UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. EL14-12-003

v.

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

Arkansas Electric Cooperative Corporation
Mississippi Delta Energy Agency
Clarksdale Public Utilities Commission
Public Service Commission of Yazoo City
Hoosier Energy Rural Electric Cooperative, Inc.

Docket No. EL15-45-000

v.

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

MOTION TO INTERVENE OUT-OF-TIME, MOTION TO LODGE, AND REQUEST FOR REHEARING OF WIRES LLC

Pursuant to section 313 of the Federal Power Act ("FPA")[1] and Rules 212, 214, 713, and 716 of the Rules of Practice and Procedure[2] of the Federal Energy Regulatory Commission

[1] 16 U.S.C. § 825l (2012).

[2] 18 C.F.R. §§ 385.212, 214, 713, 716 (2019).

("Commission" or "FERC"), WIRES LLC ("WIRES")[3] hereby submits this Motion to Intervene Out-of-Time, Motion to Lodge, and Request for Rehearing of Opinion No. 569 issued in the above-captioned proceedings on November 21, 2019.[4]

I. BACKGROUND AND INTRODUCTION

In November 2013, a coalition of large industrial and commercial electric energy customers filed a joint complaint in Docket No. EL14-12-000 ("MISO I") asking FERC to, among other things, find the base return on equity ("base ROE") used in the Midcontinent Independent Transmission System Operator, Inc. Transmission Owners' ("MISO TOs'") and American Transmission Corporation's ("ATC") formula transmission rates to be unjust and unreasonable and to reduce the base ROEs from 12.38 percent and 12.2, respectively, to 9.15 percent.[5] The Commission subsequently issued an order in October 2014, preliminarily finding the base ROE to be unjust and unreasonable and establishing settlement and hearing judge procedures on the base ROE issue.[6] In February 2015, before this complaint was adjudicated, a group of municipal organizations and electric cooperatives filed a second complaint in Docket No. EL15-45-000 ("MISO II") to preserve and extend the refund effective date established in the first complaint.[7] The MISO II complaint sought a determination that the base ROE is unjust and unreasonable and requested that it be lowered to no higher than 8.67 percent, while also seeking consolidation with the MISO I proceeding.

[3] For more information about WIRES, please visit www.wiresgroup.com.

[4] *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) ("Opinion No. 569").

[5] Complaint of the Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Indiana Industrial Energy Consumers, Inc., Minnesota Large Industrial Group, and Wisconsin Industrial Energy Group, Docket No. EL14-12-000 (filed Nov. 12, 2013).

[6] *Ass'n of Business Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,049 (2014).

[7] Complaint Requesting Fast Track Processing and Motion to Consolidate of Arkansas Electric Cooperative Corporation, Mississippi Delta Energy Agency, Clarksdale Public Utilities Commission, Public Service Commission of Yazoo City, and Hoosier Energy Rural Electric Cooperative, Docket No. EL15-45-000 (filed Feb. 12, 2015).

After settlement negotiations in MISO I failed, an Administrative Law Judge issued an initial decision recommending that the MISO TOs' base ROE be lowered to 10.32 percent.[8] The Commission affirmed the initial decision in Opinion No. 551, finding that the just and reasonable base ROE for the MISO TOs, due to anomalous capital market conditions, should be set at the central tendency of the upper half of the zone of reasonableness[9] pursuant to the two-step Discounted Cash Flow ("DCF") methodology established in Opinion No. 531.[10] Similarly, in MISO II, no settlement was reached and an Administrative Law Judge issued an initial decision recommending a base ROE of 9.70 percent.[11]

In April 2017, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") vacated and remanded Opinion No. 531.[12] The court held that under FPA section 206, FERC must first find that an existing rate is unjust and unreasonable before establishing a new rate that it determines to be just and reasonable.[13] The court explained that the Commission cannot simply declare that an existing ROE is unjust and unreasonable because it exceeds the single ROE value produced by a DCF analysis.[14] Because Opinion No. 551 relied on the methodology vacated by the D.C. Circuit, in November 2018, the Commission issued an order directing briefs in the two pending ROE complaints against the MISO TOs seeking comment on

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

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

[10] *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531, 147 FERC ¶ 61,234 ("Opinion No. 531"), *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014) ("Opinion No. 531-A"), order on reh'g, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015) ("Opinion No. 531-B"), *rev'd, Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

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

[12] *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) ("*Emera Maine*").

[13] *Emera Maine*, 854 F.3d at 27.

[14] *Id*.

how the methodology that it had proposed in October 2018 in response to *Emera Maine* should be applied in the MISO proceeding ("Briefing Orders").[15]

Under the new methodology, the Commission would first establish a composite zone of reasonableness by averaging the results of the DCF, the capital-asset pricing model ("CAPM"), and the Expected Earnings model. This composite zone of reasonableness would be divided into quartiles to determine presumptively just and reasonable ROEs for (1) below-average risk utilities, (2) average risk utilities, and (3) above-average risk utilities. Under this methodology, any complaint or challenge to an existing base ROE filed pursuant to FPA section 206 would be dismissed if the Commission determines that the existing base ROE falls within the quartile of the presumably just and reasonable base ROEs for a utility of similar risk. If the Commission determines that an existing base ROE is unjust and unreasonable under this standard, the Commission would then determine a new just and reasonable base ROE by averaging the estimated cost of equity produced by each of the three methodologies referenced above, in addition to the result of the Risk Premium model.

Recognizing the significance that its proposed ROE methodology would have to all FERC-jurisdictional public utilities, FERC issued a Notice of Inquiry ("NOI") in March 2019, to seek comments from a broader group of stakeholders regarding whether, and if so how, it should modify its policies concerning the determination of base ROEs.[16] FERC specifically sought feedback on each of the four models proposed in the Briefing Orders.[17]

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[15] *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 165 FERC ¶ 61,118 (2018) ("MISO Briefing Order"); *see also Coakley v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) ("NETO Briefing Order") (together with NETO Briefing Order, the "Briefing Orders").

[16] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207, at P 3 (2019) ("NOI").

[17] NOI at P 28.

WIRES filed comments in response to the NOI.[18] WIRES generally supported the proposal to employ four financial models in its ROE analysis, instead of relying solely on the DCF methodology. As described in WIRES' comments, the proposed methodology relied on several financial models used by investors to set the ROE, mitigating the effect of distortions that may occur if the Commission relied on only one model such as the FERC version of the DCF model. WIRES further explained that the methodology also provided a statutorily appropriate framework for determining whether an existing ROE has become unjust and unreasonable. WIRES also contended that the proposed ROE methodology was best-suited to promote investment in new transmission needed to accomplish the objectives of ensuring efficient and reliable electric service and enabling the ongoing transition to new generating sources. As a result, WIRES urged the Commission to adopt the proposed methodology as the best means of attracting critical capital to these risky, but sorely needed, investments on a national basis.

However, despite receiving approximately 175 initial comments and 30 reply comments in the NOI docket, the Commission opted instead to use Opinion No. 569 to make drastic changes to its proposed ROE methodology without substantively addressing the comments in the generic NOI proceeding or taking comment on the new approach. In Opinion No. 569, the Commission stated that it will use the DCF model and CAPM, but not the Expected Earnings or Risk Premium models.[19] To determine whether the existing ROE has become unjust and unreasonable, the Commission will determine the relevant utility's risk profile and then identify a range of presumptively just and reasonable base ROEs within the overall zone of reasonableness for that utility based on its risk profile.[20] The analysis will proceed in this sequence: the Commission

[18] Initial Comments of WIRES, Docket No. PL19-4-000 (June 26, 2019) ("WIRES Comments").
[19] Opinion No. 569 at P 31.
[20] *Id.* at P 60.

> will apply the DCF and CAPM models separately to the applicable proxy group, producing two zones of reasonableness: a DCF zone of reasonableness and a CAPM zone of reasonableness. Then the top of the DCF zone of reasonableness will be averaged with the top of the CAPM zone of reasonableness and the bottom of the DCF zone of reasonableness will be averaged with the bottom of the CAPM zone of reasonableness to determine a single composite zone of reasonableness for use in both the first and second prong analysis under FPA section 206. If an existing ROE is found to be unjust and unreasonable, the replacement ROE will be set at the central tendency of the composite zone or reasonableness or the central tendency of the upper or lower halves of the composite zone of reasonableness depending upon whether the utility is of average, above average, or below average risk, respectively.[21]

II. EXECUTIVE SUMMARY

The need for electric transmission investment in the United States remains critical for ensuring efficient and reliable electric service and enabling the ongoing transition to new generating sources. Numerous studies show that transmission investment provides enormous value and that the need for new transmission has never been greater. FERC needs to adopt policies that promote investment, and no such policy is of greater import than the methods used to set ROEs on those investments. Adequate ROEs are critical to attract capital to this challenging business, and the ROE methodology adopted in Opinion No. 569 jeopardizes that goal.

The base ROE methodology the Commission announced in Opinion No. 569 does not satisfy the *Hope* and *Bluefield* capital attraction standard[22] because it will not result in just and reasonable base ROEs. Each of the four models that the Commission proposed in the Briefing Orders to incorporate into its methodology for determining ROE provides additional information upon which investors rely and are valuable tools to be used in the Commission's analysis.

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[21] *Id*. at P 437.

[22] *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n,* 262 U.S. 679, 693 (1923) ("*Bluefield*"); *see also FPC v. Hope Nat. Gas. Co.*, 230 U.S. 591, 603 (1944) ("*Hope*"), "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks… [and] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." (together, "*Hope* and *Bluefield*").

Incorporating more models into the ROE determination provides for a more robust ROE analysis and more accurately reflects the information that investors use in analyzing their investment opportunities. The Commission's decision to include only two of the four methodologies, in an abrupt departure from its initial proposal and without an opportunity to comment, detracts from transmission-owning public utilities' ability to attract capital and invest in transmission infrastructure and therefore violates *Hope* and *Bluefield*.

Additionally, the Commission did not adequately support its decision to rely only on the DCF and the CAPM models and not the Expected Earnings and the Risk Premium models. Its exclusion of the Expected Earnings and Risk Premium models is arbitrary and capricious and not based on substantial evidence.

Moreover, the Commission erred in making the decision to issue sweeping policy changes in this docket based only on the proceeding-specific record in the MISO proceeding and ignore the substantial record it requested and amassed in the NOI docket. A specific contested proceeding is not the most appropriate docket for the Commission to announce broad policy changes that will impact the methodology for determining transmission ROEs for all FERC-jurisdictional public utilities. The Commission recognized this and issued an NOI to which a diverse and industry-wide variety of stakeholders responded, providing thousands of pages of comments and reply comments. The record compiled in the NOI docket represents a major devotion of time and resources by stakeholders to provide reasoned and substantive comments to the Commission to inform its decision on this important issue. However, the Commission has not considered these comments in reaching its decision in the MISO proceeding. Issuing a sweeping substantive change from the methodology proposed in the Briefing Orders and the NOI in the instant docket is contrary to the Administrative Procedure Act ("APA") because affected stakeholders were not afforded an

opportunity to comment on the new methodology. Accordingly, WIRES asks the Commission to remedy this procedural infirmity on rehearing and thoughtfully consider and respond to the arguments made in the NOI docket instead of announcing industry-wide policy changes on the basis of the more narrow record specific to the MISO TOs.

Finally, application of Opinion No. 569 will almost certainly have negative consequences for needed investment in transmission infrastructure. Transmission is the backbone of the Bulk Electric System and continued investment is necessary to meet the needs of the future. Maintaining safety, changing consumer needs, an evolving fuel mix for electric generation that is increasingly comprised of renewable and clean energy resources that need to be transported from remote locations to market centers, the potential for increased demand due to increased penetration of electric vehicles, and the need to integrate and accommodate new technologies all underscore the value of transmission as well as the need for additional investment in our nation's electric transmission system. On top of that, building and maintaining electric transmission is a risky, multi-billion-dollar, on-going, long-term commitment. It is critical that the Commission's policies provide adequate incentives needed to encourage investment in transmission-owning public utilities. There is significant competition for capital and the new ROE methodology fails to provide the necessary signals to investors to incent investment in transmission. And finally, the new ROE methodology does not satisfy the *Hope* and *Bluefield* capital attraction standard and may result in discouraging investment in transmission-owning public utilities and transmission infrastructure.

III. MOTION TO INTERVENE OUT-OF-TIME

Pursuant to Rule 214, WIRES submits the following in support of its Motion to Intervene Out-of-Time. WIRES is an international non-profit trade association of investor-, publicly-, and

cooperatively- owned transmission providers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and progressive state and federal policies that advance energy markets, economic efficiency, and consumer and environmental benefits through development of electric power infrastructure. WIRES' members support investment in needed and beneficial transmission infrastructure – investments that are critical to ensure a reliable, cost-effective, and modern bulk power system. WIRES is moving to intervene in this matter now because, as discussed below, the Commission's new methodology for determining just and reasonable base ROEs has detrimental industry-wide impacts that were not reasonably foreseeable prior to the issuance of Opinion No. 569.

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.[23] WIRES satisfies these criteria and should be granted late intervention.

A. Good Cause Exists For WIRES Not Intervening Within the Prescribed Period.

WIRES has good cause for filing a motion to intervene after the issuance of Opinion No. 569. It was not reasonably foreseeable that the Commission's order addressing the discrete FPA section 206 complaint proceedings in Dockets No. EL14-12 and EL15-45, which address only the base ROEs of the MISO Transmission Owners, would impose a new industry-wide methodology for calculating base ROE for all investor-owned electric utilities going forward. This is

[23] 18 C.F.R. § 385.214(d)(1).

particularly true given that, in March 2019, the Commission issued a NOI to examine how to revise its policies for determining the base ROE used in setting rates charged by jurisdictional public utilities. WIRES submitted comments and actively participated in that proceeding. In light of the NOI, it was not reasonably foreseeable that the Commission would issue an order in these specific proceedings that has implications regarding how the Commission will determine the just and reasonable base ROE for all jurisdictional public utilities. Specifically, as discussed below, the Commission's rejection of the Expected Earnings and Risk Premium models—on an industry-wide basis—raises issues that were not previously apparent and only became apparent after the Commission's issuance of Opinion No. 569.

As discussed below, WIRES' interest in intervening is to ensure the broader implications of Opinion No. 569 on investment in transmission and in getting needed infrastructure built are addressed. Were the Commission to deny WIRES' motion to intervene at this stage, it would in effect require industry groups and trade associations, like WIRES, to intervene in *all* company-specific rate filings to preserve their right to participate and review Commission orders in the event the Commission's orders unexpectedly implicate the Commission's methodology for determining base ROE for all jurisdictional public utilities. This outcome would be inefficient, unnecessarily burdensome for market participants, stakeholders, and the Commission, and inconsistent with the Commission's rules, which provide for late interventions for good cause such as those present here. Accordingly, the Commission should find that good cause exists for WIRES to intervene at this time and permit WIRES to address the industry-wide implications of Opinion No. 569 that were not reasonably foreseeable before the issuance of that order.

B. WIRES' Intervention Will Not Disrupt the Proceeding, Prejudice Existing Parties, or Create Additional Burden for Existing Parties.

Granting WIRES' motion to intervene will not disrupt the proceeding, prejudice existing parties, or create additional burdens for existing parties. The Commission has previously accepted late motions to intervene in conjunction with a request for rehearing where the order under review presents issues that have broader implications.[24] Granting WIRES' late intervention would not prejudice or create additional burdens for existing parties because WIRES is intervening to provide additional industry perspective on the implications of the Commission's new methodology for determining just and reasonable base ROEs for jurisdictional public utilities. Accordingly, the Commission should grant WIRES' motion to intervene because it will provide the Commission with unique additional industry perspective to aid in its decision-making, and will not prejudice or burden any existing party. This is particularly important because this industry-wide perspective heretofore has not been available in this proceeding and instead was provided in the NOI docket, which—as discussed further below—is the more appropriate venue for further action on ROE methodology.

C. WIRES' Interests Are Not Adequately Represented.

WIRES' interests are not adequately represented in this proceeding. WIRES represents the interests of its diverse membership which seeks to promote investment in transmission. WIRES has sponsored several widely-recognized studies demonstrating the need for transmission investment and the societal benefits from such investment, and WIRES is uniquely situated to comment on the impact the Commission's new ROE methodology will have on such investment.

[24] *See e.g.*, *Pub. Serv. Comm'n of Wisc. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 at P 69 (2015) (granting late-filed motion to intervene of the City of Escanaba which sought rehearing of a Commission order that raised issues with implication beyond the current proceeding); *S. Nat. Gas Co.*, 130 FERC ¶ 61,193 at PP 5-7 (2010) (granting trade association's late-filed motion to intervene for the purpose of seeking rehearing of an issue with broad industry implications). *See also Paiute Pipeline Co.*, 70 FERC ¶ 61,227 at 3 (1995) (stating that trade association's motion to intervene out of time is granted and that the Commission will address the simultaneously filed request for rehearing).

The Commission has long recognized the value of perspectives from industry organizations such as WIRES in considering matters with broad policy implications, noting previously that "[w]here membership associations meet the standard of Rule 214, [the Commission] should encourage informed pleadings . . . ."[25] Accordingly, WIRES is able to provide a unique and well-informed industry perspective on the issues decided in Opinion No. 569 that cannot be adequately represented by any other existing party.

D. Communications

All correspondence, communications, pleadings, and other documents related to this proceeding should be addressed to the following representative:

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IV. MOTION TO LODGE

WIRES respectfully moves to lodge in Docket Nos. EL14-12 and EL15-45 the attached Comments, which WIRES submitted to the Commission on June 26, 2019 in Docket No. PL19-4. The WIRES Comments are highly relevant to the issues in Dockets Nos. EL14-12 and EL15-45 because they are directly responsive to the proposal in the Briefing Orders and concern the Commission's modifications to the methodology it uses to establish a new just and reasonable base ROE when the existing base ROE has been shown to be unjust and unreasonable.

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[25] *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,265, at P 9 (2007). *See also S. Nat. Gas Co.*, 130 FERC ¶ 61,193 at PP 5-7 (granting trade association's late-filed motion to intervene and noting that the trade association "is able in this proceeding to present [its members'] common views regarding an issue of continued significance for the industry").

The Commission grants motions to lodge where parties present good cause for granting the motion.[26] WIRES' motion to lodge is appropriate here because, in Opinion No. 569, the Commission dramatically revised its methodology for establishing a just and reasonable base ROE without considering the WIRES Comments (or the voluminous comments submitted by others in the docket), which directly address the issue.

As discussed above, in the Briefing Orders, the Commission proposed to, among other things, change its approach to establishing a just and reasonable base ROE when it determines that an existing base ROE is no longer just and reasonable.[27] The Commission proposed to use four financial models—the DCF model, the CAPM, the Expected Earnings model, and the Risk Premium model—to establish a new base ROE. In particular, in the MISO Briefing Order, the Commission established a paper hearing addressing whether and how this new methodology should apply to the proceedings in Docket Nos. EL14-12 and EL15-45 pending before the Commission involving the MISO Transmission Owners' base ROE.[28]

In the NOI, the Commission sought comments on the revised ROE methodology set forth in the Briefing Orders. The Commission explained that, "[a]lthough the Commission requested briefing . . . in the *Coakley* and MISO Briefing Order, [the NOI] proceeding [would] provide *all interested stakeholders* with the opportunity to comment on the Commission's ROE policy in light of the decision in *Emera Maine*."[29] WIRES subsequently submitted its Comments in the NOI proceeding.

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[26] 18 C.F.R. § 385.716.

[27] MISO Briefing Order at P 18.

[28] MISO Briefing Order at P 20.

[29] ROE NOI at P 28 (emphasis added).

In Opinion No. 569, the Commission abruptly changed course and drastically altered the method by which it establishes a just and reasonable base ROE when it determines that an existing base ROE is no longer just and reasonable. In doing so, the Commission did not consider or respond in any way to the Comments that WIRES submitted to the Commission in the NOI proceeding. These comments directly support the Commission's proposal to utilize the Expected Earnings and Risk Premium models, in addition to the DCF model and CAPM, in establishing a just and reasonable base ROE. Accordingly, WIRES moves to lodge its Comments into Docket Nos. EL14-12 and EL15-45 so that the Commission may consider the Comments in conjunction with WIRES' request for rehearing of Opinion No. 569.

V. SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

In accordance with Rule 713(c)(2),[30] WIRES provides the following enumerated statement of issues, including citations to representative Commission and court precedent:

1. The Commission erred in approving a methodology that will result in unjust and unreasonable base ROE determinations that do not satisfy the *Hope* and *Bluefield* standard;

2. The Commission acted arbitrarily and capriciously,[31] abandoning its previous proposal to rely on four financial models—the DCF, the CAPM, the Expected Earnings model, and the Risk Premium model—to establish a new just and reasonable base ROE when the existing base ROE has been shown to be unjust and unreasonable;

3. The Commission erred in approving a new methodology that violates *Emera Maine* because it effectively collapses the two-pronged section 206 analysis into one by unreasonably narrowing the range of presumptively just and reasonable base ROEs that results from application of the new analysis,[32] essentially shifting the burden from complainants (to prove that the existing base ROE is unjust and unreasonable) to utilities (to prove that their existing base ROE, if it falls outside of the narrow range of presumptively just and reasonable ROEs, is just and reasonable), contrary to FPA section 206;

[30] 18 C.F.R. § 385.713(c)(2).

[31] 5 U.S.C. 706(A)(2) (2012).

[32] *See Emera Maine* at 24-25.

4. The Commission acted arbitrarily and capriciously in deciding to issue industry-wide policy changes on the basis of a limited record in a single adjudicative proceeding after it had opened and developed a full record in a generic proceeding;[33]

5. The Commission erred in failing to provide adequate notice and opportunity for comment on a new proposal to the industry to which it will be subject;[34] and

6. The Commission's refusal to consider and respond to the extensive record on this same proposal that it requested and to which multiple stakeholders contributed in the NOI docket is arbitrary and capricious.[35]

VI. REQUEST FOR REHEARING

The APA provides that courts shall set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] As the D.C. Circuit describes, the Commission's "policy decisions are entitled to deference so long as they are reasonably explained. . . . Under the arbitrary and capricious prong of the standard, [the court] must ensure that FERC has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . ."[37] The Commission has not satisfied its duty under the APA and therefore its actions in Opinion No. 569 are arbitrary and capricious.

A. The Commission's Decision to Abandon its Previous Proposal to Rely on Four Financial Models When Establishing a New Just and Reasonable Base ROE is Arbitrary and Capricious.

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[33] 5 U.S.C. § 553(b)

[34] *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (*citing Batterton v. Marshall*, 648 F.2d 694, 708 (D.C.Cir.1980)); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (internal citations omitted) ("*PG&E*").

[35] *See*, *e.g.*, *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ([A]n agency's "failure to respond meaningfully" to objections raised by a party renders its decision arbitrary and capricious.); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35–36 (D.C. Cir. 1977).

[36] 5 U.S.C. 706(A)(2).

[37] *Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 468 F.3d 831, 839 (D.C. Cir. 2006) (internal citations omitted).

The Commission erred in Opinion No. 569 by abandoning its previous proposal to rely equally on the four financial models—the DCF, the CAPM, the Expected Earnings model, and the Risk Premium model—when establishing a new just and reasonable base ROE.[38] In Opinion No. 569, the Commission stated that it "will expand [its] methodology for determining . . . a new just and reasonable replacement base ROE under the second prong of [FPA] section 206," and that it "will use the DCF model and CAPM in our ROE methodology, but not the Expected Earnings or Risk Premium models."[39]

In the MISO Briefing Order, the Commission explained at length why it was necessary to rely on the four financial models in establishing a new just and reasonable base ROE. Specifically, the Commission explained that, "[w]hile some investors may give some weight to a DCF analysis, it is clear that other investors place greater weight on one *or more of the other methods* for estimating the expected returns from a utility investment."[40] The Commission added that "cost of equity estimates based on all four of the methods . . . are a reasonable measure of investor expectations, since they are among the information that investors rely upon when making investment decisions."[41]

Conversely, in Opinion No. 569, issued one year later, the Commission unexpectedly reversed course. In particular, the Commission stated that, "on balance, the Expected Earnings and Risk Premium models would not improve our ROE determinations sufficiently to justify using those models, in light of their flaws and the potential inaccuracies and complexity that they could

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[38] MISO Briefing Order at PP 16, 18, 34-41; *see also* Coakley Briefing Order at PP 17, 32-39; ROE NOI at PP 26, 28, 34.

[39] Opinion No. 569 at P 31.

[40] MISO Briefing Order at P 37 (emphasis added).

[41] MISO Briefing Order at P 37.

introduce to our ROE analyses."[42] Rather, the Commission explained that "expanding our ROE methodology to include the CAPM, as well as the DCF model, will better reflect how investors make their investment decisions and result in more accurate cost of equity estimates."[43] These explanations for this change in course are unavailing and insufficient and the resulting ROE is not "sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise capital necessary for the proper discharge of its public duties."[44] The Commission's decision to use the DCF model and CAPM to establish a new just and reasonable ROE, but not the Expected Earnings or Risk Premium models, is not supported by the record, and is therefore arbitrary and capricious.

1. The Commission Should Rely on the Four Financial Models Outlined in the Briefing Orders and ROE NOI in Order to Establish a Just and Reasonable Base ROE.

As WIRES explained in its NOI comments, the Commission should adopt an ROE methodology that relies on several financial models used by investors which would mitigate the effect of distortions that may occur if the Commission were to rely on only one model, such as the FERC version of the DCF model.[45] No single financial model captures perfectly the myriad factors that investors consider or accurately reflects all market conditions.[46] However, by equally weighting the DCF, CAPM, Expected Earnings, and Risk Premium models, the Commission's

[42] Opinion No. 569 at P 31.

[43] Opinion No. 569 at P 32; *see also* Opinion No. 569 at PP 35-39.

[44] *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 693 (1923) ("*Bluefield*"); *see also Hope*, 320 U.S. at 603.

[45] *See* WIRES Comments at 10-16.

[46] *Id*. at 12-14.

original proposal would help avoid illogical or unjust and unreasonable results by providing additional data points used by investors.[47]

The investment community employs various forms of the four financial models outlined in the MISO Briefing Order—including the Expected Earnings and Risk Premium models—to determine the cost of equity. Investors recognize that each of the four financial models has its own advantages, but that each has shortcomings as well. This is largely because each financial model is based on or incorporates assumptions that may be limited or fluctuate with market conditions. The use of diverse methodologies to calculate allowed ROEs is the best method available to overcome the inherent shortcomings of individual models and the related assumptions for applying them in regulatory proceedings.[48]

The Commission recognized this fact in the Briefing Orders and in the NOI. For example, in the Briefing Orders, the Commission quoted Roger Morin, the author of New Regulatory Finance:

> In the absence of any hard evidence as to which method outdoes the other, *all relevant evidence should be used* and weighted equally, in order to minimize judgmental error, measurement error, and conceptual infirmities. A regulator should rely on the results of *a variety of methods* applied to a variety of comparable groups, and not on one particular method.[49]

The Commission concluded that, "by providing four different approaches to estimating the cost of equity and determining ROEs, using these models together reduces the risk associated with relying on only one model; that is the risk of misidentifying the just and reasonable ROE by relying on a flawed cost of equity estimate."[50]

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[47] *Id*. at 11.
[48] *Id*. at 14.
[49] MISO Briefing Order at P 38 (quoting Roger A. Morin, New Regulatory Finance, at 429 (Public Utilities Reports, Inc. 2006) ("Morin")) (emphasis added).

[50] MISO Briefing Order at P 40.

In Opinion No. 569, notwithstanding its prior statements supporting the use of four models, the Commission abruptly changed course by announcing that it would use only the DCF model and CAPM to establish base ROEs going forward.[51] This is not the reasoned, adequately noticed, decision-making that is required under the APA. The Commission's basis for abandoning the Expected Earnings and Risk Premium models appears to be that those models suffer from certain flaws or defects.[52] Yet, the Commission itself recognized in Opinion No. 569 that, "to the extent that investors in fact rely on a financial model, the fact that the model may have defects *does not invalidate its use in determining ROE*."[53] Thus, not only is Opinion No. 569 inconsistent with the Briefing Orders and the NOI, but it is internally inconsistent as well. Moreover, the Commission has chronicled the many flaws associated with the DCF model and why it is no longer appropriate to rely solely upon that model.[54] Accordingly, any "defects" with the Expected Earnings or Risk Premium model alone cannot form the basis for the Commission's determination to not utilize these models in its ROE analysis.

Significantly, Opinion No. 569 incorrectly found that investors do not rely on the Expected Earnings or Risk Premium models in evaluating investment opportunities.[55] But to the contrary, in its NOI comments WIRES made clear that these models are among the different methodologies that investors and investment analysts use to forecast ROEs.[56] In Opinion No. 531-B, the Commission noted this as well, stating that "the expected earning analysis and DCF analysis are used to estimate two different types of returns, each valid in its own right, that investors rely upon

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[51] Opinion No. 569 at PP 1, 18.

[52] *See* Opinion No. 569 at PP 31, 201-207, 340-351.

[53] Opinion No. 569 at P 171 (emphasis added).

[54] *See* MISO Briefing Order at PP 42-49.

[55] Opinion No. 569 at P 345.

[56] WIRES Comments at 15.

in determining whether to invest in a particular company."[57] The Commission's failure in Opinion No. 569 to address the record in the NOI proceeding regarding investors' reliance upon the Expected Earnings and Risk Premium models, as well as the Commission's previous findings on the issue, render its decision to abandon those financial models arbitrary and capricious.

Furthermore, Opinion No. 569 does not address how the Commission's decision to use only the DCF model and CAPM in its ROE analysis will adequately mitigate the flaws associated with either of those models. In the MISO Briefing Order, the Commission justified its proposal to rely upon the four financial models by explaining that "[t]here is significant evidence indicating that combined estimates from different models is more accurate than relying on a single model."[58] The Commission again used this exact same language in Opinion No. 569 to justify its proposal to utilize only the DCF model and CAPM in establishing a base ROE.[59] The Commission cannot rely upon the same rationale in support of a materially altered proposal.

Finally, it is important to note that the Commission did not propose in either the Briefing Orders or the NOI to use only the DCF model and CAPM to establish a just and reasonable base ROE. As a result, parties were not given adequate notice of the Commission's new approach and were given no opportunity to evaluate and provide comments on the new approach.

2. The Commission's Findings Regarding Whether the DCF Has Performed Inconsistently with Underlying Theory Are Flawed.

The Commission's analysis of whether anomalous market conditions have distorted its DCF analysis, and whether the Commission's new ROE analysis adequately addresses these distortions, is unsound. As Opinion No. 569 details, in Opinion Nos. 531 and 551, the Commission

[57] *Martha Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165, at P 130 (2015).

[58] MISO Briefing Order at P 40 (citation omitted).

[59] Opinion No. 569 at P 38 (citation omitted).

set the ROE at the midpoint of the upper half of the zone of reasonableness because the Commission found that anomalous market conditions had distorted its DCF analysis.[60] In the MISO Briefing Order, the Commission explained that anomalous market conditions would be "largely irrelevant" under the Commission's proposed ROE analysis because the cost of equity results produced by the DCF model would be averaged with the results of the other three models.[61] In particular, the Commission concluded that, under its proposal to rely upon the four financial models, "whether a change in capital market conditions is anomalous or persistent is of less importance, because relying on multiple financial models makes it more likely that the Commission's decision would accurately reflect how investors are making their investment decisions."[62]

In Opinion No. 569, the Commission finds that "the issue of whether the low-interest rate capital market conditions during 2015 were 'anomalous' or may have distorted the results of the DCF model are not relevant to our revised approach to determining just and reasonable ROEs."[63] The Commission notes that, under its new approach, it is "averaging the results of the DCF and CAPM models to determine the composite zone of reasonableness and setting the ROE of average risk utilities at the central tendency of that composite zone of reasonableness."[64] The Commission concludes that "there is thus no need to find that low-interest rate capital market conditions distort

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[60] Opinion No. 569 at PP 160-161 (citing Opinion No. 531, 147 FERC ¶ 61,234, at P 145; Opinion No. 551, 156 FERC ¶ 61,234, at P 119).

[61] _Id._ at P 162 (citing MISO Briefing Order at P 46).

[62] _Id_.

[63] _Id._ at P 170.

[64] _Id_.

the results of a DCF analysis so as to justify increased the ROE for average risk utilities above the central tendency."[65]

The Commission's reasoning in Opinion No. 569 falls short of the reasoned decision-making required by the APA. Again, the Commission cannot rely upon the same reasoning in both the MISO Briefing Order and Opinion No. 569 to support two irreconcilably different ROE analyses (i.e., relying on four financial models versus relying on only two). If the Commission truly believes that it need not account for distortions in its DCF analysis due to anomalous market conditions under its new ROE methodology, then the Commission must articulate a *new* rationale for why that is the case. The Commission cannot simply fall back upon its reasoning from the MISO Briefing Order, which concerned its proposed approach to rely upon four financial models—specifically for the purpose of mitigating the flaws in the models the Commission now chooses to rely on without such mitigation. The Commission's reasoning in Opinion No. 569 is arbitrary and capricious and unsupported by substantial evidence.

3. The Commission's Failure to Include the Expected Earning Model in its New ROE Methodology is Inconsistent with the Capital Attraction Standard of *Hope* and *Bluefield*.

Not only is Opinion No. 569's determination not to include the Expected Earning model as part of the Commission's methodology for establishing a just and reasonable base ROE arbitrary and capricious, it does not meet the *Hope* and *Bluefield* capital attraction standard. The Commission has previously found that the Expected Earnings model, which calculates the earnings an investor expects to receive on the book value of a particular stock, is useful because it corroborates the results produced by the DCF model.[66] For example, in Opinion No. 551, the

[65] Id. at P 170.

[66] Id. at P 200 (citing Opinion No. 551, 156 FERC ¶ 61,234, at P 230).

Commission relied upon the results of an Expected Earnings analysis to find that a mechanical application of the DCF methodology would not satisfy the requirements of *Hope* and *Bluefield*.[67] However, in Opinion No. 569, the Commission backtracked, finding that "it is not appropriate to use the Expected Earnings model in [its] new base ROE methodology"[68] because "the record does not support departing from [its] traditional use of market-based approaches to determine ROE."[69]

As an initial matter, the Commission's analysis of *Hope*'s and *Bluefield*'s capital attraction standard with respect to the Expected Earnings model is flawed. *Hope* and *Bluefield* require that the Commission establish a base ROE that is "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[70] In Opinion No. 569, the Commission attacks the use of Expected Earnings as not consistent with *Hope*. The Commission errs by analyzing the Expected Earnings model in a vacuum. Specifically, the Commission's narrowly-focused objections misstate the intended purpose of the model within the Commission's originally-proposed ROE methodology. The Expected Earnings model is more appropriately evaluated as but one of four financial models that the Commission would use, in conjunction, to establish a just and reasonable base ROE. By focusing only on the alleged deficiencies of the Expected Earning model, the Commission misses the larger objective of *Hope* and *Bluefield*—to ensure that transmission-owning public utilities can attract investment capital. The Commission's new two-model approach renders achieving that objective much more difficult.

Opinion No. 569 finds that various aspects of the Expected Earnings model are inconsistent with *Hope* and *Bluefield*. For example, the Commission criticizes the Expected Earning model's

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[67] Opinion No. 551, 156 FERC ¶ 61,234, at P 9.

[68] Opinion No. 569 at P 200.

[69] Id. at P 201.

[70] *Hope*, 320 U.S. at 603.

use of book value of a particular stock, as opposed to its market value. Opinion No. 569 states that, because investors cannot purchase an investment in a public utility at book value, the Expected Earnings model does not represent "returns on investments in other enterprises having corresponding risks" and thus using the model does not satisfy *Hope*.[71] The Commission's objections focus on the use of Expected Earnings alone and therefore miss the mark. The Expected Earnings model satisfies *Hope* and *Bluefield* as part of the Commission's four-model proposal because it contributes to an overall reflection of investor behavior that supports capital attraction. Including at least one methodology that utilizes book-value concepts provides a stabilizing influence in the event that inputs in the other models are anomalous at any time.[72] Including the Expected Earnings model in the ROE methodology reflects a key balancing component of utility ratemaking that no other model accounts for, and it must be a factor in the Commission's ROE analysis to ensure that base ROEs are just and reasonable. Without the use of Expected Earnings in the base ROE analysis, the results are unjust and unreasonable and will not support capital attraction or investment in transmission. Accordingly, the Commission should utilize the Expected Earnings model in establishing a new just and reasonable base ROE.

4. The Risk Premium Model Should Be Included in the Commission's ROE Methodology.

Like the Expected Earnings model, the Commission should also employ the Risk Premium model in its new ROE methodology. The Commission acknowledged the value that the Risk Premium model provides in Opinion No. 551, stating that "it is appropriate to rely on risk premium

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[71] Opinion No. 569 at PP 201-202 (internal citations omitted). Additionally, the Commission states that the simplicity of the Expected Earnings model does not justify its use when it otherwise does not advance Hope's objectives. Opinion No. 569 also to use of the Expected Earnings model because *Hope* states that the market value of a utility is the result of its earnings, which depends upon its rates. Opinion No. 569 at P 207 (internal citations omitted).

[72] WIRES Comments at 15.

analyses as corroborative evidence during periods of anomalous capital market conditions."[73] Yet, in Opinion No. 569, the Commission found to the contrary. In particular, Opinion No. 569 erroneously concludes that "the additional robustness that the Risk Premium model adds to the ROE determination is outweighed by the disadvantages of its deficiencies."[74] But, indeed, all of the models have deficiencies and the purpose of their collective use is to moderate these individual deficiencies.[75] Failing to include the Risk Premium model means that, by definition, certain DCF limitations will go unaddressed and skew the Commission's analysis.[76] If models are disqualified because of their deficiencies, the Commission cannot reasonably rely on any of them.

5. Although Opinion No. 569's most consequential error is the exclusion of the Expected Earnings and Risk Premium models, Opinion No. 569 contains additional errors and leaves important questions unresolved.

The most significant error that Opinion No. 569 commits is its arbitrary and capricious abandonment of the Expected Earnings and Risk Premium Models. However, it contains various additional errors and leaves unaddressed important issues. While the decision to not use the Expected Earning and Risk Premium models in its analysis is the most evident change from the initial proposal, there are other changes that impact the ROE methodology. For example, the Commission also failed to recognize that the record evidence on state ROEs must be treated as an understated floor on the returns that investors require for investments in electric transmission. The Commission thus erred with respect to state ROEs both by understating their importance and failing to acknowledge their implications. The Commission stated in Opinion No. 569 that it "need not" consider state ROE evidence, except as a "check given the model risk." Opinion No.

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[73] Opinion No. 551, 156 FERC ¶ 61,234, at P 191.

[74] Opinion No. 569 at P 340.

[75] WIRES Comments at 14-15.

[76] *Id*. at 13-15.

569 at P 363. And yet the Commission acknowledges that state ROEs "feature lower risks than transmission companies subject to Commission ROEs." *Id.* This acknowledgement is consistent with an undisturbed finding of Opinion No. 531:

> investors providing capital for electric transmission infrastructure face risks including the following: long delays in transmission siting, greater project complexity, environmental impact proceedings, requiring regulatory approval from multiple jurisdictions overseeing permits and rights of way, liquidity risk from financing projects that are large relative to the size of a balance sheet, and shorter investment history. We find that these factors increase the NETOs' risk relative to the state-regulated distribution companies.

Opinion No. 531 at P 149.

The Commission's conclusion that state ROEs deserve less consideration because they are "less precise" thus fails to recognize that state ROEs provide critical information because electric transmission ROEs should generally be higher than state ROEs. While distribution is especially known as less risky than transmission, the Wolfe Research report noted above reveals that investors see state generation as facing less risk than transmission as well. In its analysis under Step 1 of its FPA Section 206 analysis, the Commission cites state ROEs as supportive of its decision. But the numbers the Commission cites reveal that they undermine its selection of 9.88% as the new base ROE. The Commission recounted that the relevant range for state ROEs, including all integrated utilities and most distribution-only utilities was "from 9.5 percent to 10.4 percent." Opinion No. 569 at P 522. The Commission's result inexplicably falls in the bottom half of this range for less risky alternative investments. An ROE that is not above or at least near the top of this range would be insufficient to attract capital given investments of comparable risk.[77]

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[77] The state ROE evidence was not as significant in the MISO Briefing Order because the result there was closer to the upper, rather than the lower, end of the state ROEs range for the complaint time period.

In addition, stakeholders were not provided adequate opportunity to evaluate the Commission's decision to account for risk at two distinct points in its ROE analysis. The Commission first accounts for a utility's risk in creating a proxy group of similarly-situated utilities that the Commission uses to establish a zone of reasonableness.[78] The Commission then accounts for risk a second time in dividing the zone of reasonableness into quartiles composed of utilities of high risk, medium risk, and low risk.[79] There is no basis for the Commission to consider risk this second time after already taking risk into account in composing the proxy group. In addition, even for aspects of the Commission's proposal that were adopted unchanged, the application and impact changed with the new methodology. The differences between the two methodologies and the impact upon applications is another reason why Opinion No. 569's abandonment of the Commission's proposed ROE methodology in the MISO Briefing Order is arbitrary and capricious and cannot stand.

Additionally, the Commission's failure to consider the record in the NOI docket leaves important considerations unaddressed, some of which Order No. 569 compounds. For example, the narrower zone of reasonableness that Opinion No. 569 establishes effectively results in collapsing the Commission's two-pronged section 206 analysis, violating the spirit of *Emera Maine*. In that order, the Court found that it is not enough for the Commission to invalidate a rate under section 206 just because the existing rate is greater than the rate that it determines to be the just and reasonable replacement under the second prong of the section 206 analysis.[80] In other words, the Commission cannot collapse the two prongs of the section 206 analysis into one.

[78] Opinion No. 569 at PP 387-389.

[79] Id. at PP 57-68.

[80] *Emera Maine* at 25 ("To satisfy its dual burden under section 206, FERC was required to do more than show that its single ROE analysis generated a new just and reasonable ROE and conclusively declare that, consequently, the existing ROE was *per se* unjust and unreasonable.").

However, the Commission in Opinion No. 569 so narrowed the zone of reasonableness used in the first prong of the section 206 analysis that it virtually guarantees the existing rate will be unjust and unreasonable unless it is virtually the same number (or very close to it) as the ROE computed under the second prong of the section 206 analysis.

It is unreasonable for the Commission to ignore the full zone of reasonableness established in the first prong of the section 206 analysis, instead introducing its quartile concept that disregards most of the zone and further to remove any financial models that could have resulted in a wider zone of reasonableness and wider resulting quartiles. As a result, the quartiles used in establishing the zone of reasonableness used in the first prong of the section 206 analysis are very narrow. Thus, the zone of reasonableness under the first prong is effectively the same as the just and reasonable rate under the second prong, which is inconsistent with *Emera Maine*. Moreover, the narrowness of the range of presumptively just and reasonable ROEs conflicts with FPA section 206 because it shifts the burden that FPA section 206 places on a complainant to demonstrate that an existing ROE is unjust and unreasonable to the utility to demonstrate that any ROE that falls outside of this narrow range is just and reasonable. And the narrowness of the range of presumptively just and reasonable ROEs will have concrete impacts on transmission investment: because minor changes in market conditions or the composition of the relevant proxy group will be more likely to shift this narrow range of presumptively just and reasonable ROEs such that a utility's existing ROE falls outside of it, utilities may face more frequent (and potentially pancaked) complaints. As a result, ROEs may become more volatile, creating uncertainty that may both unnerve investors and discourage beneficial transmission investment.

As an additional example, the Commission's adoption of a high-end outlier test applied to results of the two-stage DCF model incorporating a long-term growth component is both

unnecessary and demonstrates the flaws of weighting the DCF model results as half of the ROE determination. The Commission appropriately recognized in Opinion No. 531 that the use of the two-stage DCF renders the high-end outlier test superfluous.[81] However, the Commission adopted a high-end outlier test used in conjunction with the two-stage DCF in Opinion No. 569. The Commission did so despite its recognition "that the inclusion of a long-term growth projection based on GDP tends to normalize the ROEs produced by the model, and that this minimizes the likelihood that there will be any high-end outlier."[82] The Commission does not adequately explain its reversal on the need for the high-end outlier test. Indeed, the fact that the Commission felt the need to retain a high-end outlier test supports the concerns that WIRES and other parties have raised about the limitations of the DCF model. An ROE analysis that produces just and reasonable results should not need to rely on outlier tests to screen companies out of proxy groups. However, because the new methodology announced in Opinion No. 569 weights the DCF model as half of the analysis despite its acknowledged limitations, the Commission apparently needed the option to smooth out its results through a high-end outlier test. This is arbitrary and capricious and further supports the flaws of relying too heavily on the DCF results.

B. Opinion No. 569 does not satisfy statutory requirements for the issuance of a rule widely affecting industry and the Commission should address the record it solicited in the NOI docket.

1. The Commission's issuance of Opinion No. 569 does not satisfy the APA's requirements.

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[81] Opinion No. 531 at P 118 ("Because we are adopting a two-step DCF methodology for determining the ROE for public utilities, we find that the high-end outlier issue in this proceeding is moot. Under the two-step DCF methodology, it is unnecessary to screen the proxy group for unsustainable growth rates because the methodology assumes that the long-term growth rate for each company is equal to GDP.").

[82] Opinion No. 569 at P 378.

The MISO Transmission Owners' proceeding is not the appropriate docket for the Commission to issue sweeping changes to its ROE analysis. The Commission can depart from its policies, provided it offers a reasonable explanation for doing so.[83] However, in Opinion No. 569 the Commission does not provide a reasonable explanation for announcing a major policy change that would affect every jurisdictional ROE in this more narrowly limited adjudicative proceeding. The record in this adjudicative proceeding is highly specific to the facts of the case involving the MISO Transmission Owners' ROE determination, and Opinion No. 569 relies extensively on the testimony of one witness and on Trial Staff.

This error is particularly inconsistent with the Commission's issuance of the NOI, in which it requested and received comment from a multitude of stakeholders on the exact proposal that it issued in the Briefing Orders. The Commission has not explained its reasoning for issuing an industry-wide policy change in this adjudicated proceeding while the generic NOI docket remains open. Because it has not explained its reasoning for doing so, the Commission's action is arbitrary and capricious.

WIRES does not dispute the general proposition that the Commission has the authority to choose to proceed with changes to its policies in adjudicative proceedings instead of rulemakings. However, the cases Opinion No. 569 cites for this proposition in which a rulemaking had already been opened differ factually from the situation presented here and therefore may be distinguished.[84] Unlike in those cases, the Commission did not explicitly limit the application of

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[83] *Id.*, P 58 (internal citations omitted).

[84] *See Michigan-Wisconsin Pipeline Co. v. FPC*, 520 F.2d 84, 86 (D.C. Cir. 1975) (Commission issued a NOPR on related issue but indicated therein that any decisions it made in similar cases before an order issued in the rulemaking docket would be on a case by case basis); *Pacific Gas and Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (no generic rulemaking docket had been initiated related to challenged order); *AEP Power Mktg., Inc.*, 108 FERC ¶ 61,026, at P 190 (2004) (Commission issued a generic rulemaking and indicated that challenged orders made clear that measures would only be applied until such time as a broader rulemaking order issued); *Investigation*

Opinion No. 569 and did not indicate that it would take action in the NOI docket. In *NLRB*, the Supreme Court noted that "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion or a violation of the [Administrative Procedure] Act."[85] This is such a case as transmission owners that are not parties in the instant docket will be affected by the new methodology without having notice or an opportunity to comment. Thus, a multitude of affected entities that have not had the opportunity to have their views heard in this proceeding will suffer adverse consequences as a result of Opinion No. 569.[86] Thus, the Commission may depart from this general proposition and indeed should exercise its discretion to do so on rehearing in this case, given the unique circumstances presented here.

2. If Opinion No. 569 is intended to be a rule of general application, it should not issue without sufficient notice and opportunity for comment.

The Commission's new two-model ROE methodology announced in Opinion No. 569 was not vetted through adequate notice and comment or through briefing in this proceeding. Both in the Briefing Orders and in the NOI, the Commission sought and received comments on the proposal to use four models in its ROE analysis, as opposed to relying solely on the DCF model. Commenters and participants in this proceeding were not on notice that the Commission might elect instead to employ a two-model approach and did not consider or provide comments that addressed that eventuality. Thus, the Commission's action in Order No. 569 did not satisfy due process. Nor does the record support the use of the ROE methodology announced therein.

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of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 103 FERC ¶ 61,349 at PP 51-52 (2003) (Commission found generic rulemaking not required because tariff revisions expressly affected only individual companies and did not constitute rule changes, and because it sought comments on market behavior rules in the section 206 investigation).

[85] *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) ("*NLRB*").

[86] *See id.* at 295.

Even if the Commission had provided notice of the two-model methodology, it failed to satisfy the APA by issuing what appears to be a new substantive rule outside of a notice and comment rulemaking. The APA requires notice and comment for substantive rules.[87] Although it exempts "interpretive rules" and "general statements of policy" from notice and comment requirements,[88] courts have recognized that exceptions to notice and comment requirements must be applied carefully to avoid infringing on private rights. The D.C. Circuit states that "[t]he application of APA rulemaking requirements to an agency action depends on 'whether the agency action jeopardizes the rights and interests of parties, for if it does, it must be subject to public comment prior to taking effect.'"[89]

The new ROE methodology the Commission announced in Opinion No. 569 potentially impacts the interests of all jurisdictional public utilities. "The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings."[90] Nothing in Opinion No. 569 expressly limits its application only to the MISO Transmission Owners. Rather, the order indicates that

> [t]he Commission will use this methodology to determine whether an existing base ROE is unjust and unreasonable under the first prong of section 206, and for determining a new just and reasonable replacement base ROE under the second prong of section 206 when an existing ROE has been shown to be unjust and unreasonable.[91]

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[87] 5. U.S.C. § 553(b).

[88] *Id.* § 553(b)(3)(A)

[89] *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (*citing Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980)).

[90] *PG&E*, 506 F.2d at 38 (internal citations omitted).

[91] Opinion No. 569 at P 18.

The accompanying press release notes that the order "adopts a new methodology for determining whether a jurisdictional public utility's rate of return on equity (ROE) is just and reasonable under section 206 of the Federal Power Act."[92] Opinion No. 569 announces a prospective change in ROE methodology that the Commission will potentially apply to all jurisdictional public utilities, and if it does so, will significantly impact their interests.[93] Thus, the Commission should have promulgated this change through notice and comment rulemaking through the NOI that it had already opened.

3. The Commission should respond to the record it solicited in the generic NOI docket.

Opinion No. 569 asserts that the Commission can make changes to its policies in adjudicative proceedings and need not employ a generic proceeding.[94] However, where the Commission has concurrently opened a generic proceeding specifically to obtain comment on the exact proposal at issue in the adjudicative proceeding, it must consider and address the record in the generic proceeding. To do otherwise creates the impression of a regulatory "bait-and-switch" and constitutes arbitrary and capricious decision-making. Although parties may have "had ample notice of" the Commission's proposed changes to its ROE analysis (at least, the four-model

[92] Federal Energy Regulatory Comm'n, FERC Adopts New Base ROE Methodology, Addresses Complaints Against MISO, https://www.ferc.gov/CalendarFiles/20191121114712-E-11-news-release.pdf.

[93] *See PG&E*, 506 F.2d, 38-39 (explaining that substantive rules have the force of law and in subsequent administrative proceedings, the underlying policy is not subject to challenge while general policy must be supported in particular applications going forward and that an agency cannot evade notice and comment by camouflaging binding precedent as general policy). The APA defines "rule" as an agency action that has "future effect" and is "designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates . . . or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)("*Chrysler*") (observing that the APA does not define "substantive rule" and court guidance essentially defines substantive rules by negative inference but that substantive rules are binding and have the force of law). Although *Chrysler* was later superseded by statute on the substantive Freedom of Information Act issues that it considered, this does not affect its discussion of the APA.

[94] Opinion No. 569 at P 456 (internal citations omitted).

proposal), their "opportunity to address" the changes caused by the Commission's decision to modify its initial proposal is nonexistent, given the Commission's actions in this order.[95]

Even if the Commission is not legally required to act in the generic NOI proceeding, it should exercise its discretion to do so under the circumstances. Having opened a generic proceeding and requested that stakeholders provide input on the exact proposal at issue in the adjudicative proceedings, the Commission should consider and address the extensive record it sought. Responding to the NOI was a major undertaking involving a large commitment of resources by respondents, and Congress has recognized that when independent agencies like the Commission seek information from the public, they should minimize the resulting burden on respondents.[96] To do otherwise treats the regulated community's efforts cavalierly and evades the APA's notice and comment requirements. As stated above, WIRES moves to lodge its initial and reply comments in this docket for the Commission's consideration on rehearing.

Moreover, the NOI docket contains much more evidence for the Commission to consider given its acknowledgment that there may not be sufficient relevant evidence in the record of this

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[95] *Id.* at P 457. In a 273-page order, fewer than half a dozen paragraphs reference the NOI.

[96] The Paperwork Reduction Act ("PRA") requires federal agencies, including the Commission, under Office of Management and Budget ("OMB") oversight to "maximize the practical utility of and public benefit from information collected" and "minimize the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected." 44 U.S.C. §§ 3501, § 3504(c)(3,4). The PRA requires each agency to "review each collection of information before submission to the Director [of OMB] for review …, including (i) an evaluation of the need for the collection of information; (ii) a functional description of the information to be collected; (iii) a plan for the collection of the information; (iv) a specific, objectively supported estimate of burden; (v) a test of the collection of information through a pilot program, if appropriate; and (vi) a plan for the efficient and effective management and use of the information to be collected." *Id*. at § 3506(c)(1)(A). The PRA further requires each agency to "ensure that each information collection … (iii) informs the person receiving the [request to provide the] information of (I) the reasons the information is being collected; (II) the way such information is to be used; [and] (III) an estimate, the extent practicable, of the burden of the collection." *Id*. at § 3506(c)(1)(B). Although the Commission does not provide burden estimates for NOIs, it would seem counter to Congress' intent to reduce the burden of responding to agencies' information collection efforts to request that stakeholders build an administrative record in response to specific question, only to disregard those responses in favor of addressing the issues in an adjudicative proceeding. The NOI contained 89 questions and sub-questions, to which 56 entities and over 11,000 individuals submitted responsive comments and reply comments, running to approximately 2,000 pages.

proceeding. In Opinion No. 569, the Commission took issue with the relevance of some of the record evidence in this proceeding.[97] The Commission effectively ignored the extensive record evidence amassed in the NOI docket supporting the use of the Expected Earnings and Risk Premium models. Opinion No. 569 discounts the utility of the Expected Earnings and Risk Premium models based on the limited record evidence in this proceeding,[98] but fails to consider the multitude of additional evidence in the NOI docket that supports its use in the ROE analysis. This is further evidence of the arbitrary and capricious nature of the Commission's action.

The Commission should address the record evidence in the NOI proceeding. ROE is central to public utilities' ability to make capital investments and obtain financing. The Commission recognized this, citing witness testimony that the regulator-established ROE impacts every measure of future financial performance.[99] Given the overwhelming importance of ROE to transmission-owning public utilities and its impact on decisions relating to investment in needed transmission infrastructure, the Commission erred in disregarding the extensive record it requested in the NOI docket in favor of acting in this proceeding. This recognition of the importance of ROE renders the Commission's failure to address the voluminous record in the NOI docket even more arbitrary and capricious. Instead, the Commission should consider and address the arguments and evidence that stakeholders submitted on the proposal and make its decision based on that record evidence. [100] The D.C. Circuit has noted that notice and comment "is a two-way street: the

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[97] *Id.* at P 156.

[98] *Id.* at PP 210-228.

[99] *Id.* at P 190 (internal citations omitted).

[100] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1962) ("the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made. Normally an agency rule would be arbitrary and capricious if the agency…entirely failed to consider and important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency…") (internal citations omitted) (quoting *Burlington Truck Lines v. U.S.* 156, 168 (1962)).

opportunity to comment is meaningless unless the agency responds to significant points raised by public."[101] Thus, the Commission should respond to the record that it solicited in the NOI docket and base its decisions on the record evidence therein.

Finally, if the Commission disregards the generic NOI proceeding and maintains its sea change in transmission ROE policy announced in this proceeding, unintended consequences will result. The precedent Order No. 569 has set invites increased participation in adjudicative proceedings in which the Commission could conceivably issue any policy change that would have any impact on the broader regulated community. This would result in higher number of intervenors and active participants in more adjudicative proceedings seeking to protect their potential future interests. The concomitant increase in expenditure of both Commission and stakeholder resources would be significant, burdensome, and likely inefficient.

[101] *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("A response is also mandated by *Overton Park*, which requires a reviewing court to assure itself that all relevant factors have been considered by the agency.") (internal citations omitted).

VII. CONCLUSION

For the foregoing reasons, WIRES requests that the Commission: 1) grant its motion to intervene out of time; 2) grant its motion to lodge; and 3) grant its request for rehearing.

Respectfully submitted,

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December 23, 2019

ATTACHMENT

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

INITIAL COMMENTS OF WIRES

WIRES respectfully submits these comments in response to the Commission's March 21, 2019 Order in Docket No. EL19-4-000, *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶61,207 (2019) ("NOI"). WIRES is an international non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and progressive state and federal policies that advance energy markets, economic efficiency, and consumer and environmental benefits through development of electric power infrastructure.[1]

I. Executive Summary

WIRES was formed to promote electric transmission investment in the United States. The need for such investment remains critical for ensuring efficient and reliable electric service and to enable the ongoing transition to new generating sources. Numerous studies show that transmission investment provides enormous value and that the need for new transmission has never been greater. FERC should adopt policies that promote this

[1] For more information about WIRES, please visit www.wiresgroup.com.

investment, and no such policy is more important than the methods used to set Returns on Equity ("ROE"). Adequate ROEs are critical to attract capital to this risky business.

WIRES believes that the ROE methodology the Commission preliminarily adopted in 2018 in the New England ROE proceedings[2] and subsequently applied to the MISO transmission owners and others, reasonably accomplishes the above objectives and should be adopted on a national basis. This methodology relies on several financial models used by investors to set the ROE, mitigating the effect of distortions that may occur if the Commission relies on only one model such as the FERC version of the Discounted Cash Flow ("DCF") model. The New England decision also provides a statutorily appropriate framework for determining whether an existing ROE has become unjust and unreasonable.

II. The Need for Transmission Investment Has Never Been Greater

WIRES strongly supports ROE policies that will promote investment in new transmission facilities in the United States. Adequate ROEs are critical to attracting capital to the transmission business. In turn, transmission investments lower costs to consumers, enhance the reliability of the electric power system, enable the integration of new generation facilities, and promote robust competition for power supplies. The evidence is incontrovertible that transmission investments made in the wake of the Commission's pro-investment policies beginning early in this century have significantly reduced congestion costs, allowed the generation fleet to be modernized, and reduced the

[2] *Coakley, Mass. Att'y Gen. v. Bangor Hydro-Elec. Co.*, 165 FERC ¶ 61,030 (2018) ("*2018 Coakley Order*").

need for Reliability Must Run contracts in RTO markets. In New England, for example, congestion costs have been reduced by over $500 million annually since New England's transmission owners began their modernization of the transmission grid in the region. At the same time, the enhanced transmission capability has enabled the region to integrate thousands of megawatts of new generation that has increased the efficiency of power production and addressed public policy goals.

PJM recently released a transmission study that demonstrates the value and importance of transmission investment in its footprint. The PJM Study finds that the PJM transmission system allows sub-regions to share capacity and leverage diversity to reduce the need for additional generation by up to $3.78 billion annually and has reduced capacity payments by approximately $1 billion per year in recent years. PJM found that recent transmission enhancements reduced annual congestion payments by $280 million and that recently approved projects under construction would lower annual congestion payments by an additional $100 billion. The study further demonstrates that investment in transmission facilities improves reliability, enhances opportunities in competitive markets, and enables the shift to more efficient and environmentally beneficial sources of generation.[3]

Several studies sponsored by WIRES support the continuing need for transmission investment and demonstrate the societal benefits from such investment. A few years ago,

[3] Similarly, a Southwest Power Pool study performed in 2016 found more than $240 million in annual fuel cost savings realized due to transmission investments made during 2012-2014, and projected overall benefits from these investments to exceed $16.6 billion over 40 years.

the Brattle Group performed a comprehensive study of the benefits of constructing new transmission facilities in order to enable the kinds of broad changes to the generation mix that is currently occurring in the United States. Brattle's conclusions remain valid today. Brattle's modelling showed that estimated net savings associated with proactive transmission planning and development processes would range from $30–70 billion in total generation and transmission investment costs through 2030. Brattle explained that its estimates are consistent with a range of U.S. and European studies showing that a robust interregional transmission system is critical to reducing the cost of achieving changes in the generation mix resulting from the need to address environmental goals. Brattle's showed that creating a more flexible transmission grid is critical for cost-effectively serving electricity customers in a rapidly changing industry.

In 2018, London Economics Inc. ("LEI") performed a study of the broader economic changes produced by two hypothetical, but typical, transmission projects, one in each of the two FERC-jurisdictional interconnections. LEI evaluated the short-term, medium-term, and long-term benefits of these upgrades. In the short-term, transmission upgrades create construction-related jobs and ripple economic effects from these jobs. LEI's study showed that, in the short-term, transmission projects with a combined investment of approximately $3 billion created over 5,000 jobs and produced over $700 million in GDP increases per year.

In the medium term, the transmission investments in these projects lowered the cost of electricity for consumers producing broader economic gains through enhanced purchasing power for other goods and services. Such investment increased earnings

available to generators by increasing their sales opportunities while still lowering market prices through more optimized, efficient dispatch, and increased opportunities for the dispatch of renewable resources thereby lowering CO2 emissions. The projects produced several billion dollars in economic benefits in the medium term that were shown to be realized over a broad geographic area.

In the long-term, LEI showed that well-planned transmission brings significant reliability value. For example, transmission investment can serve to dampen or neutralize the cost impacts of unexpected events in the market, operating much like an “insurance” policy. The value of these investments was estimated by modeling the energy system with and without the new investments, showing that the transmission investments enabled reductions in energy cost spikes and the avoidance of supply interruptions. LEI identified close to $2 billion of additional economic benefits from the two projects over the long-term.

The need for new transmission investment is enhanced by the expected electrification of the U. S. economy in the coming decades. Most experts expect that several sectors that are currently powered by fossil fuels will become electrified. For example, well over one million electric vehicles are on the roads in the United States today and this number will likely increase exponentially over the coming decades as battery technology evolves. Some experts are predicting the demise of the internal combustion engine. Electric heat pumps, which are already common in moderate climates, are becoming cheaper and more efficient in colder climates. And, advances in

technology could make electrifying industrial processes increasingly economic. This broad electrification will substantially increase electrical demand.

In a 2019 report prepared for WIRES, The Brattle Group estimated that $30–90 billion dollars of incremental transmission investments will be necessary in the U.S. by 2030 to meet the changing needs of the system due to electrification, with an additional $200–600 billion needed from 2030 to 2050. These investments will be in addition to the investments needed to maintain the existing transmission system and to integrate renewable generation built to meet existing load. Brattle explains that this level of investment is equivalent to $3–$7 billion per year on average through 2030, a 20–50% increase over annual average spending on transmission during the past 10 years; and $7–$25 billion per year on average between 2030 and 2050, a 50–170% annual increase in transmission investment.[4] These changes will be driven by economics, and not merely environmental goals. Even if only a portion of this investment turns out to be required, the expected changes in how energy is produced will require strong public policy support for new transmission investments.

The Commission has recently focused considerable effort on ensuring the resilience of the bulk power system as the generation mix changes. Achieving adequate resilience will require additional transmission investment. Renewed consideration of resilience does not only involve calibrating the mix of generating resources on the system, it also requires a robust transmission system that can reliably move power from

[4] Weiss et al, *The Coming Electrification of the North American Economy, Why We Need A Robust Transmission Grid* (March 2019).

different combinations of generation resources. Transmission investment improves resiliency by increasing the options available to system operators to dispatch generation in adverse conditions. Transmission investment is necessary to achieve adequate resiliency at a reasonable cost. The task of modernizing and strengthening the transmission grid has begun, but it is by no means finished.[5]

III. Adequate ROEs are a Lynchpin for Achieving Transmission Investment

The historical record demonstrates the importance that ROEs play in determining the level of investment that will occur. During the last few decades of the 20th century, transmission ROEs were primarily set by state regulatory commissions, who almost universally applied the same ROE to transmission and distribution investments. The result was a widely acknowledged under-investment in interstate transmission facilities. The lesson should be clear: robust investment flows from ROEs that adequately compensate utilities for the unique and substantial risks associated with attempts to construct new transmission facilities. ROEs that merely equal those established for less risky distribution assets will result in under-investment, which is contrary to the public interest.

[5] The generation mix in the United States is rapidly changing and substantial new transmission investment will be required to integrate new generation resources and accommodate changed power flow patterns from planned changes to the existing fleet of generators. Existing and anticipated state-mandated renewable power requirements indicate that significant additional generation resource changes will occur as thousands of megawatts of new renewable generation are added to the grid in the coming decades to meet state public policy goals. Moreover, many of the existing transmission assets in the United States are approaching or beyond their expected useful life, with some approaching 70, 80 or 90 years of service. Many of these aging facilities will have to be replaced.

Congress implicitly recognized this conclusion in enacting Section 219 of the Federal Power Act, which directs FERC to adopt ratemaking practices that will promote transmission investment. The Commission explicitly recognized the unique risks of transmission investment in its Opinion No. 531:

> The financial and business risks faced by investors in companies whose focus is electric transmission infrastructure differ in some key respects when compared to other electric infrastructure investment, particularly state-regulated electric distribution. For example, investors providing capital for electric transmission infrastructure face risks including the following: long delays in transmission siting, greater project complexity, environmental impact proceedings, requiring regulatory approval from multiple jurisdictions overseeing permits and rights of way, liquidity risk from financing projects that are large relative to the size of a balance sheet, and shorter investment history.[6]

The simple fact is that building new transmission facilities is very difficult. And while the need for additional transmission has been increasing, building it has become even harder. Some members of WIRES have been involved in the development of transmission projects that did not obtain necessary approvals even though the project benefits clearly outweighed their costs. In most cases, the project development costs incurred prior to cancellation were not recovered in rates.[7] Thus, the returns permitted by the Commission should be seen as a cap on most transmission ROEs. Actual overall returns, taking into account investments in projects that fail to come to fruition for

[6] *Martha Coakley et al v. Bangor-Hydroelectric Co. et al*, Opinion No. 531, 147 FERC ¶ 61,234, ¶149 (2014) ("Opinion No. 531").

[7] WIRES recognizes that the Commission has attempted to address this problem by allowing the recovery of abandoned plant costs for projects that are eligible for transmission rate incentives. However, this opportunity only exists for a limited number of projects.

reasons outside the developer's control, but are not eligible for abandoned plant cost recovery, are lower.

Public opposition to electric transmission is often widespread because transmission lines are constructed above ground, are not confined to a single geographic location, and because the benefits of transmission are not readily apparent to much of the public. Electric transmission investment often requires obtaining multiple regulatory approvals from federal, state and local authorities, requiring developers to expend considerable political capital to overcome inevitable state and local opposition. Such opposition is especially a problem for transmission facilities that provide interstate benefits that may not be apparent to those living in the vicinity of new lines. The risk always exists that even after spending considerable time and money, risks and challenges that are outside a developer's control will cause a project to be discontinued. The same level of risk rarely exists for the construction of distribution facilities. The ROEs approved by the Commission for transmission should take these risks into account in order to ensure that adequate capital will be attracted to the transmission business. The Commission's Order No. 531 correctly acknowledges the additional risk associated with transmission investment and refers to the need to set ROEs at a level likely to attract capital.

The Commission should also adopt ROE policies that are robust enough to withstand the test of time, and that provide meaningful information to participants in Commission proceedings and investors as to whether existing ROEs are likely to be

changed. The Commission's ROE policies have been in flux for almost a decade.[8] WIRES is hopeful that the Commission will adopt an ROE policy that is sufficiently robust to stand the test of time and thereby provide greater certainty to the industry, investors and participants in Commission proceedings. The Commission should also make clear that its methodology for evaluating and setting ROEs is not subject to challenge in individual rate proceedings absent a showing of extraordinary circumstances warranting the change.

IV. WIRES Endorses the Methodology Proposed in the *2018 Coakley Order*

WIRES supports adoption of the methodology set out in the *2018 Coakley Order* ("2018 Coakley Methodology") as a national methodology. Adoption of the 2018 Coakley Methodology on a national basis will conform the Commission's review of ROEs with the models that the investment community uses to forecast forward ROEs and eliminate concerns over the use of a single model, historically the FERC DCF, which the Commission itself acknowledged in Opinion No. 531 may not produce just and reasonable results. The 2018 Coakley Methodology applies the concept of diversification to ensure a more robust result that more closely represents the true cost of equity capital.

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[8] After several years of litigation, the Commission modified its electric transmission ROE policy in 2014 in Opinion No. 531. However, the methodology in Opinion No. 531 relied upon a temporary fix based on the assumption that capital markets were anomalous in the wake of the 2008-2009 recession. It left open the question of when that economic situation would change, which produced additional litigation and uncertainty. In addition, the Court in *Emera Maine* identified a number of flaws in Opinion No. 531, which forced the Commission to reconsider that approach.

WIRES believes that the investment community has reacted positively to the 2018 Coakley Methodology and that abandoning or modifying that methodology only a few months after the Commission provided a strong, reasoned explanation in support of using it will create further uncertainty in the investment community and may cause some in that community to lose confidence in the Commission's decisional processes. The 2018 Coakley Methodology is grounded in longstanding principles of finance, and comports with the methodologies used by many states and with the opinions of many experts who endorse the use of multiple methodologies to derive an allowed ROE. This proceeding may supplement the existing record to address issues not raised in the New England proceedings, but the Commission has no further need to make additional findings in this proceeding in order to apply the 2018 Coakley Methodology on a national basis.

The 2018 Coakley Method does not suffer from the infirmity of relying on short-term conditions in the capital market, which was a shortcoming of the methodology adopted in Opinion No. 531. It is detailed and replicable by the industry and other interested parties that may wish to determine in advance whether the existing ROE would be subject to change in a new Section 205 or 206 proceeding. It also provides the predictability that the investment community needs in order to evaluate investments in new transmission assets. The 2018 Coakley Methodology also permits the Commission to act quickly to resolve proceedings by providing a basis for ROE complaints and protests in Section 205 cases to be dismissed based on a finding that the existing ROE is within

the quartile zone adopted by the Commission to comply with the Court's holding in *Emera Maine* that there is a range of just and reasonable ROEs.

One of the benefits of this methodology is that it uses four ROE models that the Commission has already considered carefully in prior proceedings. The Commission's DCF methodology has of course been explored in numerous proceedings. But, the Commission also carefully evaluated a large number of arguments relating to the specific assumptions and methods applied to the Risk Premium, Capital Asset Pricing and Expected Earnings models that are used in the 2018 Coakley Methodology. These models and their inputs were carefully explored in several cases beginning with Opinion Nos. 531 and 551 and their progeny.

Commenters in this proceeding may request that the Commission reconsider these methodologies in this proceeding, but such a request would be misguided for several reasons. The Commission should have no reason to reconsider its prior approval of these alternative models in light of the careful consideration it gave to the many issues raised in the various cases in which the merits of these alternative models were subject to Commission scrutiny. Moreover, where the Commission has already reached a reasoned decision, it should not change positions unless relevant circumstances have changed, which they have not in this situation. Nor should the Commission change its position unless important new information or argument is brought forward that was not available previously and where that information is sufficiently important to the outcome that the Commission concludes its prior analysis has become legally insufficient. WIRES has not

witnessed any such new information or argument to date. Given the extensive argument on these alternative methodologies in prior proceedings, WIRES believes it is highly unlikely that any such undisclosed information exists. Respect for the Commission's decisions requires that the Commission be consistent in its analysis of issues. The need for consistency and certainty is especially important in the context of setting ROEs, where the investment community is relying on the Commission's decisions to decide whether to support investment of billions of dollars in new transmission facilities.

The 2018 Coakley Methodology improves predictability and enhances confidence in the outcome by no longer relying solely on one methodology, the FERC DCF, to derive allowed returns. The FERC DCF is a valuable tool, but it suffers from model risk both due to unusual circumstances in the capital markets (as the Commission recognized in Opinion Nos. 531 and 551) and because of the risks associated with the inputs used to derive the results. Model risk is well recognized by experts,[9] and diversification across several models mitigates the impact of model risk.

It has been argued that the DCF is sacrosanct and should be the only methodology used. However, the Commission's version of the DCF has changed over the years and uses subjective judgments throughout to establish the various inputs and assumptions that are used in the model calculation. These include FERC-specific, subjective rules governing the choice of a proxy group, the assumptions and rules used to calculate dividend yields (which are not forward looking under Commission practice), the

[9] 2018 Coakley Order at P 38 and nn.77-78.

particularized assumptions and data sets the Commission uses to calculate growth rates, the method used to determine the middle of the DCF range, and the various rules applied to potentially eliminate DCF results from the ROE calculation (such as low and high end outlier tests, merger and acquisition rules, and dividend consistency rules).

From its prior ROE proceedings, the Commission understands that virtually every version of its unique form of the DCF analysis is subject to disagreement over the data used and the methods of calculation, and that these differences can produce huge disparities in the results produced by the model. These differences reflect subjective choices the Commission makes for regulatory purposes. No single "true" representation of the DCF model exists. Indeed, the Commission has changed its mind many times regarding the appropriate methods, assumptions and data to be used in the DCF calculation. WIRES does not mean to imply that the Commission should not make these assumptions (they obviously are necessary) or that these concerns exist only for the DCF model. All models are imperfect, and they rely on simplifying assumptions as well as subjectivity as to inputs. The point is that the use of diverse methodologies to calculate allowed ROEs is the best method available to overcome the inherent shortcomings of individual models and the related assumptions for applying them in regulatory proceedings.

The benefits of diversification are recognized by experts. For example, the 2018 Coakley Methodology takes into account Dr. Morin's concerns about the use of only one methodology, which concerns the Commission has acknowledged in a prior order:

> In the absence of any hard evidence as to which method outdoes the other, all relevant evidence should be used and weighted equally, in order to minimize judgmental error, measurement error, and conceptual infirmities. A regulator should rely on the results of a variety of methods applied to a variety of comparable groups, and not on one particular method. There is no guarantee that a single DCF result is necessarily the ideal predictor of the stock price and of the cost of equity reflected in that price, just as there is no guarantee that a single CAPM or Risk Premium result constitutes the perfect explanation of that stock price.[10]

In short, the use of multiple models reduces the danger of model risk; encompasses the different methodologies that investors and investment analysts use to forecast ROEs; and reduces the likelihood that any single decision made about the use of the models will drastically affect the final result. Finally, including at least one methodology that utilizes book-value concepts provides a stabilizing influence in the event that inputs in the other models are anomalous at any time.

If the Commission adopts the 2018 Coakley Methodology, it should be able to readily resolve a large number of extant rate proceedings in which the allowed ROE is at issue. In the wake of Opinion No. 531 (which was decided in 2014), the existing records in most or all extant ROE cases should include the data necessary to calculate allowed ROEs using all four methodologies comprising the 2018 Coakley Methodology, because Opinion No. 531 called for the use of these four models in the overall analysis. On the other hand, if the Commission were to make substantial changes to the 2018 Coakley Methodology, it would create the risk that most or all of the extant ROE proceedings will have to go back into hearing in order to complete the records to meet the Commission's

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[10] Morin at 429, cited in *2018 Coakley* Order at P 36.

new ROE requirements. This would be very unfortunate because it would delay resolution of those proceedings, extend the uncertainty felt in the investment community, and impose enormous burdens on parties that have already partially or fully litigated the issues.

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Dated: June 26, 2019

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C. this 23rd day of December 2019.

Larry Gasteiger

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