

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

**ANSWER OF THE AMERICAN PUBLIC POWER ASSOCIATION
AND TRANSMISSION ACCESS POLICY STUDY GROUP**

In Opinion 569-A, the Commission held that it was appropriate “to establish a new base ROE policy in the[] MISO complaint proceedings,” rejecting transmission owner arguments that the Commission should instead take action in this Base ROE NOI proceeding.¹ Notwithstanding that holding, those transmission owners’ trade associations, the Edison Electric Institute (“EEI”) and WIRES, filed herein on June 24, 2020 a Motion for Expedited Action requesting the same relief and making the same arguments that the Commission already rejected.² That Motion comes on the heels of multiple “supplemental” comments filed herein by various groups of transmission owners, all of which were filed nearly a year after the Commission’s deadline for filing initial comments.³ Those supplemental comments largely repeat positions taken by transmission owners in their rejected requests for rehearing of Opinion 569.⁴

¹ *Ass’n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154, P 205 (2020) (“Opinion 569-A”).

² Joint Motion for Expedited Action of the Edison Electric Institute and WIRES (June 24, 2020), eLibrary No. 20200624-5186 (“EEI/WIRES Motion”).

³ WIRES Supplemental Comments (June 18, 2020), eLibrary No. 20200618-5140 (“WIRES Supplemental Comments”); Joint Motion for Leave to File Supplemental Comments and Supplemental Comments on the Inquiry Regarding the Commission’s Policy for Determining Return on Equity (June 15, 2020), eLibrary No. 20200615-5312 (“SCE Comments”); Supplemental Comments of the New England Transmission Owners (May 12, 2020), eLibrary No. 20200512-5131 (“NETOs Comments”); Motion for Leave to File Supplemental Comments and Supplemental Comments of the EEI (May 11, 2020), eLibrary No. 20200511-5170.

⁴ *Ass’n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019) (“Opinion 569”), *on reh’g*, Opinion 569-A.

The American Public Power Association and the Transmission Access Policy Study Group hereby⁵ submit this answer in opposition to the EEI/WIRES Motion. Through its statements in Opinion 569-A and the absence of any action on electric ROE issues in this proceeding, the Commission has indicated that it does not intend to address matters related to ROE for electric utilities in this NOI docket. Given that stance, the Commission should explicitly reject the Motion and should close this docket with respect to electric utilities to avoid any further filings that do nothing more than waste the Commission's and stakeholder's resources. If the Commission is willing to entertain the EEI/WIRES motion and the late-filed, "supplemental" comments, due process requires that the Commission give notice to all stakeholders and provide them an opportunity to respond substantively to the transmission owners' arguments.

I. ANSWER

A. *The Commission should reject the Motion.*

The EEI/WIRES Motion asks the Commission "to develop a base ROE methodology for public utilities that it will apply going forward and that will be applicable to the electric industry as a whole."⁶ But the Commission says it has already done that: it has confirmed that Opinion 569 "establish[ed] a revised methodology for determining just and reasonable base ROEs for public utilities under the Federal Power Act."⁷

To the extent that EEI/WIRES take issue with the Commission's position that it will apply the Opinion 569-A methodology to determine public utility ROEs going forward, the EEI/WIRES Motion amounts to an impermissible request for rehearing of Opinions 569 and 569-A. Their members already argued in the MISO Complaint Proceedings that "it would be

⁵ Pursuant to Commission Rule of Practice and Procedure No. 213, 18 C.F.R. § 385.213.

⁶ EEI/WIRES Motion at 2.

⁷ *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 171 FERC ¶ 61,155, P 1 (2020).

inappropriate for the Commission to establish a new base ROE policy in [those] proceedings without considering the broader universe of comments and evidence submitted in response to the Base ROE NOI.”⁸ The Commission rejected that argument, holding that its issuance of the Base ROE NOI “did not prohibit it from changing its base ROE policy in an adjudication nor require that changes in base ROE policy occur in” this generic proceeding.⁹

The EEI/WIRES Motion does not even acknowledge that the Commission has already considered and denied their requested relief. To use EEI/WIRES’s own words, the Commission should “act promptly,”¹⁰ “take definitive and necessary action,”¹¹ and “provide much-needed clarity”¹² by rejecting their motion.

B. If the Commission does not intend to take further action, it should close the docket with respect to electric utilities.

Initial comments on the Base ROE NOI were due on June 26, 2019 and reply comments were due on July 26, 2019. Emphasizing the importance it placed on receiving timely comments, the Commission denied an unopposed request, by multiple trade associations representing both transmission owners and transmission customers, for a thirty-day extension of reply comments.¹³

Despite the Commission’s insistence on timely comments, four groups representing transmission owner interests have filed herein “supplemental” comments in May and June 2020, nearly a year after initial comments were due.¹⁴ All of those supplemental comments inappropriately respond to Opinions 569 and 569-A. Parties who timely intervened in the MISO

⁸ Opinion 569-A, P 200.

⁹ *Id.* P 205.

¹⁰ EEI/WIRES Motion at 3, 6.

¹¹ *Id.* at 1, 7.

¹² *Id.* at 6; *see also id.* at 3

¹³ Notice Denying Extension of Time (May 21, 2019), eLibrary No. 20190521-3049.

¹⁴ *See supra*, note 3.

ROE Proceedings can seek rehearing and/or judicial review of those opinions, and indeed they have already done so. And, as the Commission made crystal clear, parties to other proceedings are “free to argue . . . that the base ROE methodology applied in [the MISO ROE Proceedings] should be modified or applied differently because of the specific facts and circumstances of th[ose] proceeding[s].”¹⁵ Transmission owners unsatisfied with the Commission’s determinations should be required to follow those established procedures; they should not be permitted to continue filing comments in this proceeding.

Given the Commission’s position that Opinion 569-A establishes a new policy for establishing public utilities’ base ROE, allowing the ceaseless drip of procedurally improper comments in this proceeding unnecessarily burdens the Commission, stakeholders, and ultimately the public. Two consumer-side groups have already felt compelled to respond to the untimely supplemental comments.¹⁶ Countless others surely have expended resources and incurred legal costs to assess whether a response was needed to protect their interests. And the Commission also expends resources to address these late-filed comments and the inevitable responses.

The Commission should put an end to this waste and unfairness by formally closing this docket with respect to electric utilities. Such closure would be consistent with the EEI/WIRES request that “the Commission should terminate this proceeding to provide regulatory certainty to the industry” if the Commission has no intention of taking further action here.¹⁷

¹⁵ Opinion 569-A, P 205.

¹⁶ Response of Complainant-Aligned Parties to Late-Filed Supplemental Comments of New England Transmission Owners (June 2, 2020), eLibrary No. 20200602-5158; Answer on Behalf of the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside (June 30, 2020), eLibrary No. 20200630-5523.

¹⁷ EEI/WIRES Motion at 6.

C. Alternatively, the Commission must give stakeholders an opportunity to respond substantively.

If—despite its contrary indication in Opinion 569-A—the Commission is entertaining the possibility of taking additional action with respect to electric utilities in this proceeding, due process requires that the Commission grant stakeholders a formal opportunity to respond substantively to the arguments made in the late-filed “supplemental” comments. An “elementary and fundamental requirement of due process” is “to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections.”¹⁸ Granting the EEI/WIRES Motion, without first establishing a schedule for reply comments, would violate that fundamental principle. *Cf.* D.C. Cir. R. 35(d) (“A petition for rehearing ordinarily will not be granted, nor will an opinion or judgment be modified in any significant respect in response to a petition for rehearing, in the absence of a request by the court for a response to the petition.”).

The four “supplemental” comments amount to over 200 pages of new arguments ranging from a “comprehensive proposal” that contradicts Opinions 569 and 569-A¹⁹ to a proposal to upend the well-established and recently confirmed use of the median as the measure of central tendency for individual utility filers.²⁰ If the Commission were to do anything other than reject those comments as procedurally improper, it must also hear from other interested parties about the merits of those arguments. In such a hearing, we would be prepared to demonstrate, as just one example, that WIRES’s argument highlighting the market/book ratio of 1.0 at which holding companies invest in their subsidiary transmission-owning public utilities,²¹ means that the market/book (and associated expected earnings/book) ratios of the proxy group holding

¹⁸ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

¹⁹ NETOs Comments at 8.

²⁰ SCE Comments; *see* Opinion 569, P 425 n.866 (confirming that “the Commission will continue to use . . . the median as the measure of central tendency for a single utility.”).

²¹ WIRES Supplemental Comments at 27.

companies do not represent the market/book (and associated expected earnings/book) ratios of the public utilities whose cost of equity is at issue in Commission proceedings. If the Commission intends to give any credence to the late-filed supplemental comments in this proceeding, therefore, it must provide an opportunity for stakeholders to substantively respond to the new arguments.

II. CONCLUSION

For the reasons discussed above, the Commission should reject the EEI/WIRES Motion. The Commission should also terminate this proceeding with respect to electric utilities, or alternatively give the public a fair opportunity to respond substantively to the late-filed “supplemental” comments in this proceeding.

Respectfully submitted,

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