July12, 2013

VIA ELECTRONIC MAIL

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The Honorable Philip D. Moeller, Commissioner
The Honorable John R. Norris, Commissioner
The Honorable Cheryl A. LaFleur, Commissioner
The Honorable Tony Clark, Commissioner
Federal Energy Regulatory Commission
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Re: Docket No. RM13-18, Petition of WIRES for Statement of Policy and June 2013 Edison Electric Institute Report on Transmission Rates of Return on Equity

Dear Chairman and Commissioners:

In June 2013, the Edison Electric Institute ("EEI") released a report entitled "Transmission Investment—Adequate Returns and Regulatory Certainty Are Key" ("EEI Report"). Subsequently, WIRES (the "Working group for Investment in Reliable and Economic Electric Systems") filed on June 26, 2013, a petition seeking to have the Commission issue a Statement of Policy on base return on equity ("ROE") allowances for transmission investment. Both EEI and WIRES argue that even though interest rates have declined substantially since the beginning of the recession in 2008, this Commission should not reduce the current ROE allowances for transmission investment included in the regulated rates that public utilities charge for transmission services.[1] The public utility commissions, industrial electric customers, public power systems, rural electric cooperatives, state consumer advocates and associated trade associations, nonprofit consumer advocacy organizations, and environmental organizations signing this letter ("Joint Signatories") respond briefly below to these contentions, and in particular to certain of the points EEI makes in its Report.

Our primary message is simple—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 economic conditions and factors, as the Federal Power Act[2] requires. The FPA allows public utilities to earn a return sufficient to attract capital from investors; it does not require the continued payment of ROE allowances that are unduly high given changed economic conditions, simply because at some point in the past, the Commission

[1] The WIRES Petition (Docket No. RM13-18-000) asks the Commission, if it grants the Petition, to take "official notice" of the EEI Report. Petition at 12 & n.13.

[2] 16 U.S.C. §§ 791a-828c ("FPA").

found such an ROE just and reasonable under then-prevailing circumstances.[3] The Commission also should not abandon the Discounted Cash Flow ("DCF") methodology it now uses to determine ROE allowances just because it no longer produces the same ROE awards that it did prior to 2008. Economic conditions throughout the Nation (if not the world) have fundamentally changed since that time. In the past five years, electric consumers have suffered through decreased employment, shrinking paychecks, home foreclosures, and myriad other economic losses. Industrial consumers also have faced extraordinary economic challenges, including decreased demand and aggressive foreign competition. EEI's arguments that its members' high pre-2008 ROE allowances cannot be reduced without disappointing investors must be weighed against these hard facts.

Among the erroneous points made in the EEI Report are the following:

- EEI (Report at 2) sees "no link between record low interest rates and investors' expected return on transmission investment." This bald statement stretches credulity. Investors survey the variety of investments available to them, their relative risk and their associated potential returns. Because very low-risk interest-bearing investments are part of that array, investors will look at the associated interest rates for such investments and rank other investment options accordingly. Hence, if interest rates are low, then other investments will be more attractive at lower rates of return than if interest rates were higher. Many of today's high ROEs exist precisely because the Commission took account of past interest rates by applying its longstanding policy linking final updated ROEs to yields on 10-year treasuries. If interest rates and ROEs are linked when interest rates rise, then they are linked when interest rates fall.

- EEI claims (Report at 14) that "[e]lectric utilities do not compete just with other electric utilities for capital; they also compete with companies from other sectors of the economy," and expresses concern that absent sufficiently "robust" returns, investors may flee to "more attractive and less risky" alternatives. Report at 7. EEI fails to acknowledge that electric utility access to capital is enhanced because utility stocks are considered generally less risky, less volatile, and more dividend-paying than non-utility issues.[4] Utility equities will likely continue to be considered a safer class of investment,

[3] Under the seminal case law, a utility rate of return should be sufficient to: (1) maintain the financial integrity of the enterprise; (2) enable the company to attract new capital; and (3) provide a return to the common equity owner that is commensurate with returns on investments in other enterprises of corresponding risk. *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944) ("*Hope*"); *Bluefield Water Works and Improvement Company v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93 (1923) ("*Bluefield*"). EEI's contentions (Report at 5) aside, investors are not guaranteed ROEs that must remain unchanged over the life of an investment. As the Supreme Court stated in *Bluefield*, "[a] rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." *Bluefield,* 262 U.S. at 693.

[4] Paul E. Debbas, Value Line, Industry Analysis: Electric Utilities, *available at* http://www.valueline.com/Stocks/Industry_Report.aspx?id=7239. For example, electric power sector stocks outperformed overall markets in the wake of Standard & Poor's Ratings downgrade of the US government. Paul Carlsen, *S&P's Government Cut Impacts Some Utility Debt But*

as regulated utilities are given the opportunity to recover their costs and earn a "fair and reasonable" return on their investment.[5] As a result, investors are generally willing to accept a lower return on equity for utility stocks than in some other sectors, *e.g*., tech stocks or start-ups.

- EEI further asserts (Report at 2) that the premise upon which historical transmission investments were made was "stable returns over the asset lives of the facilities." As applied to equity investments, this statement makes little sense. Investors seeking an investment with a stable return over the life of a long-lived asset such as transmission facilities usually invest in bonds, which by definition carry a stable return. Investors in stock, even the stocks of regulated companies, must accept the possibility that returns may vary over time.[6] EEI was not heard arguing for recovery of past rather than current capital costs when ROEs were rising, and even now it is not proposing a moratorium on ROE increase filings. Its call for "stability" is therefore nothing more than a call to make rate regulation a one-way street.

- EEI repeatedly asserts that transmission investments are "extremely risky" (see EEI Report at pages 1, 7-8) and cites this as a reason for retaining high ROE awards even in the face of reduced interest rates. But rating agencies, investment analysts, investors, and some transmission owners themselves plainly do not share that view; setting aside positions taken before FERC, one will search in vain for a real-world investment document that characterizes rate base, cost-plus transmission as anything other than an exceptionally safe investment. Few businesses are as risk-free as that of selling access to essential facilities at cost-plus prices, typically through non-bypassable formula rates that, in effect, collect the allowed revenue requirement as an unavoidable tax.

- In its very subtitle, the EEI Report purports to seek "Regulatory Certainty." In fact, however, EEI is seeking to re-litigate the Statement of Policy that the Commission issued just last year.[7] The Commission therein both reaffirmed that it will, in appropriate cases, grant transmission rate incentives to reduce the risk of transmission projects, and dialed

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Sector Stocks Outperform Volatile Markets, Electric Utility Week, August 15, 2011, at 13; *S. Cal. Edison Co.*, 131 FERC ¶ 61,020 at P 89 (2010), *reh'g denied*, 137 FERC ¶ 61,016 (2011), *aff'd in part and remanded in part on other grounds*, No. 11-1471, 2013 WL 1920937 (D.C. Cir. May 10, 2013).

[5] Value Line, What is a Defensive Stock? (April 8, 2012), *available at* http://www.valueline.com/Stocks/Commentary.aspx?id=12866 (explaining that mature industries tend to fare better in contraction and noting that utilities are often deemed safe havens).

[6] As noted above, the Supreme Court even stated in *Bluefield* that, "[a] rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." *Bluefield,* 262 U.S. at 693. This is as true today as it was in 1923.

[7] "Policy Statement," *Promoting Transmission Investment Through Pricing Reform,* Docket No. RM11-26-000 (Nov. 15, 2012), 141 FERC ¶ 61,129.

back its willingness to grant project-specific ROE adders to provide incentives for new investment. Now, EEI is seeking, in effect, to apply non-targeted ROE adders to the entire rate base, old and new, by raising every public utility's base ROE allowance above its current cost of capital.

- EEI proposes (Report at page 14) a set of recommendations for how the Commission can "enhance its flexibility" by either adjusting how certain DCF inputs are calculated or abandoning the DCF methodology in favor of "alternative approaches." The Commission should not entertain fixes to something that is not broken. In fact, the only thing "wrong" with the current DCF methodology is that, in combination with current economic conditions, it leads to ROE results that transmission owners and their investors wish were higher. When economic conditions change, transmission owners will seek approval of ROE increases, and will no longer argue that methodological changes are needed. Far from an anomaly, the rise and fall of ROEs in accordance with economic conditions is implicit in the FPA and case law interpreting it.

- EEI raises the specter that lower returns will skew planning, stating that "[i]f ROEs for transmission are not sufficient, a utility may choose a short-term more-local project or alternative resource solution to maintain reliability rather than choose the riskier, more strategic option that could provide additional benefits to customers and be more cost-effective." (Report at page 7.) But the risk of planning distortion runs the other way. Propping up federal transmission return allowances relative to ROE allowances set by the states would skew utility investment decisions as between transmission and other system needs, such as distribution level infrastructure additions, cleaner generation, and demand-side management,[8] and would tilt towards inaction the cost-benefit analyses by which siting authorities and regional planners weigh whether investment in new transmission is worthwhile.

- EEI goes on to state (Report at page 7) that "without adequate returns to support investment in needed transmission, projects evaluated in [Order No. 1000] planning

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[8] *See, e.g.*, Sept. 12, 2011 Comments of Joint Signatories in *Promoting Transmission Investment Through Pricing Reform*, Docket No. RM11-26 at pp. 35, 81 and Attachment B (Statement of Jim Tracy), ¶ ¶ 15-19. As Mr. Tracy noted at ¶ 18 of his statement:

> Utilities will typically spend money to replace or add facilities to stay ahead of the curve and avoid problems before they occur, because reliability is a high priority. But these are still discretionary investments in the sense that they can be deferred for some period of time without risking acceptable service reliability. For example, a decision to replace underground distribution lines can be deferred. If this can be done and if the utility's shareholders can earn a higher return on transmission investments than on such deferred distribution upgrades or replacements, this is likely to cause a shift in the utility's use of its investment dollars. A higher-than-required ROE allowance on new transmission facilities could skew the incentives toward investment in such higher return projects even if investment in distribution facilities carrying a lower ROE might be optimal for overall reliability. This would not be desirable, particularly if incentives are made too readily available, and could encourage overbuilding of transmission capacity.

processes may not be undertaken because limited capital will be invested elsewhere, likely resulting in delay or absence of projects required to address congestion, to implement public policy objectives, and to bring benefits to customers." But this veiled threat to forgo investing in needed transmission facilities cannot be reconciled with the assertions of EEI and a number of its individual members that they should have exclusive rights to build new transmission facilities in their service areas so that they can satisfy their own public utility obligations to provide reliable service.[9] On the contrary, making these conflicting assertions requires a certain degree of *chutzpah*.[10]

For all of these reasons, the Joint Signatories urge the Commission to continue to review the ROE allowances of Commission-regulated public utilities using the DCF methodology to ensure that they remain just and reasonable in light of current economic conditions, and to reduce them as necessary to meet the relevant legal standards.

[signatures follow]

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[9] As the Commission is well aware, public utilities have recently contested each other for primary rights to build transmission facilities in numerous states, including Illinois, Indiana, Kansas, Minnesota, and Pennsylvania. *See, e.g.*, FERC Docket Nos. EL10-14, EL10-52, EL12-24, EL12-28, and EL12-69, and Kansas Corporation Commission Docket No. 08-ITCE-936-COC. Even more recently, EEI joined in arguing that incumbent transmission owners may safely be given primacy rights to build because "FERC will regulate the price the owner of the line may charge, limiting it to its prudently incurred costs of providing the service." *See South Carolina Public Service Authority, et al. v. FERC*, D.C. Cir. Nos. 12-1232, et al., Joint Brief of Petitioners and Supporting Intervenors Concerning Rights of First Refusal, filed May 28, 2013, at 25. While making that argument to the D.C. Circuit, EEI is simultaneously seeking to change the Commission's ROE methodology so as to systematically recover more than the actual cost of equity capital.

[10] The D.C. Circuit has defined "chutzpah" as follows: "[C]hutzpah is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan." *Harbor Ins. Co. v. Schnabel Found. Co*., 946 F.2d 930, 937 n.5 (D.C. Cir. 1991). *See also, Marks v. Commissioner* 947 F.2d 983, 986 (D.C. Cir. 1991) (describing the court's "developing chutzpah doctrine"); *Caribbean Shippers v. Surface Transportation Board*, 145 F.3d 1344, 1365 (D.C. Cir. 1998) (same).

Very Truly Yours,

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