowed through its retail bill."[23] NC WARN states that most of its members and families are customers of Duke Energy in North Carolina.[24] Duke Energy does not dispute that some portion of Duke Energy's

[23] *PATH*, 140 FERC ¶ 61,229 at P 106.

[24] Complaint at 2-3.

wholesale rates are flowed back into NC WARN members' rates.[25] Thus, NC WARN has standing sufficient to comply with Rule 206.[26]

16. We also find, contrary to Duke Energy's assertions, that NC WARN's complaint meets the threshold filing requirements of the Commission's Rules of Practice and Procedure for complaints.[27] NC WARN has met the threshold requirements of Rules 203 and 206 by: (1) arguing that Duke Energy has "failed to adequately comply with the Commission's Order No. 1000 and related Commission orders and policies by not effectively connecting its transmission system with neighboring utilities[;]"[28] (2) asserting that the "ongoing failure to reduce excess capacity through transmission and generation planning and cost allocations leads to waste and unreasonable and unjust rates[;]"[29] and (3) making "a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction."[30]

[25] Answer at 10 (arguing that *NC WARN has not alleged* that there is a direct pass-through of wholesale rates approved by the Commission to retail rates) (emphasis added).

[26] Rule 206(a) provides that "*any person* may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission or for any other alleged wrong over which the Commission may have jurisdiction." 18 C.F.R. § 385.206(a) (2014) (emphasis added).

[27] Rule 203 requires a complaint to contain "the relevant facts" and "the position taken by the participant . . . and the basis in fact and law for such position." 18 C.F.R. § 385.203(b)(6), (7) (2014); Rule 206 requires the complaint to, among other things, "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements." 18 C.F.R. § 385.206(b)(1) (2014).

[28] Complaint at 2.

[29] *Id*. at 4.

[30] 18 C.F.R. § 385.206(b)(4) (2014). *See* Complaint at 15 & n.4 (alleging that Duke Energy's failure to join an RTO or make other annual purchase arrangements results in excess capacity that could save Duke Energy customers $2-5 billion, or more). NC WARN's explanation of how customers could benefit from Duke Energy joining an RTO, *see* Complaint at 10, also complies with Rule 206(b)(3), 18 C.F.R. § 385.206(b)(3) (2014), by discussing the practical and operational benefits that would flow from ruling in NC WARN's favor.

leads to higher rates does not prove that rates are unjust and unreasonable or caused by or result in anticompetitive effects. Indeed, while NC WARN alleges that the Southeast (at least neighboring utilities Dominion Power, Southern, and TVA) has excess generating capacity, that fact, even if true, would not mean that excess capacity is available to Duke Energy such that additional construction would certainly be unnecessary. It is also unclear whether such capacity would be deliverable or meet Duke Energy's resource needs. Accordingly, we are not persuaded that we must investigate, fund a study or hold a hearing concerning whether it would be beneficial for Duke Energy to join an RTO. Moreover, as Duke Energy points out, even if, for sake of argument, an RTO would be beneficial to the region, the applicable standard in this case is not whether an RTO would be beneficial. Rather, the standard is whether an RTO is necessary to remedy undue discrimination or preference.[115]

65. As NC WARN has not shown Duke Energy's capacity construction or procurement practices are unjust and unreasonable or unduly discriminatory or preferential, we deny the relief NC WARN seeks.

IV. Conclusion

66. For the reasons discussed above, we find that NC WARN has not demonstrated that Duke Energy's capacity construction and procurement-related activities result in unjust and unreasonable wholesale energy or transmission rates. We also find that NC WARN has not made a viable claim of market manipulation, nor has NC WARN shown that Duke Energy violated Order No. 1000 or related orders or practices. Consequently, we decline to investigate, fund a study, or hold a hearing in Raleigh, North Carolina to evaluate whether it would be beneficial for Duke Energy to join an RTO; nor will we require Duke Energy to purchase capacity from neighboring utilities. The complaint is denied.

The Commission orders:

The complaint is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[115] *Snohomish*, 272 F.3d at 615.