



# United States of America Before The Federal Energy Regulatory Commission

Statement of )  
Policy on Electric )  
Transmission Rates ) Docket No. RM13-18-000  
Of Return on Equity )  
)

## **WIRES' SUMMARY OF COMMENTS AND ANALYSIS**

On June 28, 2013, WIRES<sup>1</sup> (or “Petitioner”) submitted to the Federal Energy Regulatory Commission (“FERC” or the “Commission”) a request (“WIRES Petition”) for the Commission to institute an expedited generic proceeding to reassess its policy and provide clarifications about regulated rates of return on equity (“ROE”) for electric transmission projects, with respect to the application of the discounted cash flow (“DCF”) methodology in particular.

WIRES petitioned the Commission in pursuit of a public discussion and timely exploration about the benefits of a consistent and sustainable infrastructure investment environment that WIRES maintains could be jeopardized if traditional ratemaking practices do not recognize the unusual capital market conditions existing today, the magnitude of the need for expansion of the transmission system,

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<sup>1</sup> WIRES (aka, the **W**orking group for **I**nvestment in **R**eliable and **E**conomic electric **S**ystems) is a national non-profit association of investor-, member-, and publicly-owned entities dedicated to promoting investment in a strong, well-planned, and environmentally beneficial high voltage electric transmission grid. Information about its principles and members is available on its website [www.wiresgroup.com](http://www.wiresgroup.com).

the risks associated with development of transmission capable of serving as a platform for 21<sup>st</sup> Century power markets, the difficulties of permitting and constructing transmission, and the long-term benefits that a stronger grid can provide to the North American economy, transmission customers, and electricity consumers. Recent developments in energy law, Commission policy, and the national economy should inform application of DCF. Whereas DCF arguably reflects the shorter-term expectations of stockholders and electricity consumers, it does not consider whether, or how, consumers and the economy will be adequately served by the transmission network in decades to come. If, as experts predict, the nation will require \$300+ billion of transmission investment as we systematically replace and improve the entire electric power system, policy makers should be looking for ways to sustain and stabilize the attractiveness of transmission infrastructure as an investment.

In that light, the WIRES Petition maintained that electric transmission development is uniquely important, and uniquely difficult, among infrastructure investments. The WIRES Petition clearly acknowledged that the Federal Power Act (“FPA”) protects consumers first and foremost and that it allows customers and the Commission itself to revisit the legality of a rate even after it has been adjudicated “just and reasonable.” WIRES was seeking the most direct route to open a discussion about what constitutes a just and reasonable rate for utility assets lasting 40-50 years in the context of the extensive changes in the structure and operations of the power industry, the volatility in today’s unusual financial markets, and the need for investment in the high voltage grid. Well-planned and adequate transmission has become more vital to consumers’ long-term interests and to the whole economy than ever before, whether in terms of the cost of power, the emergence of more diverse and efficient energy supplies, competition within new wholesale power markets, support for digital technologies, environmental mitigation, or maintenance of high levels of service reliability.

WIRES believes the Commission now has an opportunity, in part afforded by its own Order No. 1000 plans, to reexamine precedents and policies governing the establishment of this key aspect of just and reasonable transmission rates. In

WIRES' estimation, there is no fairer way to conduct such reexamination than by taking comment from the full scope of affected parties and then considering whatever policy modifications may be appropriate.

To date, the Commission has not spoken directly to the pleadings or issues raised by WIRES in its Petition. Indeed, it is not obligated to do so. However, the issues remain both important and urgent. The ALJ who recently rendered his opinion regarding FPA Section 206 complaints against transmission ROEs in the ISO-New England region, feeling bound by FERC precedent and current practice, quite purposefully left ratemaking policy concerns like those raised by WIRES to the Commission itself. His Initial Decision<sup>2</sup> summarizes the conflicting interests of transmission providers, investors and customers alike and thereby contributes to understanding the current debate over the state of just and reasonable rates of return for electric transmission.

We are pleased that, even without Commission action or Notice, the WIRES Petition stimulated comment from some entities that might otherwise lack standing to voice an opinion in pending contested cases. The efforts expended by commenters, whether supportive or not, help positively define the metes and bounds of competing views about how to ensure the adequacy of the high voltage grid. An investment climate for regulated infrastructure based on attractive but stable returns is not a pipe-dream.<sup>3</sup> Naturally there will be disagreements about how to get there, but taking the unpredictability out of ROE determinations is a component of that climate to which we aspire. Because WIRES views regulation of the grid as a matter of supervening importance to a 21<sup>st</sup> Century economy, raising these concerns for further examination by the Commission seemed an obvious step. It therefore reiterates its desire that the Commission take action on the Petition.

The following summary and analysis of the comments submitted in this proceeding encapsulates the current debate on this critical issue.

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<sup>2</sup> *Coakley v. Bangor Hydro-Elec. Co.*, Docket No. EL11-66-001, 144 FERC ¶ 63,012 (Aug. 6, 2013) (Initial Decision) (J. Cianci).

<sup>3</sup> See also Interview by Carl Dombek, *TransmissionHub*, with FERC Commissioner John R. Norris, "FERC Commissioner Norris: FERC's priority should be establishing a stable ROE policy," (Sept. 11, 2013).

## I. Responses of Various Interest Groups

Numerous participants in this docket, especially state regulatory agencies, have chosen to intervene without comment on the WIRES Petition.<sup>4</sup> Comments in support of WIRES' initiative generally come from generators and groups with a substantial stake in better market access as well as disciplined prices. Opposition comes from current transmission customers, especially smaller load-serving public power and cooperative entities.

**A. Support.** Support for a broad, generic discussion about how to ensure adequate transmission investment was included in comments filed by the American Wind Energy Association and the Solar Energy Industries Association ("Associations"). Reviewing the Commission's own strategic goals, the public policy requirements for transmission planning under Order No. 1000, the need for a robust transmission system, and the risks associated with transmission investment and development, the Associations state that "transmission investments are unlike investments in any other utility infrastructure where the projects tend to be smaller in size, shorter in duration, and are located in one area." The Associations therefore believe that "regulators should look for opportunities to provide certainty by maintaining and authorizing stable, long-term returns for transmission owners and developers . . ." (at 4). "It is both the level of [a] return and the stability of that return that attract investors," the Associations state. On those bases, the Associations support WIRES' request for a generic reexamination of the Commission's approach to setting rates of return, including "methodological options that will reduce or eliminate the uncertainties and risks to investors, as well as customers, and avoid potential reductions in investment" in needed infrastructure.

The Governors Wind Energy Coalition, a coalition of the nation's governors that support development of domestic clean energy resources, also supports the

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<sup>4</sup> Requests to intervene as a party were filed without comment by: Arkansas Public Service Commission; Dairyland Power Cooperative; Delaware Division of the Public Advocate; Duquesne Light Company; North Carolina Utilities Commission; Kansas Corporation Commission; New York Transmission Owners; Westar Energy, Inc. The Commission's practice is to allow all interested persons to participate in generic proceedings that might affect a group of energy industry participants or customers, without a formal demonstration of the direct interests affected ("standing").

WIRES Petition. “We view WIRES’ request for a public proceeding and policy clarification on this important issue as necessary and appropriate to the extent the Commission believes these issues were not addressed in the Commission’s ‘Policy Statement.’”<sup>5</sup> The Coalition is “pleased to support WIRES’s [sic] efforts to draw attention to this important national challenge.”

Iberdrola USA supports the five specific proposals for changing application of the DCF methodology, arguing that “[r]ecent litigation challenges to transmission ROEs make it uncertain that ROEs will continue to be adequate to attract transmission investment going forward.” (at 3). Iberdrola USA maintains that rates of return that are within, but not at the extremes of, a determined zone of reasonableness should not be automatically subject to challenge without a strong showing that the returns are not just and reasonable. Factors “outside of the traditional DCF analysis” such as current federal monetary policies should be considered as they provide “a more complete picture” of ROEs needed to attract capital, contends Iberdrola USA.

**B. Opposition.** The first responsive comments filed in this docket were submitted by a diverse group of public advocates, interest groups, and regulators (“Joint Signatories”). The letter, addressed to the individual Commissioners, is critical of a series of arguments that are not made in the WIRES Petition but are instead included in a White Paper not authored by WIRES and not filed in this docket at that time.<sup>6</sup> We will not elaborate on the extensive critique of the EEI White Paper here.<sup>7</sup> However, Joint Signatories also appear to fear that the WIRES

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<sup>5</sup> Governors’ Wind Energy Coalition Comments, Docket No. RM13-18-000 at 1 (July 30, 2013) (citing *Promoting Transmission Investment Through Pricing Reform*, Docket No. RM11-26-000, 141 FERC ¶ 61,129 (Nov. 15, 2012)).

<sup>6</sup> Joint Signatories focus almost exclusively on Edison Electric Institute’s (“EEI”) arguments in “Transmission Investment – Adequate Returns and Regulatory Certainty Are Key,” published in June. WIRES finds very little in Joint Signatories’ arguments that is responsive to its principal concerns. However, we take the ensuing “conversation” about EEI’s paper at least as evidence of pent-up demand for a generic assessment of the arguments made on both sides.

<sup>7</sup> EEI subsequently filed its White Paper in this docket, on August 14, 2013. It was covered by a request that the Commission “maintain flexibility in its [DCF] analysis and exercise its discretion in determining ROEs . . .” which we interpret to mean flexibility to consider a variety of risk factors and alternative methodologies beyond mechanical application of DCF. WIRES’ request for rate certainty and consistency with FERC’s overall transmission policies is also reflected in some of the EEI comments. EEI did not express an opinion about WIRES’ proposal for a generic proceeding.

Petition is a justification for ever-higher ROEs, that WIRES believes those ROEs should not be subject to reduction under any circumstances, and that the Petition tries to justify relaxation of the Commission's vigilance in protecting consumers. Joint Signatories ultimately deliver a message that "the Commission should continue to scrutinize public utilities' transmission rates to ensure that all elements, including ROE allowances, remain just and reasonable in light of changing conditions and factors . . . ."

Subsequently, several of the Joint Signatories submitted individual "supplemental" comments in this docket. Those comments bear more directly on the WIRES Petition. The American Public Power Association ("APPA") is a national service organization representing utilities that operate as subdivisions of local government and, even as major providers of electric power in larger communities, are "transmission-dependent." APPA describes the WIRES Petition as seeking "fundamental changes in current Commission policies that, if adopted, would skew [the] balance [between industry financial needs and consumer interests] in favor of the industry, to the detriment of the consumers who must pay the bills." (at 3).

APPA contends that WIRES advocates substituting a vague public interest test for the just and reasonable standard that no rate (other than the median pinpoint rate) within an adjudicated 'zone of reasonableness' can be presumed lawful under Commission precedent, and, arguably, that any changes in earned returns, whether from better management or financial externalities, should inexorably cause rates to be re-litigated. APPA challenges standardization of proxy group evaluation or growth rate determinations. It argues that FERC's "long-standing DCF methodology" produces predictable results and regulatory certainty in normal and changing financial markets alike and that WIRES' contention that consideration of the benefits to consumers of already-constructed projects when complainants seek to reduce approved returns is a subjective "value" proposition that will lead to regulatory uncertainty. APPA also contends that a generic approach to ROEs cannot capture the complexity that can be captured under the Commission's well-worn ratemaking precedent. Moreover, APPA argues that Commission precedent prevents holding pending litigation in abeyance for even 30

days while these issues are ventilated in a generic proceeding. In sum, APPA claims that WIRES' request for a brief public policy proceeding to consider possible ways to make equity returns more predictable constitutes "sweeping procedural recommendations."

Many of the arguments made by Joint Signatories and APPA are supported and often repeated by the Supplemental Comments of the Modesto Irrigation District ("MID"), the Transmission Agency of Northern California ("TANC"), the Delaware Municipal Electric Corporation, Inc. ("DEMEC"), the National Rural Electric Cooperative Association ("NRECA"), and the Transmission Dependent Utility Systems ("TDU Systems"). Important additional points were made by these groups and utilities, however. In response to WIRES' request that FERC consider five possible policy changes<sup>8</sup> as ways – although not the exclusive ways – to reduce the potential for volatility in transmission rates of return, MID states WIRES' ideas constitute a "new policy" that is not sufficiently supported by precedent to justify such a basic "shift" in FERC law. MID points to a failure to demonstrate that investors will be deterred from investing in transmission even if returns are reduced up to 300 basis points.<sup>9</sup> In addition, MID argues that denial of a hearing under Section 206 "would cut short consumers' due process rights." MID interprets WIRES as replacing the just and reasonable standard with a vague public interest standard that should apply only where actual contract rates exist. Finally and principally, MID contends that FERC already substantially provides the relief WIRES seeks by screening proxy groups for outliers both at the upper and lower ends of the range of comparable returns, by favoring forward-looking data and projections (e.g.,

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<sup>8</sup> The WIRES Petition (at 20-21) proposed that the Commission take steps to maintain stable transmission returns on equity capital, such as standardization of proxy groups used in the DCF methodology; establishing a range of reasonableness threshold for setting complaints for hearing; broadening consideration of comparable capital-intensive investments; benchmarking the appropriateness of DCF results using other return methodologies; and support for use of forward-looking data. These are not major departures from Commission precedent; versions of these practices are already employed by the Commission and regularly come up in Section 205 and 206 proceedings.

<sup>9</sup> MID adds that "WIRES did not ask for any policy changes when ROEs were rising. Its request for 'stability' is therefore nothing more than a plea to provide investors with an unfair advantage compared to ratepayers." Supplemental Comments of the Modesto Irrigation District, Docket No. RM13-18-000 at ¶ 21 (July 26, 2013).

in calculating growth rates), by permitting comparisons to the capital needs of other industries as appropriate, and by employing methodologies other than DCF. WIRES, claims MID, has left the Commission unclear about what problems it seeks to resolve.

TANC offers the same fundamental points, plus reiteration of its opposition to the conclusions in EEI's White Paper. However, TANC makes the argument that WIRES is proposing a form of valuation ratemaking harkening back to Nineteenth Century Supreme Court precedent<sup>10</sup> subsequently overturned by *Hope*. Presumably, TANC is referring to WIRES' general observation that the benefits that specific transmission projects provide or are projected to provide should be considered when investors' existing returns on those investments are challenged.<sup>11</sup> Because shifts in an economy can dramatically enhance or undermine the value of utility assets, TANC argues that the skewed returns that WIRES wants to avoid "actually results from using value to set rates." (at 8).

TDU Systems focuses on customers' hearing rights under FPA Section 206. WIRES proposed that the Commission hesitate to set complaints for hearing without a showing that the existing returns resulted in significantly changed – higher or lower – returns.<sup>12</sup> This approach is characterized by TDU Systems as a "zone of immunity" within which existing rates of return would be immune from challenge. TDU Systems suggests that, to the contrary, complainants are entitled to a hearing if a *prima facie* case is made that the existing rate exceeds just and reasonable. It

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<sup>10</sup> *Smith v. Ames*, 169 U.S. 466 (1898). The case is remembered for Justice Brandeis' dictum that a provider of a public service must be allowed to charge rates that would yield a "reasonable return on fair value of its property," which (according to a preeminent scholar of utility rates) "opened the floodgates for long, tortured, empty, and meaningless fruitcake discussions surrounding original versus reproduction costs [which] the Hope case laid . . . to rest." Bonbright et al., *Principles of Public Utility Rates* (rev. ed 1987), 125, 200.

<sup>11</sup> WIRES Petition at 21-23 and n. 26.

<sup>12</sup> WIRES suggested that FERC establish hearings on existing rates only when ROEs appear to vary meaningfully from the "just and reasonable rate" within the zone of reasonableness (i.e., the range of rates that are too low ("confiscatory") or too high ("excessive") based on current industry experience ("proxies"). WIRES' proposal for a hypothetical window of 40% above or below what the DCF indicates is the 'pinpoint' just and reasonable number (i.e., a rate of return that is shown to be at the upper or lower 10% of the zone) is but one possible threshold for a *prima facie* showing of unlawfulness.



relies on the Commission's *Bangor Hydro-Electric* case<sup>13</sup> for the proposition that no rate within a zone of reasonableness, other than the single rate established at the mid-point or median of the range, can be presumed just and reasonable. At bottom, TDU Systems' criticism originates from its apparent belief that "public utilities . . . are seeking to make it virtually impossible for interested parties to initiate FPA section 206 complaints," even though they can file rate increases with impunity. (at 6).

NRECA also reiterates the charge that WIRES wants FERC to "close its doors to complaints about excessive rates." However, recognizing that pinpointing a just and reasonable rate of return may involve a balancing of factors instead of mechanically looking for the middle of a zone of arguably lawful rates, NRECA distinguishes its position by stating its procedural objection as follows: "It is one thing to suggest that the Commission should weight one factor or another more or less in pinpointing a just and reasonable rate within a zone of reasonableness, but quite another to foreclose the weighing process altogether." (at 3).

Finally, DEMEC simply contends that the "generic and sweeping changes" set forth in the Petition would be "fundamentally unfair."

Industrial customers, represented by the American Forest & Paper Association ("AFPA") and the Delaware Public Service Commission ("DPUC") also filed comments in general opposition to what they perceive WIRES as proposing. AFPA ascribes the positions of EEI to WIRES, which would, in AFPA's view, "undertake sweeping and systemic changes" and "summarily reverse or jettison longstanding Commission policy and precedent." AFPA indicts WIRES' request for a generic proceeding as a request for "everything from preemptively limiting the statutory rights of parties under Section 206 . . . to considering the 'value' of projects rather than the utility's need to attract capital on just and reasonable terms." (at 3).

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<sup>13</sup> *Bangor Hydro-Elec. Co.*, 122 FERC ¶61,038 (2008). TDU Systems also quotes *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, at 251 (1951): "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. . . To reduce the abstract concept of reasonableness [that is, the 'area'] to concrete expression in dollars and cents [that is, the 'pinpoint'] is the function of the Commission."

WIRES is attempting a “complete revolution,” unsupported by facts, according to AFPA.

The DPUC believes that WIRES’ proposals would “inject the Commission in matters and issues it has specifically avoided” and result in “endless litigation arguing the merits of benefits and values to be considered in establishing an appropriate ROE for investments in transmission facilities.” It states that the Brattle Report on transmission benefits was directed at transmission planning and not ROEs. (at 3). The DPUC goes on to say that, even under Order No. 1000, transmission planning should not entail “broad general welfare goals.” It conjectures that commenters that support WIRES’ transmission investment goals to meet public policy requirements would abandon their position if WIRES’ ROE arguments were applied equally to economic or reliability projects. (at 5). In sum, transmission investment is not, as WIRES suggests, a special case entitled to ratemaking policies different from other parts of the power business. Nor should its ROEs reflect capital costs to other industries, in the DPUC’s view.<sup>14</sup>

Finally, the Illinois Attorney General<sup>15</sup> (“Illinois”) also recommends denial of the relief sought in the WIRES Petition and indicates support for the comments of Joint Signatories and the AFPA, TDU Systems, and APPA. Illinois views the WIRES Petition as an “unabashed attempt to maintain an unreasonable payment from the general consuming public to the investors in transmission systems.” (at 4). Illinois stresses the importance of balancing diverse investor and consumer interests. Its comments raise two new points. First, Illinois argues that the value of transmission projects (as discussed in the Brattle report) is already reflected in ROE determinations and should not be separately addressed. Second, Illinois interprets the WIRES Petition as a vote of no confidence in FERC’s ability to set reasonable rates based on market indicators. Recognizing that “money market and business conditions” change, Illinois asserts that, to paraphrase *Bluefield*, rates of return will

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<sup>14</sup> The WIRES Petition is also subject to criticism along these same lines in at least one FPA Section 206 complaint. See Complaint of Grand Valley Rural Power Lines, Inc., et al., and Motion To Consolidate, Docket No. EL13-86-000, esp. at ¶¶ 49-61 (Aug. 30, 2013). The Complainants are not intervenors or commenters in this docket.

<sup>15</sup> Comments of The People of Illinois By Attorney General Lisa Madigan, Docket No. RM13-18-000 (Aug. 8, 2013).

change in accordance with them. The Commission should decline WIRES “thinly-disguised attempt” to limit FERC’s discretion in setting rates, insists Illinois.

## **II. WIRES’ Response and Analysis**

For purposes of clarification, the WIRES Petition only requested a Commission enquiry into the implications of multiple rate of return challenges for future investment in electric transmission, Commission policy initiatives, and the overall well-being of the United States’ economy. It argued that:

1. Developing transmission remains a risky and unusually prolonged regulated process with challenges that are unique in the energy industry.

2. Electric transmission infrastructure is an enabler of competitive power markets, new technologies, diverse energy resources, and lower electricity prices , is in the long-term interest of consumers, and the projected investment to sustain that role runs into the hundreds of billions of dollars.

3. The DCF methodology, for all its precedential weight and merit, utilizes subjective judgments about its selected components, a reactive focus on short-term economic phenomena, and blindness to potential investor behaviors. The unusual and unsustainable current capital market conditions create a downward bias on the DCF results.

4. Strong transmission infrastructure is the platform for efficient interstate commerce in electric power and, as such, it also forms the platform for achievement of the Commission’s goals under Order Nos. 888, 890, and 1000.

5. Regulated rates of return understandably fluctuate according to company risk profiles and macro-economic factors, but when adjudicating just and reasonable rates, the Commission need not ignore energy policy goals, the benefits of increased investment (present and future), or the possibility of a return to the bad old days of investment boom and bust.

We have carefully considered the limited number of comments filed in this docket. With notable exceptions, few of the commenters in this docket addressed the major issues presented by the WIRES’ Petition – the condition of our transmission delivery infrastructure, the costs to consumers and the economy of

changing patterns of infrastructure investment, the need to support the Commission's market initiatives with physical infrastructure, and the possibility that thinking creatively about ratemaking policy will serve consumers even better over the long term. The central issue here is the role that stable regulated rates can play in securing needed infrastructure investment over time or, to state it conversely, the degree to which dramatic changes (or the prospect of dramatic changes) in regulated returns could undermine investment and therefore the outlook for strengthening the electric grid in the future. If, as some commenters argue, WIRES has not fully supported its expressions of concern about the consequences of a rate of return roller-coaster, the policy-making option WIRES has placed before the Commission would be an opportunity for all parties to explore these issues more fully, including the jeopardy to the Commission's interest in advancing its own pro-market, pro-transmission policies.

In any event, WIRES never intended its search for ways to moderate adjustments to rates of return to be the final word on the subject. The objective of the WIRES Petition is not to curtail the procedural rights of consumer advocates but to encourage prudent action within the Commission's lawful discretion, acknowledging that that the breadth of that discretion may not be entirely settled. WIRES' five reform proposals simply gave the Commission a starting point for adapting its ratemaking practices to a 21<sup>st</sup> Century infrastructure problem. Those comments that instruct the Commission not to adopt WIRES' ideas because they would leave it hamstrung and unable to protect consumers do not, in our view, reflect much confidence in the Commission's judgment. The scope of the generic proceeding that WIRES seeks is ultimately up to the Commission. It may choose to proceed by initiating a rulemaking or policymaking notice, or it may choose to allow the contested cases that are pending or in hearing to proceed apace without further guidance. Either way, the issues are worth raising, and the comments submitted are worthy of a response.

**A. Is transmission a special case?** WIRES, as its name suggests, is focused on the welfare of the high voltage grid and the wholesale power markets it supports. However, because transmission is a type of investment that will deliver the most

efficiency, the most resilience, the most access to diverse low cost energy, and the most market discipline for the money of any electric power investment, and because the existing transmission system faces such unusual regulatory challenges, transmission investment is a special case. FERC competition policy has focused for two decades on opening up the grid to competitive access. Although we will basically be replacing the entire power system in the coming decades and enhancing its capabilities with new generation resources, digital control and monitoring technologies, storage, distributed generation, and even microgrids, the transmission network ties it all together in a way that is economically efficient. Investment in transmission alone needs to exceed \$300 billion. In Order Nos. 888, 890, 1000, and 2000, the Commission used transmission policy to transform the nation's wholesale power markets. The Energy Policy Act of 2005 ordered incentives and innovative siting mechanisms for transmission development. In sum, these initiatives constitute a recognition of the special role transmission investment must play in improving the availability, reliability, and cost of electricity, and we cannot simply assume that the capital will be there when needed.

Commenters may argue that none of this entitles transmission to special efforts to moderate volatility in rates of return on equity investments, but we think otherwise, especially given the important related regulatory initiatives that are at stake.

**B. Application of DCF precedent.** Transmission rates are not immune from external economic developments, from review by regulators on behalf of customers or industry, or from the demands of public policy. WIRES perceives a widespread consensus on this point but, even after 70 years, the nature of “just and reasonable” is still subject to interpretation, and transmission providers and customers are probably bound to disagree about where, in that territory between “confiscatory” and “excessive” rates, the “just and reasonable” rate lies. The Commission has discretion to resolve that debate differently in individual cases or under evolving conditions, as it has in its policies and practices governing proxy companies, median versus mid-point, and so forth. WIRES' objective in this docket is simply to make the

case that a broader perspective on the purpose and consequences of rates of return can make rate regulation something other than a zero-sum game.

Commenters argue that WIRES' Petition contravenes aspects of the Commission's rate of return policy. WIRES filed for that very reason. It does not object to the use of DCF, and it appreciates the reminders that, in several respects, the Commission has tried to apply it more scientifically by using forward-looking growth rates, elimination of certain proxy outliers, and permitting benchmarking DCF with other methodologies. Nevertheless, the volume of current litigation amply demonstrates that the end results of rate of return determinations are uncertain and fraught with controversy. WIRES enquires whether the Commission can make rate of return determinations less susceptible to radical or anomalous changes in the financial markets. Many commenters prefer to apply the DCF methodology without regard to end results or the transitory nature of the current Federal Reserve monetary policy. We submit that it is the end result of ratemaking that is important, not the means by which the Commission gets there. For that reason, the Commission should curb potentially extreme reductions and increases in existing returns that, under prevailing economic conditions, flow from mechanical application of DCF. This is not to argue for an unsupported wealth transfer, as some commenters aver. We see a reassessment of DCF policy as one, but not the exclusive, way to ensure that the appropriate flow of capital needed for critical infrastructure is there when major societal needs and benefits demand it.

WIRES also asks the Commission to consider the extent to which traditional methods of setting rates of return on equity adequately account for all of the evident risks or whether they actually institutionalize the volatility in financial markets and federal monetary policies – with attendant long-term consequences for the economy, consumers, and public policy. The real and nominal decline in U.S. transmission investment during the quarter century following 1980 has come at a great cost to electricity consumers and the economy. Repeat performances of that phenomenon must be avoided. Opponents of WIRES' views express very little interest or concern about what happens if the nation's transmission infrastructure is unable to support competitive bulk power markets, or reach high quality

domestic renewable resources or new natural gas generation, or achieve the highest levels of reliability. Congress certainly recognized the coming challenges when, in 2005, it directed the Commission to ensure that the intensive capital needs of this sector were addressed. We think that, although their perspective is one of a customer and a price-taker, transmission users and transmission dependent utilities should be just as concerned as WIRES about the prospect of inadequate transmission in the decades to come. As AWEA and SEIA have opined, creating a stable investment climate is a forward-looking strategy that serves everyone.

**C. Customer rights under Section 206.** This is a troubling area. We do not endorse a “zone of immunity” within which excessive rates can be charged with impunity, as commenters suggest. TDU Systems appeals to language in the 1951 Supreme Court decision in *Montana-Dakota* which we think illustrates how the Commission’s authority to reduce the range of potentially reasonable results to a single “pinpoint” rate of return can be interpreted and applied in different ways. Either the Commission has latitude in fashioning a rate of return approach that is responsive to changing needs and conditions, as WIRES believes it does, or the sheer weight of Commission precedent governing application of rate methodologies will govern all such determinations, as many commenters contend—with manifold citations to boot. If, as commenters imply, any deviation from that pinpoint rate of return (either existing or proposed) potentially constitutes an unjust and unreasonable rate of return, rate regulation will become a source of extreme risk and uncertainty, not to mention a recipe for extensive litigation. Customers clearly have rights protected under the FPA to challenge transmission rates of return, and not even the Commission can curtail them. However, the Commission always has to determine whether there is a reasonable ground to hold a hearing that could upset an existing just and reasonable rate of return. In that regard, WIRES is raising for consideration whether those grounds should always be provided in a *prima facie* showing by individual complainants or whether the Commission can address them in policies or rules. The typical risks and challenges faced by transmission investors and the extraordinary, unprecedented, and unsustainable developments in financial markets should both influence how rates of return are set or adjusted and how they

can be made more stable and predictable over time. WIRES contends there is a need for guidance in this area, given the importance of transmission investment and the magnitude of the need for it.

**D. Transmission benefits and “value.”** The contention that WIRES is advocating a return to valuation ratemaking is evidently based on use of the word “value” in the title of the recent Brattle Group report on transmission benefits, commissioned by WIRES and cited in the WIRES Petition. The Petition states that, although the Brattle Report was written to enhance an understanding of those benefits in transmission planning processes, the Commission and transmission customers should also consider the immediate and potential benefits that new or upgraded facilities provide to customers and the economy when setting or challenging rates of return. Although the Petition does not prescribe how that should be done, WIRES believes the idea makes sense, especially because transmission planning and investment is predicated on determining the range of economic, reliability, public policy, and other benefits to customers that will result.<sup>16</sup> However that might be done by regulators, it clearly has nothing to do with ascertaining the value of assets for purposes of rate base ratemaking, an approach that was overthrown in favor of a more cost-based, end-result oriented approach to rates over 70 years ago. Illinois’ unusual contention that the value or benefit of a project is always reflected in the ROE leads to the strange conclusion that, if its ROE is reduced, the market value of a project is necessarily and proportionally lower. Such arguments confuse outmoded valuation ratemaking with the legitimate consideration of future transmission benefits in planning, cost allocation, and ROEs. Moreover, WIRES believes that giving the benefits (as well as the costs) of infrastructure investments some weight in the ratemaking process does not create uncertainty for investors, as has been argued. It is instead a way of helping ensure that the regulatory and investment processes operate in sync to produce the best transmission projects.

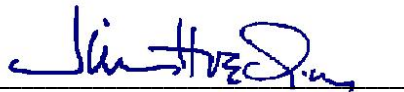
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<sup>16</sup> Benefits to customers or other utilities form a basic justification for transmission facilities and, like cost causation, a foundation for rate responsibility, “To the extent that a utility benefits from the costs of new facilities, it may be said to have ‘caused’ a part of those costs to be incurred . . .” *Illinois Commerce Commission v. FERC*, 576 F.3d 470, 476 (7<sup>th</sup> Cir., 2009).



**Conclusion.** It is evident that energy delivery infrastructure lacks a natural constituency. Unlike other power system investments, transmission serves all fuel types. Unlike distribution, it is tied much less directly, if at all, to local markets or consumer interests. At bottom, it is everyone's asset to use but all too often it is no one's responsibility – a classic “tragedy of the commons.” One may reasonably hope that, as transmission investments serve markets more regionally and inter-regionally, this phenomenon will not be perpetuated. Averting transmission “free riders” seems to be at least part of the goal of Order No. 1000. The current struggle over who will pay for the resurgent investment in the grid, while a legitimate field for debate, should not obscure the fact that a positive prognosis for stable long-term investment in the high-voltage grid is in everyone's interest and that a stable and adequate ROE is an important part of serving the broad public interest.

Respectfully Submitted,



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