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Executive Summary

Building transmission infrastructure is a 50-plus year commitment. Accordingly, the predictability, adequacy, and stability of the return to investors provided by the return on equity ("ROE") on transmission investments are key to attracting and sustaining the transmission infrastructure investments necessary to maintain the reliability and resilience of the nation's energy infrastructure and to deliver increasingly clean energy to consumers. In recent years, the Federal Energy Regulatory Commission ("Commission" or "FERC") has received an increasing number of complaints seeking to substantially reduce the ROE component of transmission rates. Many of these complaints have been filed against the same transmission owners, challenging the same ROE already under examination in earlier-filed complaints. These subsequent complaints are commonly referred to as "pancaked complaints."

Section 206 of the Federal Power Act ("FPA")[1] mandates a threshold that FERC find that an existing rate is unjust and unreasonable before setting a new rate. By setting complaints for hearing concurrently, without first ensuring that they meet the section 206 threshold, FERC has created a policy that is not supported by the law, is inconsistent with the intent of Congress, is not workable in practice, and undermines regulatory expectations for a stable and predictable ROE. Certainty and stability are necessary for a capital-intensive sector with long-lived investment such as the electric transmission industry.

Currently, FERC's practice is to set an ROE complaint for hearing based merely on the presentation of a new Discounted Cash Flow ("DCF")[2] analysis that produces a lower number than the rate on file. This threshold is too low and invites frequent initial and pancaked complaints. This policy undermines industry and investor confidence in FERC's ability to establish predictable and stable returns for investment in long-lived transmission assets. This result is inconsistent with the goal of providing stable, predictable, and adequate returns for transmission investment,[3] and inconsistent with the direction of the Supreme Court in *Hope* and *Bluefield* that returns be "sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical

[1] 16 U.S.C. § 824e. FPA section 206 requires that "[a]ny complaint or motion of the Commission to initiate a proceeding [ ] shall state the change or changes to be made [ ] and the reasons for any proposed change or changes therein."

[2] The Commission applies the "constant growth" DCF model to a "proxy group" of companies to develop a zone of reasonable ROEs that can be used to estimate the ROE for the specific utility in question. *See generally* Opinion No. 531, 147 FERC ¶ 61,234. The underlying premise of the DCF model "is that an investment in common stock is worth the present value of the infinite stream of dividends discounted at a market rate commensurate with the investment's risk." *Id.* at 62,437 at P 14. The model is applied to a proxy group, made up of a group of utilities with comparable risk, to generate a range of ROEs. This reasonable range of ROEs is called the "zone of reasonableness," within which a just and reasonable ROE may be determined by the Commission. Dividend yields, interest rates, and analyst growth projections are just a few of the key data elements used in defining both the proxy group and the zone of reasonableness. These can and do vary from day to day. Thus, because the DCF model depends on this variable data, its results will also vary from day to day. For further information on how the DCF methodology is applied by the Commission, *see generally*, ScottMadden & Edison Electric Institute., *Transmission Investment: Revisiting the Federal Energy Regulatory Commission's Two-Step DCF Methodology for Calculating Allowed Returns on Equity* at 1, 38 (Dec. 2017), http://www.eei.org/issuesandpolicy/transmission/Documents/ROE%20White%20Paper.pdf ("*Transmission Investment*").

[3] *See, e.g.*, Transcript of the 1006th Commission Meeting of the Federal Energy Regulatory Commission, (June 19, 2014), https://www.ferc.gov/CalendarFiles/20140703074240-transcript.pdf; *see also Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 2 (2014) ("Opinion No. 531"), *aff'd and modified,* Opinion No. 531-A, 149 FERC ¶ 61,032 (2014) ("Opinion No. 531-A"), *reh'g denied,* Opinion No. 531-B, 150 FERC ¶ 61,165 (2015) ("Opinion No. 531-B") (Coakley); *vacated and remanded on other grounds sub nom. Emera Maine v. FERC,* 854 F.3d 9 (D.C. Cir. 2017) ("*Emera*").

management, to maintain and support its credit and enable it to raise capital necessary for the proper discharge of its public duties."[4]

To ensure that its policies support the continued development of reliable and resilient transmission infrastructure, FERC should require complainants to meet their burden of proof prior to setting complaints for hearing. This will help minimize the practice of pancaking complaints which will establish a more stable regulatory environment that supports transmission investment and reduces uncertainty by addressing the legal and procedural problems inherent in its recent practices.

Introduction

Stable and Predictable Returns Are Important for Transmission Investment

Electric transmission infrastructure serves as the backbone of the energy grid, and the electric transmission industry is one of the nation's most capital-intensive industries.[5] Transmission infrastructure enables access to cost-effective energy supply, including renewable energy; creates the opportunity for efficient dispatch and sharing of energy resources to reduce the delivered cost of power to customers; and enables wholesale market competition. New transmission investments are also poised to utilize advanced technologies and monitoring systems, enhancing efficiency, flexibility, and reliability. In short, transmission is a cost-effective, enabling delivery system that supports and furthers many public policy goals.

The ROE is a critical component of transmission rates regulated by FERC, providing a return to investors in the transmission grid that compensates them for the risks inherent in building, owning, and operating transmission projects.[6] Consistent with long-standing Supreme Court precedent established in *Hope* and *Bluefield*, FERC is required to set a return on shareholder investment at a level that is "commensurate with returns on investments in other enterprises having corresponding risks,"[7] and that is "sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise capital necessary for the proper discharge of its public duties."[8]

Building transmission infrastructure is a 50-plus year commitment. Accordingly, the predictability, adequacy, and stability of the return to investors provided by the ROE are key to attracting and sustaining transmission infrastructure investment.[9] FERC has recognized the critical importance of predictability and stability of ROEs. When FERC voted to approve Opinion No. 531, which was intended to address the first in a series of still pending complaints, the Commissioners stated their desire that the decision would establish procedures that provide a much more stable and predictable

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[4] *FPC v. Hope Nat. Gas. Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 693 (1923) ("*Bluefield*").

[5] Transmission Investment, at 5.

[6] *Id*. at 6.

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

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

[9] Transmission Investment, supra note 2, at 2.

outcome.[10] However, despite this welcome recognition of the importance of stable ROEs, FERC's current practice of allowing pancaked complaints under a low evidentiary bar has, as explained below, served to promote instability and unpredictability by encouraging protracted (and, to date, seemingly endless) litigation.

FERC's Current Practices Undercut Predictability and Stability

Since 2011, FERC has received an increasing number of complaints filed under FPA section 206 challenging the ROEs of several transmission owners. Notably, many of these complaints have been pancaked complaints, which, as discussed above, are complaints filed while a previous complaint against the same transmission owner is still pending. These pancaked complaints are often filed shortly after the expiration of the 15-month refund period established in an earlier and still-pending complaint. Since the 15-month refund period can begin as early as the date a new complaint is filed, this serves to lengthen the time that the transmission owner's existing ROE is subject to refund beyond the initial 15 months provided under the statute.

FERC has uniformly set pancaked complaints for trial-type hearings, even though they are duplicative of earlier, still-pending complaints.[11] FERC reasons that, because these complaints are accompanied by a new DCF analysis, which merely uses more recent inputs than used in the prior complaint, they are based on "new, more current data" and are not "duplicative proceedings."[12] FERC also rejected arguments that its approach contravenes the intent of Congress to limit refund exposure when it added refund provisions to FPA section 206, claiming that Congress intended only to "achieve symmetry" between FPA section 206 and FPA section 205[13] (which allows utilities to file new rates at any time).[14]

In addition, FERC applies a low evidentiary threshold for proceeding with ROE complaints and for establishing trial-type hearings to review the justness and reasonableness of existing ROEs. FERC's orders generically find that each complaint "raises material issues of fact that cannot be resolved based upon the record before [it]."[15] Importantly, these orders do not conclude that the existing ROE is unjust and unreasonable, nor do they identify any particular questions of fact raised by the complaint or explain what evidence provided by the complainant justify establishing full trial-type hearings to examine the ROE.[16] Thus, FERC has set a low bar (bordering on no bar) to what constitutes the *prima facie* threshold for setting an ROE complaint for hearing.

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[10] See supra n. 4.

[11] A significant amount of resources are expended when a complaint is set for hearing for the transmission owner, the complainants, and the Commission. Costs such as fees for expert witnesses, drafting of multiple filings and travel expenses to hearings diminishes, if not negates, the cost savings to customers of a potential reduced ROE. In addition, pancaked ROE complaints crowd the Commission's docket and the work of its Administrative Law Judges, taking away resources from other critical issues within the Commission's jurisdiction.

[12] *See, e.g., Belmont Mun. Light Dep't v. Cent. Me. Power Co.*, 156 FERC ¶ 61,198, at PP 39-40 (2016), *reh'g denied*, 162 FERC ¶ 61,035, at PP 8-12 (2018); *see also ENE (Env't Ne.) v. Bangor Hydro-Elec.c Co.*, 147 FERC ¶ 61,235, 62,478 at P 27 (2014); *Att'y Gen. of Mass. v. Bangor Hydro-Electric Co.,* 149 FERC ¶ 61,156, 62,478, at P 28 (2014).

[13] 16 U.S.C. § 824d.

[14] *See, e.g.*, *Belmont*, Initial Order, 156 FERC ¶ 61,198 at P 40.

[15] *See, e.g.*, *Coakley v. Bangor Hydro-Elec. Co.*, 139 FERC ¶ 61,090, 61,555, at P 24 (2012); *ENE (Env't Ne.)*, 147 FERC ¶ 61,235, 62,478, at P 26; *Bangor Hydro-Electric Co.*, 149 FERC ¶ 61,156, 62,478, at P 25; *Belmont*, Initial Order, 156 FERC ¶ 61,198, at P 37.

[16] In some more recent orders, the Commission has suggested that it is applying a *prima facie* threshold based on evidence that the two-step DCF analysis adopted in Opinion No. 531 demonstrates a potentially significant decline in the utility's ROE since the previous ROE was established using the single-step DCF. These orders do not explain, however, why the potential decline

The result of these practices has been overlapping hearings, protracted litigation, and uncertainty that necessarily undercuts the predictability and stability of ROEs. For example, since 2011, four complaints have been filed challenging the ROE of transmission owners in the ISO New England, Inc. ("ISO-NE") region.[17] Only the first of those complaints has proceeded to a final decision by FERC (Opinion No. 531), and that decision was remanded by the United States Court of Appeals for the District of Columbia Circuit in *Emera Maine v. FERC* and remains pending.[18] As a result, after seven years of litigation, four ROE complaints remain pending concerning the ROE of the ISO-NE transmission owners, each at a different stage in the proceeding. Transmission owners in the Midcontinent Independent Transmission System Operator, Inc. ("MISO") region and elsewhere have faced similar duplicative ROE litigation.[19]

The instability and unpredictability around ROEs that this sequence of events has created for investors are obvious. As explained below, however, FERC is not obligated to continue down its current path. FERC can take steps to reduce uncertainty by addressing the legal and procedural problems inherent in its recent practices and by establishing a more stable regulatory environment that supports investment in robust and resilient transmission infrastructure.

estimated by the two-step DCF renders the existing ROE unjust and unreasonable. *See E. Tex. Elec. Coop., Inc. v. Pub. Serv. Co. of Okla.*, 161 FERC ¶ 61,178, at P 29 (2017); *E. Tex. Elec. Coop., Inc. v. Sw. Elec. Power Co.*, 161 FERC ¶ 61,222, at P 30 (2017). The Commission has not included this language in all recent orders, however. *See, e.g.*, *Am. Mun. Power, Inc. v. Appalachian Power Co.*, 161 FERC ¶ 61,192 (2017).

[17] *See, e.g.*, *Bangor Hydro-Electric Co.*, 139 FERC ¶ 61,090, 61,555, at P 24 (establishing hearing and settlement judge procedures on the first complaint challenging ISO-NE transmission owners' ROE); *ENE (Env't Ne.)*, 147 FERC ¶ 61,235 (2014) (second complaint); *Bangor Hydro-Elec. Co.*, 149 FERC ¶ 61,156 (third complaint); *Belmont*, Initial Order, 156 FERC ¶ 61,198 (fourth complaint).

[18] *Emera*, 854 F.3d 9.

[19] *See, e.g., Ass'n of Businesses Advocating Tariff Equity Coalition of MISO Transmission Customers v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, 61,302, at P 5 (2014) (granting hearing on initial complaint challenging ROE provided for MISO transmission owners), *clarification granted by* 156 FERC ¶ 61,606 (2016); *Ark. Elec. Coop. Corp. v. ALLETE, Inc.*, 151 FERC ¶ 61,219, 62,426, at P 49 (2015) (granting hearing on successive complaint, noting that "the Commission has previously allowed successive complaints when presented with a new analysis"), *on reh'g* 156 FERC ¶ 61,061 at PP 30-37 (2016) (rejecting rehearing on these grounds); *see also Del. Div. of the Pub. Advocate v. Balt. Gas & Elec. Co.*, 150 FERC ¶ 61,081, 61,542, at P 19 (2015) (permitting successive complaint challenging the ROE of PJM transmission owners); *N.Y. Ass'n of Public Power v. Niagara Mohawk Power Corp.*, 148 FERC ¶ 61,176, 61,983-84, at P 25 (2014) (same with respect to NYISO transmission owners); *Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co.*, 147 FERC ¶ 61,239, 62,496, at P 26 (2014) (allowing successive complaints where party provided "a new DCF analysis with new, more current data in support of a proposed lower ROE").

FERC Should Reconsider Its Current Approach and Should Decline to Entertain Successive Pancaked ROE Complaints Going Forward, Recognizing That Doing So Contravenes the Federal Power Act and Is Contrary to Sound Administrative Procedure

The experience of FERC and the industry over the past several years demonstrates the legal, policy, and administrative problems underlying FERC's consistent practice of setting every pancaked complaint for trial-type hearing procedures. These problems provide a substantial record upon which FERC can reconsider its current approach, and instead establish a policy of declining to entertain such successive complaints. While FERC has followed this flawed approach for many years, it is not obligated to continue this error, especially considering the problems discussed herein.[20]

Allowing Pancaked Complaints Evades the Explicit Limits on Refund Exposure Adopted by Congress

FPA section 206 explicitly and deliberately limits a utility's refund exposure in a complaint case to a maximum of 15 months.[21] By setting successive pancaked complaints regarding the same ROE for hearing, FERC contravenes this plain statutory language and the legislative intent behind FPA section 206 and allows complainants to evade, effectively, the 15-month statutory limit on refunds.

When Congress amended the FPA in the Regulatory Fairness Act ("RFA") to provide FERC with refund authority under FPA section 206, Congress considered—and explicitly rejected—the idea that refund liability should be indeterminate. While the original legislation proposed potentially unlimited refund exposure,[22] Congress heard testimony regarding the rate uncertainty that would result and ultimately amended the legislation to "limit[] the time period during which refund liability can accrue" by providing that, "[i]n general, refunds may only be ordered for amounts paid in excess of lawful rates during the period within 15 months of the refund effective date."[23] Congress also intended for that limited refund window to speed the resolution of FPA section 206 cases. The legislative history reflects a concern that such proceedings were taking too long to resolve, and that Congress intended to establish a

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[20] *See, e.g., W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014), *citing Alcoa, Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (explaining that the Commission is permitted to reassess its position and depart from prior precedent so long as it "provide[s] a reasoned analysis indicating the prior policies are being deliberately changed, not casually ignored").

[21] 16 U.S.C. § 824e(b) ("At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date 15 months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate").

[22] 133 Cong. Rec. 18,693 (1987) (statements of Rep. Terry L. Bruce and Rep. Edward J. Markey) (discussing refunds without reference to a time-period limitation) ("Our bill makes a one paragraph addition to section 206 of the Federal Power Act. That paragraph directs FERC to set a refund effective date for section 206 rate decrease complaints. If, after completing its investigation and proceedings, FERC decides that a wholesale electric rate is too high, the decrease can go into effect from the time the purchasing utility sought relief: the refund effective date.").

[23] *Regulatory Fairness Act: Hearing on S. 1567 and H.R. 2858 Before the S. Comm. on Energy & Nat. Res.*, 100th Cong. 74-76, 85-87, 91-92, 99-100, 107-08, 115-17, 138, 295-97 (1987) (witness statements urging modification of the legislation to avoid the uncertainty of an indeterminate refund period); S. Rep. No. 100-491, at 6 (1988), *as reprinted* in 1988 U.S.C.C.A.N. 2684, 2688 ("While giving FERC the discretionary authority to grant refunds, the Committee amendment in several respects limits the time period during which refund liability can accrue. In general, refunds may only be ordered for amounts paid in excess of lawful rates during the period within 15 months of the refund effective date.").

structure under which parties would have the incentive to resolve them within the 15-month refund window.[24]

To date, FERC has not reconciled the decision of Congress to limit refund exposure and to establish a refund structure that would speed resolution of complaints with its current practices. FERC has maintained that subsequent complaints challenging the same ROE are separate proceedings, requiring a new refund period, because they are based on "new, more current data" (in the form of an updated DCF analysis) and thus, present a "different issue" than the previous complaint.[25] Congress recognized that the determination of just and reasonable electricity rates is subject to inputs that can change frequently, like the inputs to the DCF, and did not suggest that the 15-month refund limitation should only apply to rates that are not susceptible to such changes (which is the logical corollary of FERC's reasoning).[26] FERC's practice of setting pancaked complaints for hearing, effectively extending the period within which the same ROE is subject to refund, runs contrary to the incentive structure Congress sought to establish by limiting refunds to 15 months.

FERC Seeks an Inappropriate "Symmetry" Between FPA Sections 205 and 206

As noted above, FERC reasons that it must allow duplicative ROE complaint litigation because Congress intended, in the RFA, to "add symmetry" between the rights of utilities under FPA section 205 to file for rate increases and rights of complainants under FPA section 206 to file for rate decreases.[27] But Congress explicitly established different procedures and different burdens of proof that must be met when a utility files new rates (FPA section 205) versus when FERC, on its own motion or in response to a complaint, seeks to impose a change to existing rates (FPA section 206).[28]

Specifically, under FPA section 205, the utility has a statutory right to file new rates at any time that it chooses, and FERC is in the "passive and reactive role" of determining whether the new rates are just and reasonable.[29] By contrast, under FPA section 206, FERC may require a change to existing rates on file on its own motion or in response to a complaint, but only after following the more stringent "two-step procedure" of (1) finding that the existing rate is unjust and unreasonable, before (2) fixing a new just and reasonable rate.[30] This two-step procedure, the courts have noted, provides "a form of 'statutory protection' to a utility."[31]

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[24] *See*, *e.g.*, S. Rep. No. 100-491 at 3, 1988 U.S.C.C.A.N. at 2685 ("Section 205 proceedings on average require one year for resolution" while "[r]esolution of section 206 proceedings requirements two years on average."); *see also id.* at 6, 1988 U.S.C.C.A.N. at 2688 (explaining the Senate Committee's expectation that, absent dilatory behavior, the 15-month refund period would be sufficient to protect customers).

[25] *Belmont*, Order on Rehearing, 162 FERC ¶ 61,035 at P 10; *see also Ark. Elec. Coop. Corp.*, 156 FERC ¶ 61,061, at P 33 (2016); *ENE v. Bangor Hydro-Elec. Co.*, 151 FERC ¶ 61,125, at P 28 (2015); *ENE (Env't Ne.)*, 147 FERC ¶ 61,235, 62,478 at P 27.

[26] Statements on Introduced Bills and Joint Resolutions, 133 Cong. Rec. 21,739-40 (1987) (statement of Sen. Bumpers).

[27] *See supra* n.16.

[28] *See e.g. City of Winfield v. FERC*, 744 F.2d 871, 874-76 (D.C. Cir. 1984); *City of Anaheim v. FERC*, 558 F.3d 521, 524-25 (D.C. Cir. 2009).

[29] *See e.g. NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114 (D.C. Cir. 2017), citing *Advanced Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017).

[30] *See, e.g., Emera,* 854 F.3d at 24; *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346 (D.C. Cir. 2014).

[31] *See Emera,* 854 F.3d at 24 (citing cases).

Given this deliberate choice by Congress to establish different procedures in FPA sections 205 and 206, and the statutory protections provided to utilities in both sections, FERC's prior explanation that it must entertain pancaked complaints to achieve symmetry between the two statutes is not reasonable or supportable. The legislative history upon which FERC relies states only that Congress intended, by *generally providing for refunds* under FPA section 206, to give some of the same protections to complainants that are provided to utilities under FPA section 205. FERC unreasonably converts Congress's general goal of providing refunds into a mandate for symmetry between sections 205 and 206 that does not exist, was specifically rejected, and ignores the explicit method Congress chose to implement its goal of providing refund protection. In short, FERC has stretched the intent of Congress by failing to reconcile its justification for allowing pancaked complaints with the legislative history behind the adoption of the *15-month limit on refunds* explicitly included in the statute. It has also ignored the critical differences in procedures and burdens of proof between FPA sections 205 and 206.

FERC's "New, More Recent Data" Rationale Lacks Any Reasonable Limits and Is Not a Sound Administrative Process

In the context of ROE litigation, FERC's rationale that successive pancaked complaints challenging the same ROE are separate and not duplicative merely because they rely on "new, more current data" fails to set any reasonable limit on the ability of complainants to extend the 15-month refund period continually. The DCF analysis used to establish a just and reasonable ROE relies on inputs that naturally vary from day-to-day (including dividend yields, interest rates, analyst growth projections, etc.).[32] As a result, under FERC's current approach, complainants can produce a "new" DCF analysis with "new" data that reaches a different result (i.e., recommended ROE) in nearly every case. FERC has neither reasonably accounted for this reality nor offered a reasoned explanation of how its approach guards against duplicative complaints intended simply to extend the statutory refund period beyond 15 months.[33]

Moreover, pancaked complaints challenge *the same ROE* that was challenged in an earlier complaint, even though that ROE itself is still subject to litigation and may change based on the outcome of that litigation.[34] This has clearly been the case in several pancaked complaints. As explained in *Emera*, before FERC may set aside an existing rate, it must establish that the rate is not just and reasonable. Yet, given the time required for FERC to reach a decision on a complaint, it is unlikely that the existing rate for purposes of a subsequent complaint (that is, the resulting rate from the initial complaint) will be known. As a result, there is no subsequent rate to challenge.[35] In short, FERC has no authority to supplant the rate that ultimately derives from the first complaint with the rate that derives from the

[32] Transmission Investment, supra n.2, at 17.

[33] *See* e.g. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (the Commission's obligation to engage in reasoned decision-making requires that it "examine the relevant [considerations] and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made" (citations omitted) (alterations in original)).

[34] For example, on December 27, 2012, in *ENE (Environment Northeast) v. Bangor Hydro-Electric Co.*, FERC Docket No. EL13-33-000, complainants challenged the ROE of transmission-owning utilities in New England, even though that same ROE was already subject to a separate earlier complaint, *Coakley v. Bangor Hydro-Electric*, FERC Docket No. EL11-66-000. *See also, e.g.,* Motion of MISO Transmission Owners to Dismiss Complaint, FERC Docket No. EL15-45-000 (Sept. 29, 2017).

[35] Motion of MISO Transmission Owners to Dismiss Complaint at 12, FERC Docket No. EL15-45-000 (Sept. 29, 2017) ("[I]t is one thing to allege (albeit incorrectly) that a single DCF alone may be used to prove an existing rate to be unlawful; it is quite different to claim that this same evidence can support supplanting a rate that *has not yet been identified but which will be the existing rate for section 206 purposes* when the Commission must reach a decision on the merits of a subsequent complaint." (emphasis in original)).

second complaint because, under section 206, FERC has no authority to change a rate that has not first been shown to be unjust and unreasonable.

In any event, setting for hearing numerous, separate pancaked complaints that challenge the same ROE without the complainant first having made a sufficient *prima facie* case is an unsound and increasingly unworkable administrative practice. First and foremost, this practice has created significant uncertainty for transmission owners and has subjected transmission owners to several years in which their allowed ROE is unstable and subject to change, including nearly seven years in ISO-NE alone. Not only does this contravene the intent of Congress to limit such periods of uncertainty, it also creates a serious problem of delay that FERC has sufficient authority and discretion—and indeed the obligation—to address.[36]

The practice of granting multiple pancaked complaints that challenge the same ROE and placing them in overlapping hearing procedures is administratively burdensome and needlessly complex for FERC, its Staff, and the parties, particularly given the "moving target" that results. For example, as noted above, current practices have resulted in scenarios in which a second complaint proceeds to hearing challenging the same ROE that remains under investigation in an earlier unresolved complaint proceeding. Indeed, as many as four complaints challenging a utility's ROE have been pending at a single time. That result is just one of several unintended, administratively unworkable scenarios that results from FERC's current practices.

To Improve Regulatory Stability and Support Continued Transmission Investment, FERC Must Establish a Reasonable and Transparent Evidentiary Threshold for Entertaining ROE Complaints That Aligns with the Statutory Burden of Proof Under FPA Section 206

FERC's recent approach to ROE complaints—in which it reflexively sets for hearing any ROE complaint that includes any DCF analysis producing a lower rate than the one already on file – has established an extremely low bar for initiating ROE litigation. When FERC sets ROE complaints for hearing under current practices, it does so without determining that the existing ROE is unjust and unreasonable. While FERC has made mention of a *prima facie* threshold in some orders issued since *Emera,* it does not articulate what factors contributed to its conclusion that a *prima facie* showing had been made or why further investigation of the existing ROE is warranted.[37]

The lack of clear thresholds for establishing a *prima facie* case, coupled with the practice of generically establishing hearing procedures in response to every ROE complaint, sets an exceedingly low evidentiary bar to obtaining a full trial-type hearing. It also inappropriately and prematurely shifts the burden to respondent utilities. Respondent utilities have the burden to make an affirmative defense "[o]nce the complainants…have presented a prima facie case for relief."[38] FERC's current practices, and the low bar they have set, do not follow this long-standing principle. When combined with dynamic

[36] *R*ichard J. Pierce, Jr., et al., *Administrative Law Handbook* § 5.9 (3d ed. 1999).

[37] *See* supra n.18; see also, e.g., *Joint Cal. Complainants v. Pac. Gas & Elec. Co.,* 163 FERC ¶ 61,112 (2018); *Okla. Mun. Power Auth. v. Okla. Gas & Elec. Co.*, 163 FERC ¶ 61,114 at P 34 (2018).

[38] *Minn. Power & Light*, 23 FERC ¶ 61,393, 61,835 (1983).

financial markets and the single-issue nature of ROE complaints, this low bar to obtaining a hearing has contributed to the increase in pancaked complaints.

FERC should consider reforms to its processes and approaches to remedy these problems, which have contributed to the rise in ROE litigation and the unpredictability and instability in returns for long-lived transmission assets that could threaten continued investment if not stemmed.

FERC's Permissive Approach and Low Evidentiary Bar Inappropriately and Prematurely Shift the Burden of Proof to Utilities to Show That Their Existing ROE Remains Just and Reasonable

In the recent *Emera Maine* decision, the D.C. Circuit reemphasized, in the context of ROE complaint litigation, the allocation of the burden of proof under FPA section 206. FPA section 206 mandates a "two-step" procedure, under which FERC first must find that a utility's existing rate is unjust and unreasonable *before* it can act to impose a new just and reasonable rate on that utility. A party filing a complaint under FPA section 206 seeking to lower a utility's rate thus has the burden to demonstrate to FERC that the existing rate is unjust and unreasonable;[39] only after that burden is met can FERC proceed to set a new rate.[40]

FERC's consistent practice of setting every ROE complaint (including pancaked complaints) for trial-type hearing procedures without finding that the complainant has made a *prima facie* case that the existing ROE is unjust and unreasonable improperly shifts the burden of proof away from complainants and to the transmission owner(s). As FERC itself has explained in numerous orders, "[t]he party with the burden of proof bears the burden of production, or the need to provide sufficient evidence to establish a *prima facie* case."[41] FERC has not applied that burden appropriately in recent ROE complaints; instead it has reflexively set each complaint for hearing to determine whether the rate is unjust and unreasonable and what the new just and reasonable rate should be, without requiring a sufficiently robust demonstration that a *prima facie* case has been made in the first place. This unlawfully shifts the burden to the transmission owner to show at hearing that its existing rates are not unjust and unreasonable.

FERC's recent orders continue to shift the burden to transmission owners, contrary to FPA section 206's requirement that complainants carry the burden. For example, in applying the well-worn principle that not every rate within the zone of reasonableness is *per se* just and reasonable, FERC recently explained that "the fact that [an] ROE falls within the zone of reasonableness does not necessary indicate that the[] existing ROE is *just and reasonable*."[42] This explanation gets it backward—the first question that FERC must answer under FPA section 206 is whether the existing rate has been shown to be *unjust and unreasonable*. This responsibility belongs to the complainants, not the responding utility.

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[39] *See e.g. FirstEnergy*, 758 F.3d at 353.

[40] *See e.g. Emera*, 854 F.3d at 24-25.

[41] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, Opinion No. 537, 151 FERC ¶ 61,173, at P 98 (2015), *on reh'g*, 153 FERC ¶ 61,386 (2015), *rev'd*, 157 FERC ¶ 61,026 (2016); *see also Emera*, 854 F.3d at 21 ("The burden of demonstrating that the existing ROE is unlawful is on FERC or the complainant, not the utility; *NextEra Energy Res. LLC v. ISO New England, Inc.*, 156 FERC ¶ 61,150 at P 16 (2016) (citing 16 U.S.C. § 824e(b)).

[42] *Belmont*, Order on Rehearing, 162 FERC ¶ 61,035 at P 6 (emphasis added).

To correct these problems, FERC should establish more appropriate thresholds for when a *prima facie* case has been made demonstrating that hearing procedures are warranted.

FERC Should Reform Its Approach with the Goal of Disciplining Future ROE Complaints and Ensuring That the Burden of Proof is Properly Applied

To ensure that the burden of establishing a *prima facie* case stays with complainants as the FPA requires,[43] FERC should transparently articulate and apply a more rigorous *prima facie* case requirement to future ROE complaints. To ensure that it is applying the burden of proof in a manner consistent with the Court's reasoning in *Emera*, FERC must evaluate the evidence provided in the initial complaint and determine whether complainants have, at a minimum, put forth a properly constructed DCF that does not require corrections.[44]

In addition, FERC should consider publicly articulating a clear threshold that complainants must meet in order to establish a *prima facie* case that an existing ROE warrants additional examination through hearing or other procedures. FERC is not required to initiate an investigation in response to every complaint.[45] To determine whether an ROE complaint is worthy of investigation, FERC can exercise its discretion and expert judgement to consider a number of factors, including:

- Whether, and where, the rate produced by the complainant's DCF falls within the zone of reasonableness. As the *Emera* decision reiterates, the zone of reasonableness "typically results in a broad range of potentially reasonable ROEs," and where the existing ROE falls within that zone, it is not enough for complainants under FPA section 206 to show that a new DCF methodology would produce a lower rate.[46] That the zone produces a "broad range of potentially reasonable ROEs"[47] makes it a reasonable screening tool for determining whether a section 206 ROE complaint has made a sufficient *prima facie* case to warrant a hearing. FERC should require that in cases where the effective ROE is within the zone of reasonableness under the methodology used by FERC, the complainant must meet an evidentiary standard beyond simply demonstrating a newly calculated ROE is below the effective ROE. Rather, it must show that under the unique circumstances of the case, the effective ROE may result in an unjust and unreasonable rate. This approach would recognize the natural variability in the inputs to the DCF and support regulatory certainty and stability, allowing FERC to act when an ROE may not be just and reasonable.[48]
- The magnitude of the change in ROE likely to result. FERC can consider whether undertaking the time and expense of protracted hearing procedures and the unpredictability and instability

[43] 16 U.S.C. § 824e; *see also* Administrative Procedure Act, 5 U.S.C. § 556(d) ("the proponent of a rule or order has the burden of proof").

[44] *See e.g. Belmont Mun. Light Dep't v. Cent. Maine Power Co.*, 162 FERC ¶ 63,026 at P 73 (2018), *citing Emera*, 854 F.3d at 21.

[45] *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1504 (D.C. Cir. 1990); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

[46] *Emera*, 854 F.3d at 19, 26.

[47] *Id*. at 19.

[48] *See e.g. ISO New England, Inc*., 161 FERC 61,031 at P 8 (2017), citing Emera, 854 F.3d at 26 (noting the explanation in Emera that the zone of reasonableness "creates a broad range of a broad range of potentially lawful ROEs" and that "the fact that NETOs' existing ROE did not equal the ROE that the Commission would have set using the current DCF inputs did not indicate that their existing ROE fell outside the statutory zone of reasonableness").

that results – will produce meaningful changes in the level of the existing ROE. FERC could define a threshold minimum for an overall change in revenue requirement that complainants must demonstrate is likely before it will find that a *prima facie* case has been made justifying further procedures to examine an existing ROE.

- How recently the existing ROE was established. FERC should consider how much time has passed since an existing ROE was established and should set forth a pragmatic time-based threshold within which it will not entertain a new ROE complaint absent extraordinary and compelling circumstances. Doing so would reasonably account for both the importance of rate stability to ensuring overall just and reasonable rates and supporting the development of needed infrastructure, and the fact that data in the record underlying a recently established ROE are unlikely to have been rendered out of date or irrelevant in the ordinary course of events. FERC also could preserve for itself the ability to change course if, for example, the economic dynamics change abruptly in a short period of time and cause a significant departure from a recently-established ROE.

In addition, like all other agencies, FERC has substantial discretion to order its own proceedings and design procedures sufficient to carry out its responsibilities.[49] FERC should utilize this discretion and should design and implement new approaches to address ROE complaints that foster greater regulatory certainty and reduce the current situation of extended unpredictability and instability of ROEs. FERC's procedures can be streamlined and made more certain while respecting the rights of complainants to bring FPA section 206 challenges. In particular, FERC should consider:

- Adopting a practice of determining up front, based on the filed complaint and the answer and comments/protests submitted in response, whether the existing ROE has been shown to be unjust and unreasonable. FERC is not obligated to conduct a full trial-type hearing to make such a determination and has often used "paper hearing" procedures, even in cases more complex than ROE complaints.[50] Making a determination of whether the existing ROE is unjust and unreasonable *before* establishing additional procedures aimed at finding a just and reasonable ROE (as it does today) not only would provide greater certainty and stability, it is also the most straightforward way to respond to the court's finding in *Emera* that FERC's current practices are inconsistent with the "first requirement" of FPA section 206 (i.e., that FERC find the existing base ROE unlawful *before* setting a new ROE).[51]
- In addition, or in the alternative, utilizing shorter and more focused procedures for resolving ROE complaints, with the goal of resolving those complaints with the 15-month refund period. While the ROE is a critical component of overall rates for transmission service, it is also a single issue that should not require extensive discovery or lengthy and protracted full trial-type hearings to resolve. FERC has utilized specially designed and narrowly tailored procedures in other, more complex contexts.[52]

[49] *Vt. Yankee Nuclear Power Co. v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 543 (1978), citing *FCC v. Shreiber*, 381 U.S. 279, 290 (1965).

[50] *See, e.g., PJM Interconnection, L.L.C.,* 130 FERC ¶ 61,052 (2010) (establishing paper hearing procedures to resolve multi-billion-dollar transmission cost allocation dispute on remand).

[51] *Emera*, 854 F.3d at 22.

[52] *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,191 (2004) (establishing time-limited Administrative Law Judge procedures to resolve disputes regarding the integration of grandfathered agreements into the MISO market).

Conclusion

FERC's recent practice of setting virtually all ROE complaints for hearing has resulted in nearly seven years (and counting) of rate uncertainty for transmission-owning utilities and their investors. Numerous complaints have been filed, and few have been resolved. This situation threatens to erode the confidence of investors in FERC-regulated transmission assets, which threatens the ability of utilities to cost-effectively access capital needed to maintain and expand a robust, reliable, and resilient transmission grid.

Recent events, including the *Emera* decision, have revealed significant legal and administrative procedure problems with FERC's current approach to addressing ROE complaints, especially successive "pancaked" ROE complaints. FERC is not bound to continue to follow this flawed precedent. In light of the legal and administrative challenges that have been created by the current process, FERC should reconsider its approach and restore certainty for investors and transmission-owning utilities going forward. To accomplish these goals, FERC should revisit its practice of allowing pancaked complaints, concluding that they are contrary to the language and intent of section 206 of the FPA and are unworkable in practice. In addition, FERC should adopt a more rigorous and transparent standard for determining whether prima facie showing has been made prior to establishing hearing procedures on an ROE complaint.

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