UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.	:	Docket Nos.	EL24-80-000
PJM Interconnection, L.L.C.	:		EL24-81-000
Southwest Power Pool, Inc.	:		EL24-82-000
ISO New England, Inc.	:		EL24-83-000 (not consolidated)

COMMENTS OF WIRES

In the June 13, 2024 order[1] issued in the above captioned dockets, the Federal Energy Regulatory Commission ("Commission" or "FERC") found that open access transmission tariff ("Tariff") provisions of certain regional transmission organizations ("RTOs") and independent system operators ("ISOs")[2] appear to be unjust, unreasonable, and unduly discriminatory or preferential because they permit transmission owners to unilaterally elect TO Initial Funding.[3]

[1] *Midcontinent Indep. Sys. Operator, Inc., et al.*, 187 FERC ¶ 61,170 at Ordering Paragraph (E) (issued June 13, 2024) ("Show Cause Order"); *see also Midcontinent Indep. Sys. Operator, Inc., et al.*, Notice of Extension of Time, Docket Nos. EL24-80-000, *et al*. (Oct. 8, 2024) (granting 14-day extension of time up to and including October 25, 2024, to submit responses).

[2] The Show Cause Order is directed to Midcontinent Independent System Operator, Inc. (MISO), PJM Interconnection, L.L.C. ("PJM"), Southwest Power Pool, Inc. ("SPP"), and ISO New England, Inc. ("ISO-NE"). Those parties are referred to herein collectively as "Responding RTOs/ISOs."

[3] Under TO Initial Funding, "the transmission owner unilaterally elects to initially fund the network upgrade capital costs that it incurs to provide interconnection service to the interconnection customer, and the transmission owner subsequently recovers the network upgrade capital costs through charges that provide a return on and of these network upgrade capital costs from the interconnection customer." Show Cause Order at n. 1.

WIRES,[4] on behalf of its members, submits the following comments[5] challenging the basis on which such findings rely.

Additionally, given that matters relevant to these dockets are already pending in various other dockets[6] and because of the need to accelerate transmission to interconnect new resources, WIRES requests that the Commission proceed without delay to find that the Responding RTOs'/ISOs' tariff provisions are just and reasonable and determine that no further action is required under these dockets.

I. INTRODUCTION

Electric transmission investment in the United States remains critical to realizing the benefits of efficient and reliable electric service while enabling the ongoing transition to significant amounts of renewable generation resources to power an increasingly electrified economy. In a two-year timeframe, on a relatively compressed schedule, the Commission has issued three major

[4] WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and consumer, environmental, and resilience benefits through development of electric transmission infrastructure. Since its inception, WIRES has focused on supporting investment in needed and beneficial transmission infrastructure – investments that Congress and the Commission have recognized are critical to establishing a resilient, reliable, cost-effective, modern, and clean bulk power system. This filing is sanctioned by the full supporting members of WIRES but does not necessarily reflect the views of the RTO/ISO associate members of WIRES. For more information about WIRES, please visit www.wiresgroup.com.

[5] WIRES filed a timely doc-less motion to intervene in this proceeding on June 20, 2024.

[6] *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, Notice to Hold Proceeding in Abeyance, Docket Nos. EL15-68-003, *et al*. (issued June 13, 2024) ("*Ameren Clean Power* Remand Proceeding"); *see also, PPL Elec. Util. Corp.*, 177 FERC ¶ 61,123 (issued Nov. 19, 2021) (accepting and suspending PJM Tariff revisions and establishing paper hearing procedures).

orders (Order Nos. 2023,[7] 1920[8] and 1977[9]) regarding processes foundational to the development and construction of new transmission. All three orders endeavor to help accelerate the buildout of transmission infrastructure needed to serve the country's growing energy demand and changing resource mix; and, together, these orders place tremendous pressure on the industry to develop and construct this new transmission infrastructure at a pace that is sufficient to meet those needs while keeping in mind customer affordability.

Commission policies that balance the interests of the customer and the investor-owned utility, and are grounded in facts and law, lead to a durable, constructive regulatory framework that produces just and reasonable outcomes based firmly on the "public interest."[10] Unfortunately, the Show Cause Order fails in this regard.

In the Show Cause Order, the Commission conceives of several reasons in support of eliminating TO Initial Funding, including concerns that "unilateral TO Initial Funding may increase costs by requiring the interconnection customer to pay a higher financing rate than the interconnection customer would otherwise receive through a lender when using Generator Upfront Funding" and "[i]t appears that these increased costs do not provide any additional benefits to the

[7] *Improvements to Generator Interconnection Procedures and Agreements*, Order No. 2023, 184 FERC ¶ 61,054, *limited order on reh'g*, 185 FERC ¶ 61,063 (2023), *order on reh'g & clarification*, Order No. 2023-A, 186 FERC ¶ 61,199 (2024), *appeals pending,* Petition for Review, *Advanced Energy United v. FERC,* Nos. 23-1282, *et al*. (D.C. Cir. Oct. 6, 2023) (collectively, "Order No. 2023") (requiring improvements to the generator interconnection process, including construction of network upgrades).

[8] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 (2024), *appeals pending*, Petition for Review, *Appalachian Voices, et al. v. FERC*, Nos. 24-1650, *et al.* (4th Cir. July 16, 2024) ("Order No. 1920") (setting requirements to establish long-term regional transmission planning).

[9] *Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 1977, 187 FERC ¶ 61,069 (2024) ("Order No. 1977") (amending permitting regulations for siting electric transmission facilities to ensure consistency with amendments to the Infrastructure Investment & Jobs Act and the Federal Power Act ("FPA")).

[10] *Federal Power Comm'n v. Hope Nat. Gas Co*., 320 U.S. 591, 603 (1944) ("*Hope*") ("[t]he rate-making process under the Act, *i.e.*, the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.").

interconnection customer than it would otherwise receive through Generator Upfront Funding."[11] However, whether an interconnection customer may be able to secure lower cost financing is irrelevant to whether TO Initial Funding is just and reasonable. Importantly, there is no precedent in the FPA to support a ratemaking standard that bases its just and reasonable determination on whether customers can finance discrete projects cheaper than the utility providing the service for a range of customers. For the Commission to use that concern as a basis for removing TO Initial Funding, particularly without any recognition of the impact not just to transmission owners but to all other end use customers, is a fundamental departure from well-established case law and Commission precedent.

Moreover, the Commission cannot require investor-owned public utilities to construct, own, operate, and maintain an entire class of transmission, *i.e.*, network upgrades[12] on a non-profit basis. Yet, that is precisely what the Commission proposes to do in the Show Cause Order.

As described further herein, requiring public utilities to construct, own, operate, and maintain such transmission with no opportunity to earn a return on those facilities will violate

[11] *See* Show Cause Order at P 50.

[12] Network Upgrades are defined to mean those "additions, modifications, and upgrades to the Transmission Provider's Transmission System required at or beyond the point at which the Interconnection Customer interconnects to the Transmission Provider's Transmission System to accommodate the interconnection of the [ ] Generating Facility to the Transmission Provider's Transmission System." *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 at Appendix 6 to LGIP, Standard Large Generator Interconnection Agreement ("LGIA"), Art. 1 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220, *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

fundamental tenets of law and Supreme Court precedent.[13] Given the potential that the transmission owners would not be permitted to earn a return on a rapidly growing portion of the transmission assets they will own, operate, and maintain, ignores the impact that this will have on transmission owners, their investors, and the customers they serve. Before the Commission can take such an historic leap, it must first demonstrate that doing so is not in violation of the U.S. Constitution, the FPA, longstanding case law, and Commission precedent. For all the reasons detailed below, WIRES requests that the Commission proceed without delay to find that the Responding RTOs'/ISOs' tariff provisions are just and reasonable and determine that no further action is required under these dockets.

II. COMMUNICATIONS

In accordance with Rule 203(b)(3) of the Commission's Rules of Practice and Procedure, all communications and correspondence regarding these proceedings should be directed to:

Larry Gasteiger
Executive Director
WIRES
529 Fourteenth Street, NW
Suite 1280
Washington, D.C. 20045
lgasteiger@exec.wiresgroup.com
Ph: (703) 980-5750

[13] *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-693 (1923) ("*Bluefield*"); *Hope*, 320 U.S. at 603. Up to this point in time, network upgrades have not comprised a significant portion of a transmission owner's assets; however, it is well documented across the industry (and corroborated by the Commission) that an "historic grid transformation" is happening due to the retirement of fossil-fueled generation, the interconnection of significant numbers of renewable energy resources, and the electrification of the transportation and building sectors. *See* Order No. 1920 at PP 99, 104 (stating "[t]he record demonstrates that significant expansion of the transmission system is occurring through . . . interconnection-related network upgrades constructed in response to individual generator interconnection requests.").

III. COMMENTS

A. The Show Cause Order Violates the Basic Tenet of the Regulatory Compact

The regulatory compact, which lies at the heart of cost-of-service regulation, involves a set of mutual rights, obligations, and benefits that form a relational contract between the investor-owned public utilities and their customers.[14] Under the regulatory compact principles, public utilities were granted an exclusive service franchise/territory and, in exchange, accepted the responsibility to serve all applicants in the territory and submit to rate regulation. Public utilities were obligated to supply service efficiently, but had the right to recover their costs, including an opportunity to earn a return/profit equal to their cost of debt and cost of equity.

Based on historical case law and more than a century of development and change, the regulatory compact can be summarized as the careful balance between compensatory rates and confiscation of utility property that provides a utility with an opportunity to be properly compensated for owning and operating *all* of its transmission facilities, including network upgrades, in exchange for providing safe and reliable power at a reasonable cost to all customers who request service. This requirement is embedded in the FPA,[15] as well as in caselaw interpreting the FPA requirements.[16] Notwithstanding recent policy developments, the FPA remains grounded in the regulatory compact.

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[14] Karl McDermott, "*Cost of Service Regulation in the Investor-Owned Electric Utility Industry, A History of Adaptation*," at vii, Prepared for Edison Electric Institute, Washington, D.C. (2012).

[15] 16 U.S.C. § 824d.

[16] *Hope*, 320 U.S. at 603 ("the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests"); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018) ("*Ameren*") ("if Petitioners are conceptually correct that they bear these risks as owners of the transmission lines, it supports their basic contention that they are entitled to be compensated *now* as owners for operating the upgrades."); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1515 - 1516 (D.C. Cir. 1984) ("*Farmers Union*") (finding that comparable risk analysis has an important role in rate regulation).

Based on such long-standing precedent, the Commission cannot require transmission owners to operate a portion of their business on a non-profit basis in a way that "attack[s] their very business model".[17] Moreover, prohibiting transmission owners from earning a return on a portion of their assets places a financial strain on those utilities because once the transmission owner assumes ownership of those interconnection-related network upgrades, they become part of the transmission owner's transmission system and, thus, present the same types of risks as the rest of the transmission owner's transmission system. As such, the Commission cannot ignore the relationship between risk and return at a fair rate of return. The following relevant case law charts the Supreme Court's decisions that refined and informed that relationship.

In *Wilcox v. Consolidated Gas Co.*, the Supreme Court began to discuss the relationship between risk and return, directly reasoning that a fair rate of return included a return on invested capital and a return for risk.[18]

By 1923 in the *Bluefield* decision, the Court began to focus on the idea of comparable risk stating:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably 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 the money necessary for the proper discharge of its public duties.[19]

[17] *Ameren*, 880 F.3d at 581.

[18] *Wilcox v. Consolidated Gas Co*., 212 U.S. 19 (1909).

[19] *Bluefield*, 262 U.S. at 692-693.

Two decades later in the *Hope* decision, the Court firmly established the principle of basing a regulated utility's return on the financial risks of other comparable firms by stating as follows:

> [T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[20]

A recognition of these principles is crucial to "assure confidence in the financial soundness of the utility."[21] Even more so, application of such principles in this proceeding is essential because if transmission owners are denied the ability to choose TO Initial Funding they will be required to construct, own, operate, and maintain a portion of their transmission assets on a non-profit basis. Put simply, transmission owners will be required to accept additional risk-bearing responsibility for those assets through the expansion of their transmission systems with zero return in violation of *Bluefield* and *Hope*. Thus, if the aim of regulation is to preserve the balance of the original bargain between investors and customers, then the process demands that transmission owners are provided some assurance of cost recovery (return of and on) on their *entire* transmission system, including normal business risks confronted by the utility for constructing, owning, and maintaining interconnection-related network upgrades.[22] Anything less would undermine the transmission owners' ability to attract the new capital required to provide safe and reliable service while maintaining the financial soundness of the enterprise.[23]

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[20] *Hope*, 320 U.S. at 603 (citations omitted).

[21] *Bluefield*, 262 U.S. at 693.

[22] *Hope*, 320 U.S. at 603 ("the end result . . . cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint").

[23] *Id.*; *see also Farmers Union,* 734 F.2d at 1515 ("As typically applied under the 'just and reasonable' standard, original cost ratemaking attempts to set the rate of return for a regulated enterprise at the same level as the rate of return on an unregulated enterprise with similar associated risks.").

B. Responding RTO/ISO Tariff Provisions Permitting TO Initial Funding are Consistent with the FPA and Commission Precedent and Therefore are Just and Reasonable and Not Unduly Discriminatory or Preferential

WIRES urges the Commission not to delay ruling on this long-outstanding issue and find for the following reasons that Responding RTOs'/ISOs' tariff provisions are just and reasonable:

- Consistent with the FPA and case law, transmission owners must be compensated for owning, operating, and maintaining *all* transmission facilities. There is no difference between interconnection-related network upgrades and other classifications of transmission facilities once they are integrated into the transmission owner's system. Transmission owners face the same risks in owning and operating network upgrades as they do in owning and operating all other transmission facilities on their system. Thus, it is just and reasonable to compensate transmission owners for interconnection-related network upgrades the same as they are compensated for their other transmission facilities.

- Whether an interconnection customer can obtain financing at lower or similar rates is the wrong question. If the transmission owners' rate of return has been determined to be just and reasonable, whether an interconnection customer can finance the network upgrades at a point in time at a different, lower rate of return is not relevant. Rates cannot simply be set at any level the Commission chooses in an individual case with the expectation that the financial impact of the individual rate on the entire utility enterprise does not violate the *Hope* and *Bluefield* capital attraction standard.

- Under Order No. 2003, participant funding was limited to RTOs/ISOs because they are independent, and "have no incentive to administer the Transmission System in a discriminatory manner."[24] The Commission further found that requiring transmission providers to revise their tariffs to include "[a] standard set of procedures . . . for all jurisdictional transmission facilities will minimize opportunities for undue discrimination and expedite the development of new generation."[25] In addition, revisions to the *pro forma* generator interconnection procedures and agreements under Order Nos. 845[26] and 2023,[27] have required additional process improvements, including greater transparency, to allow for greater access to information and reduced discrimination. Absent any record evidence

[24] Order No. 2003-A at P 691; *see also* Order No. 2003 at PP 695, 701 (clarifying that "when the Transmission Provider is an independent entity, the Commission is much less concerned that all generation owners will not be treated comparably because independence ensures that the Transmission Provider has no incentive to treat Interconnection Customers differently."), and 703 (clarifying that permitting participant funding of transmission upgrades "may provide the pricing framework needed to overcome the reluctance of incumbent Transmission Owners in many parts of the country to build transmission, with the result that badly needed transmission infrastructure could be put in place quickly.").

[25] *Id.* at P 11.

[26] *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 at PP 20, 190, 200, 201, 215, 237 - 239, 305 - 309, 385, 523, and 525 (2018) ("Order No. 845").

[27] *See* Order No. 2023 at PP 11 – 17, 136, 138, 230, 261, 350, 363, 459, 602, and 621.

that the Responding RTOs/ISOs who oversee the interconnection processes have administered their interconnection processes in an unduly discriminatory manner, WIRES asks that the Commission acknowledge the significance of the required safeguards embedded in the Responding ISOs/RTOs' tariffs, including the Commission-accepted open and transparent processes that limit any opportunity for undue discrimination. In addition, the tariffed processes afford all interconnection customers the ability to challenge a transmission owner's application of the self-funding option (i) through the RTOs'/ISOs' dispute resolution processes, (ii) by filing the agreements unexecuted with the Commission, or (iii) by filing an FPA section 206 complaint with the Commission.

- The Commission theorizes (again) on the potential for undue discrimination despite there being no evidence proffered of such, and side steps what arguably was a straightforward directive from the *American Clean Power* Court, which remanded the Commission's MISO self-funding remand orders largely on the basis that the Commission did not adequately offer "an assessment of the risk of discrimination and an explanation of why individualized proceedings provide generators with sufficient protection against that risk."[28]

- The Show Cause Order is inconsistent with the policy in Order No. 1920, which would allow the transmission owners to earn a rate of return on interconnection-related network upgrades addressing certain interconnection-related transmission needs originally identified through the generator interconnection process.[29] As explained above, Commission regulations heavily mitigate against the potential for undue discrimination and concerns about selective implementation can easily be addressed.[30]

IV. CONCLUSION

WIRES respectfully submits these comments for consideration by the Commission as it deliberates on these important issues. Additionally, WIRES requests that the Commission proceed

[28] *American Clean Power Ass'n v. FERC*, 54 F.4th 722, 727 - 728 (D.C. Cir. 2022).

[29] Order No. 1920 at P 1110.

[30] *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, Post Remand Initial Brief of Xcel Energy Services, Inc. on behalf of the Northern States Power Operating Companies ("NSP Companies"), Docket Nos. EL15-68-003, *et al.*, at 8 (Oct. 1, 2018) ("As discussed in prior pleadings in proceedings regarding the self-fund issue, the NSP Companies consider the self-fund issue from a somewhat unique perspective: the NSP Companies have both constructed transmission facilities in the MISO region pursuant to [*pro forma* Generator Interconnection Agreements ("GIAs"), *pro forma* Facility Construction Agreements ("FCAs") and/or *pro forma* Multi-Party Facilities Construction Agreements ("MPFCAs")] as a Transmission Owner or Affected System Operator, and have funded transmission facilities needed for the interconnection of new NSP System generation resources pursuant to GIA, FCA and/or MPFCA agreements as the Interconnection Customer (or the successor to an Interconnection Customer). Since June 2015, the NSP Companies have executed numerous GIAs, FCAs or MPFCAs pursuant to MISO's Tariff in the two roles.").

without delay to find that the Responding RTOs/ISOs' tariff provisions are just and reasonable and determine that no further action is required under these dockets.

Respectfully submitted,

/s/ Larry Gasteiger
Larry Gasteiger
Executive Director
WIRES
529 Fourteenth Street, NW
Suite 1280
Washington, D.C. 20045
Mobile: (703) 980-5750
lgasteiger@exec.wiresgroup.com

Date: October 25, 2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day had served the foregoing document upon each person designated on the official service compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 25th day of October 2024.

/s/ Larry Gasteiger
Larry Gasteiger
Executive Director
WIRES
529 Fourteenth Street, NW
Suite 280
Washington, D.C. 20045
Mobile: (703) 980-5750
lgasteiger@exec.wiresgroup.com