UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PPL Electric Utilities Corp.,	)	Docket No. ER21-2282
PJM Interconnection, L.L.C.	)	

PROTEST OF THE ORGANIZATION OF PJM STATES, INC.

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PROTEST OF THE ORGANIZATION OF PJM STATES, INC.

Pursuant to Rules 211 and 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, the Organization of PJM States, Inc. ("OPSI"),[1] respectfully submits this Protest in response to the PJM Interconnection, L.L.C. ("PJM") Transmission Owners' ("TOs") June 30, 2021 tariff filing proposing to create the right for TOs to elect to fund and earn a return of and on Network Upgrades ("proposal").[2] On June 30, 2021, OPSI filed a timely doc-less intervention and is therefore a party to this proceeding.

OPSI is a not-for-profit inter-governmental organization of 14 utility regulatory agencies with separate jurisdictions either wholly or partly in the service area of PJM, a Commission-approved regional transmission operator ("RTO"). PJM operates the high-voltage electric transmission grid and wholesale electricity market within its service area. OPSI's activities include, but are not limited to, coordinating data or issue analyses and policy formulation related to PJM, its operations, its Independent Market Monitor, and related Commission matters.

I. BACKGROUND

On June 30, 2021, the PJM TOs submitted a proposal to the Commission under section 205 of the Federal Power Act[3] to revise the PJM Open Access Transmission Tariff ("tariff") to create the right for Transmission Owners to fund the capital cost of those Network Upgrades that are necessary to accommodate new generator interconnections to the transmission system, but which the TOs own and operate after the Network Upgrades are put into service. The proposal

[1] Approved on July 28, 2021, and adopted by OPSI's Board of Directors; Vote: Yes: Delaware PSC, PSC of District of Columbia, Illinois CC, Kentucky PSC, Maryland PSC, Michigan PSC, New Jersey BPU, PUC of Ohio, Pennsylvania PUC, Tennessee PUC, Virginia SCC, PSC of West Virginia, and the Indiana URC which also abstains from Section II.B of this protest; Abstain: North Carolina UC.

[2] PJM Tariff Revisions to Implement Transmission Owners' Funding of Network Upgrades, Docket No. ER21-2282 (June 30, 2021).

[3] 16 U.S.C. § 824d.

argues that TOs are entirely uncompensated for their obligation to own or operate Network Upgrades after the assets are put into service. Under this premise, citing an expectation that PJM interconnection requests will grow "exponentially"[4] and a list of incremental risks TOs purport to face in owning or operating Network Upgrades after interconnection is complete, the proposal would grant TOs the right-of-first-refusal to issue loans to generation developers for the purpose of building Network Upgrades, and to add said loans to their rate base, thus ensuring TOs a return of, and on, the loan amount regardless of developer default.

II. PROTEST

A. The Proposal Places Risks of Default and Under Recovery of Revenue Requirements on Transmission Ratepayers.

In the event of either default by interconnection customers or failure of generation developers over time the proposal could ultimately harm transmission customers. Currently generators must fund their own Network Upgrades necessary for interconnection up front and suffer any consequence of default. Whereas under the proposal, instead of the generators bearing the risk of default of their investment, those costs would shift to transmission customers. As a result, in the event of default, the transmission customers would suffer higher transmission charges to cover a generation developer's default if security is not sufficient to fully cover the cost of the Network Upgrade. While the proposal purports to address this problem through a security instrument, the proposal does not insulate transmission customers from the all risk of default by generators.

The proposal's provision against loan losses takes the form of a security instrument from the interconnection customer to either PJM or the TO. However, the TOs become the judge of

[4] Proposal at 2.

whether the security is acceptable: "either the Transmission Provider (for the benefit of the Interconnected Transmission Owner) or the Interconnected Transmission Owner, shall determine whether the letter of credit or other form of security is reasonably acceptable."[5] Ultimately, whether or not a security is sufficient, the TOs will stand to recover a full return over time on their rate base. Having no incentive to ensure receipt of effective security when issuing loans for building Network Upgrades, TOs will be more susceptible to accepting ineffective forms of security, thus unjustly increasing the general ratepayers' exposure to charges for unrecovered portions of loans in default. This standard for determining whether security is sufficient is not just and reasonable because the TOs' will have no incentive to ensure they receive reliable forms of security from the interconnection customer.

Due to its lack of protection from undue harm to ratepayers and interconnection customers alike, the proposal is not just and reasonable and should be rejected.

Moreover, even without an under-secured default, transmission ratepayers will be required to subsidize Network Upgrades included in rate base because of the difference between traditional rate base, rate of return revenue requirements and the levelized payments from interconnection customers as proposed by the TO's.

While it is not clear in the TO proposal, we assume that the levelized payments from interconnection customers will be used to offset the transmission rate revenue requirements. This credit of only a levelized payment will result in excess payments and subsidization by transmission ratepayers in the early in-service years of each network upgrade.

An example levelized cost rate included in the proposal shows that for a $1,000,000 Network Upgrade the annual levelized payment from the interconnection customer will be

[5] Proposal at 130 (in this case "Transmission Provider" refers to PJM).

$104,809.[6] But unless FERC changes its transmission rate formulae, the same $1,000,000 investment that will be included in the TO rate base will have a first year revenue requirement of approximately $142,000.[7] Thus, in the first year after a TO funded Network Upgrade goes into service, transmission ratepayers will pay approximately $37,000, or 35%, more than the credit the TO receives from the interconnection customer. The excess payments made by transmission ratepayers will accumulate for approximately 8 years and the subsidy from transmission ratepayers in this example will accumulate to approximately $150,000. In other words, the transmission ratepayers will pay the difference between net rate base costs and levelized costs for eight years to assure that TO's receive the full ROE on an investment that they are not required to make under present interconnection rules. During those early years of an in-service Network Upgrade, the excess and unnecessary net payments made by transmission ratepayers will increase customers' bills.

Even though the net present value of levelized payments by the interconnection customer and the revenue requirement in the TO transmission tariff will be the same after the 20 year life of the proposal's pro forma agreement, the excess cost to transmission ratepayers paid in the early years will only gradually reduce and reach zero on a present value basis after 20 years. In other words, due to the difference between rate base revenue requirements and levelized payments by interconnection customers, transmission ratepayers will always be in a position of having paid a cumulative net present value subsidy to compensate TO's for an investment in an

[6] Proposal at Attachment E, ln. 55.

[7] This revenue requirement is based on the return, and income taxes using the assumptions in the TO levelized cost calculation applied to $1,000,000 investment in year 1, offset by ½ of year 1 depreciation and deferred income taxes. It also assumes that the network upgrade will be depreciated over a 20 year period since the levelized cost calculation is based on a 20 year contract with the interconnection customer.

asset that could have been acquired at zero cost under the present PJM tariff rules for interconnections.

This shifting of costs upon transmission ratepayers during early years of the asset could lead to significant and unnecessary rates for transmission ratepayers, particularly if the TOs' prediction that there is going to be a significant increase in future Network Upgrade investments comes to fruition. These forced subsidy payments from transmission ratepayers are relatively small in the example of a $1,000,000 Network Upgrade as the proposal outlines. But the TOs prop up their unjustified concerns of a growing storm of Network Upgrades by arguing that they may be facing $4 billion in zero cost rate-based Network Upgrades under the present tariff. At that level, the first year subsidy forced out of transmission ratepayers would be $148 million and the peak cumulative subsidies in the years before the levelized payments exceed the traditional revenue requirements would be $600 million. These dollars are simply plucked from transmission ratepayer pockets for the sake of providing profits to TOs that, under their proposed tariff revisions, would be allowed to make rate base investments that are not needed.

Thus, considering the potential for interconnection customers to default on their agreements to pay for Network Upgrades over time, and the subsidy that transmission customers will pay in the early years of each Network Upgrade due to the difference between traditional revenue requirements and levelized payments from interconnection customers, the investments that the TOs seek unilateral authority to make are plainly not prudent and the proposed tariff provisions are not just and reasonable for transmission ratepayers.

B. The Proposal is Anticompetitive and Discriminatory

The TO proposal may lead to a number of concerning anticompetitive effects within PJM. By including Network Upgrades in rate base, and allowing the TOs the option to fund,

should the cost of interconnection increase under the TO funded option, the TOs will be able to choose which generation faces these increased costs. Because generation-owning TOs will be able to unilaterally increase the interconnection cost of a competitor's generation, benefitting the TO's own or affiliate generation, the proposal provides an economic incentive for discrimination; and "Discrimination is, of course, prohibited by the Federal Power Act."[8] Even if the proposal did not allow the TOs to pick and choose who faces increased costs, adding additional costs for new entry generation to interconnect still puts that new generation at a competitive disadvantage to incumbent generation; of course, TO-affiliated generation is incumbent generation.

Between PJM's capacity market under the Reliability Pricing Model ("RPM") and the Fixed Resource Requirement ("FRR") construct, all supply and demand in the RTO is accounted for. PJM's RPM requires all non-FRR capacity to bid into the market, and requires load to then buy back a necessary amount of capacity. This is true even for a vertically-integrated utility. Instead of selling in only excess capacity, like a utility might do in a "residual" market, PJM's RPM requires all non-FRR utilities to sell all capacity and buy back from the market its needs. The current proposal provides vertically-integrated TOs plus those TOs with affiliate generation an opportunity to gain a competitive advantage over new-entry generation competitors by making the required Network Upgrades more expensive. While *Ameren* and the FERC orders following it contain discussion and argument relating to TOs unduly discriminating against potential competitors through funding Network Upgrades, those cases never produced a finding on the merits of the issue.[9]

The *Ameren* court stated:

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[8] *Ameren Servs. Co. v. Fed. Energy Regul. Comm'n*, 880 F.3d 571, 578 (D.C. Cir. 2018) ("*Ameren*").
[9] *Id.* at 582.

> At present, however, we have no need to reach the merits of those questions. Because the Commission failed even to respond to these concerns, and because it offered neither evidence of nor motive for discrimination by non-vertically integrated [TOs] among their customers, it is sufficient now to require that it do so.[10]

The *Ameren* court noted though that "FERC is not obliged to show actual evidence to support a determination of *potential* discrimination," but rather, "in the absence of evidence [supporting a determination of potential discrimination], the Commission must at least rest on economic theory and logic."[11] Any TO that also owns or is affiliated with generation would be economically incentivized to elect to fund the Network Upgrades of unaffiliated interconnection customers (and future market competitors) who might have secured a better rate for funding elsewhere, making it more difficult for those interconnection customers to access PJM's markets or to compete upon entry in the markets. This presents both sound economic theory and logic that the proposal provides for potential discrimination by generation-owning or generation-affiliated TOs, and therefore the Commission should deny the proposal as unjust and unreasonable under Section 205 of the Federal Power Act.

Another unjust and unreasonable anticompetitive effect of the proposal would arise through the proposal's violation of the PJM tariff and the Commission-approved "but for" test for funding Network Upgrades, in place today, and requiring new generators to pay the full cost of Network Upgrades needed for interconnection – a regulatory model designed to send the correct price signals to developers for siting new generation, and to ensure the <u>most economic</u>

[10] *Id*.
[11] *Id*. at 578 (emphasis in original).

generation becomes interconnected.[12] The proposal would effectively strike down this Commission-approved regulation without reasoned justification and is therefore inappropriate.

Further, any proposal effectively acting as a TO's right of first refusal would severely limit the funding options for certain Network Upgrades and would result in disparate impacts upon generation developers. Some generation developers may end up in a better position if a TO unilaterally elects to fund its Network Upgrades. Conversely, other generation developers may be disadvantaged should the TO unilaterally elect to fund its Network Upgrades, as the generation developer might have gotten a better rate on funding elsewhere compared to the TO's rate of return including gross-up for income taxes. This disparate impact will also befall generation developers in circumstances where TOs elect not to fund. The balance of such disparate impact upon interconnection customers would be unduly discriminatory and harmful to basic elements of fair competition, particularly when considering that the status quo implicitly allows the interconnection customer to seek funding based on wherever its best interests may lie. The proposal, in contrast, would disparately impact interconnection customers through no fault of their own.

Finally, because the proposal has no method of limiting the time to resolve certain disputes, it would effectively grant TOs' the power to veto any Network Upgrade by disputing any changes to the pro forma agreement requested by the interconnection customer upon execution of the contract. Subsection (c) of the proposal's tariff language would require an interconnection customer to execute the pro forma agreement first, followed by the TO executing and delivering the contract within 15 business days after receipt.[13] Subsection (c) also provides

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[12] *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,299, at 17 (". . . generators will be required to pay the full cost of grid expansion . . ." which "forces the developer to consider the economic consequences of its siting decisions when evaluating its project options, and should lead to more efficient siting decisions.") (1999).
[13] Proposal at 123.

that, if the interconnection customer executes the pro forma agreement with changes as yet unapproved by the TO, then the regular 15 business day deadline for the TO to execute and deliver the pro forma agreement no longer applies. Instead, the proposal would direct the parties in those circumstances to "use due diligence" to execute the contract "as expeditiously as possible."[14]

These quoted guidelines for dealing with disputes over the pro forma agreement are ambiguous at best, and would allow for either party to delay the process unnecessarily under the pretense of using "due diligence" and acting "expeditiously as possible." As explained above, however, the TOs would be much more likely to have incentive to stall the procedures in order to derail a planned Network Upgrade for a potential competitor generator, whereas the interconnection customer would not. The interconnection customer's end goal is to sell its product through PJM's wholesale markets, which first requires interconnection to the transmission system, which depends upon the Network Upgrade. This asymmetric incentive amounts to the TOs having veto power over Network Upgrades in cases of protracted or late contract negotiations and is therefore anticompetitive, unjust and unreasonable, and would lead to cases of undue discrimination by the TOs.

C. Transmission Owners' Claimed Risks are Unsubstantiated

1. The proposal does not support a need for additional profits to Transmission Owners.

The Commission must reject the proposal because utilities and their investors are not entitled to a return on investments that they do not make, and have no need to invest in Network

[14] *Id*.

Upgrades because utilities are already compensated for the risks and expenses associated with owning and operating Network Upgrades.

Despite the TOs reliance upon cases like *Hope* and *Bluefield*,[15] which speak to a utility's right to a fair return on investment based on the risks of the investment, they are not entitled to a return on assets they receive at no cost. Given the dates of the respective decisions, the Courts in *Hope* or *Bluefield* may not have even contemplated such a cost structure as participant-funded upgrades. The proposal would simply allow TOs to usurp specific investments from interconnecting customers in order to pad their rate base without a just and reasonable basis, and critically, the risks that TOs purport to face are either already compensated for through their Commission-approved ROE, or do not actually threaten any financial rights of the TOs.

The TOs argue, in essence, that they are entitled to increased earnings because they currently receive certain assets at no cost for which they become responsible. However, a utility receiving zero-cost assets as contributed property does <u>not</u> create a new right for investors supporting other utility assets to earn more profit. Nor do utilities have a right to earn a return on all assets under their control or ownership. Today, utilities across the nation receive Contribution in Aid of Construction ("CIAC") at no cost and upon which they earn no return. Additionally, utilities owning fully depreciated assets do not earn a return on those assets. These well-established practices requiring utilities to own and operate assets upon which they receive no return further diminishes the TOs argument. That is, Network Upgrades, as new assets, may come with less risk than fully depreciated assets.

Most of the risks the TOs complain about in the proposal are operational risks. This does not justify increased profits. Profits compensate equity investors for their investment. In

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[15] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) ("*Bluefield*").

determining a reasonable and adequate level of profits for a utility the Commission takes into consideration what investors can earn on investments in alternative non-regulated companies, considering the risks inherent in a utility as compared to the investor risks in alternative investments. If there are operational risks for a utility the Commission already factors those risks into the ROE that it authorizes for the utility to earn.

Not only are TOs already compensated through ROE for the risks cited in the proposal, but any expenses incurred by TOs in relation to Network Upgrades will in all likelihood be passed on to transmission ratepayers. Therefore the TOs' prognostication of an upcoming proliferation of Network Upgrades from new interconnecting renewable energy sources is largely irrelevant insofar as the prospect of uncompensated risk is concerned.

Many of the risks complained of by the TOs could potentially – but not certainly – result in increased expenses for a TO. In the event of increased expenses, and so long as the expenses are the type meriting Commission approval for ratemaking, the TO will pass its increased expenses onto transmission ratepayers through its transmission tariff.

The TOs claim they are entitled to an opportunity to earn more profits by investing money in Network Upgrades. They claim that they are entitled to make these investments because more interconnections increase risks, and by making the investments, they will be entitled to earn an ROE on the investments. Yet, it is transmission customers that will face the risks and will bear the costs in the event that any of those risks materialize. If the Commission agrees with the TOs' premise that adding interconnection customers increases risks to the network, then the Commission must also recognize that transmission ratepayers, rather than TOs, face an increased risk of being charged for costs incurred if those risks materialize.

2. **The Transmission Owners propose the most expensive option to alleviate the unquantified risks they purport to face.**

   a. **Failure to quantify alleged risks.**

The Transmission Owners' filing takes shortcuts with respect to the evidence used to support a change in the PJM tariff. The effective argument of the Transmission Owners, as repeated now from MISO and NYISO, is that TOs face risks from the operation of Network Upgrades, for which they receive the costs of operation and maintenance, and those risks significantly affect the Transmission Owners' ability to attract capital. Among those risks, the TOs claim, are "(1) operational and safety risks; (2) reliability and cybersecurity compliance risks; (3) environmental risks; (4) weather and climate risks; and (5) outage coordination risks."[16]

The "evidentiary record" stops at this point, however. The Transmission Owners are able to list anecdotal examples of the types of risk they might face, but do not attempt to quantify these risks in any way. For example, the TOs entitle one type of risk "Operational and Safety Risks" and provide an affidavit that describes those risks as "the inherent safety hazards involved in both the installation and day-to-day operations of high-voltage transmission equipment."[17] If there is one type of risk the TOs should be able to quantify, it is this type. TOs have been operating Network Upgrades for years. As such, it is very much a part of their business model. The Weaver Affidavit spends over 1200 words describing this type of risk, yet at no time sets forth even an approximate cost of this type of risk for an average Network Upgrade. The testimony goes on to make the blanket assumption that the risk from the Network Upgrades should be included in rate base, without any justification that the risks of ownership, and therefore the just return, merits reflecting the risks of ownership plus financing the project. The

[16] Proposal at 13.
[17] Weaver Affidavit at ¶ 7.

testimony contains no discussion of the types of assets, the age of the assets, or other features so that particularized judgment may be exercised. Furthermore, the Weaver Affidavit does not even attempt to explain why any risks associated with new Network Upgrades that are not in rate base differ with those of older depreciated assets that they own – that are also not in rate base.

Despite the Transmission Owners' insistence that these risks being partially uncompensated endangers their ability to attract capital, beyond speculation, the Transmission Owners offer no evidence that they have actually faced increased difficulty attracting capital. The present treatment of Network Upgrades has been in place for more than a decade. So too have many of the state laws incentivizing renewable generation, which the TOs claim will increase Network Upgrades and therefore transform their business into a not for profit enterprise. If this were the case, then the Transmission Owners surely could support their claims of difficulty attracting capital with more than speculative theory. Further, by pointing to the generation interconnection queue, the Transmission Owners represent a number of necessary upgrades that will not come to fruition. Only 23% of projects and 15% of requested capacity megawatts in the PJM interconnection queue are ultimately developed and interconnected, so the scale of the increase in Network Upgrades is overstated by the TOs.[18]

b. Unreliable representation of impact from Network Upgrades

The Transmission Owners argue that growing number of Network Upgrades driven by renewable resources interconnecting to the transmission system will overwhelm the amount of assets on which they receive a return. The proposal posits that if 23% of queued projects are actually built and placed in service, then existing and future Network Upgrades would amount to $2.695 billion in the next few years, or "four percent of the PJM Transmission Owners' current

[18] 2020 RTEP Report, p. 23. Available at https://www.pjm.com/library/reports-notices/rtep-documents.

combined net transmission plant of $67 billion."[19] While the TOs present these numbers for "illustrative purposes," they misrepresent the situation. In attempting to evidence a "significant risk,"[20] TOs use inflated forecasted numbers relative to current net transmission plant, to argue that the percentage of Network Upgrades compared to rate base is at a "tipping point."[21] Their illustrative example depends upon projected growth in Network Upgrades but failed to model or presume projected investments for which they will earn a return, such as in baseline and supplemental projects. In a separate docket OPSI has recently noted to the Commission the significant amount of transmission investments since 2005.[22] Therefore the TOs' "illustrative" example is unreliable and not illustrative to the Commission.

c. Misapplication of the concept of thin capitalization.

In another of the proposal's many mischaracterizations, the TOs incorrectly equate larger proportions of contributed Network Upgrades that have been funded by interconnection customers to "thin capitalization." The TOs make an erroneous argument that as zero-cost plant becomes a larger proportion of total plant they face financial risks due to becoming "thinly capitalized."[23] This is simply not true.

Thinly capitalized businesses are those that have excessive levels of debt. They are commonly referred to as being highly-leveraged or over-leveraged. There may be potentially

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[19] Proposal at 18 (basing 23% "upon the historical completion rates over the past three years") (emphasis added).
[20] Weaver Affidavit at ¶ 3.
[21] Proposal at 19.
[22] Comments of OPSI, Docket No. RM20-10-000, at 6-7 (June 23, 2021) (including a chart of baseline and supplemental transmission investments in PJM from 2005 to 2018 revealing over $26 billion of cumulative baseline project investments over that time and nearly $15 billion of supplemental project investments from as recently as 2015 to 2018).
[23] Proposal at 16 (stating "the quantity of Network Upgrades is expected to increase very significantly in the coming years. Thus, the magnitude of assets that do not earn a return grows as a portion of total capital employed, and the utility becomes more thinly capitalized, affecting its ability to raise capital.") (citation omitted); Hunger and Adamson Affidavit at p 21 (stating "under the current mechanism the PJM TOs will become increasingly thinly capitalized, with a smaller proportion of rate base to the transmission assets that they operate.").

more financial risk to equity investors in some over-leveraged or "thinly capitalized" companies. However, increasing contributed property does not result in thin capitalization. The mere fact that the proportion of zero-cost (contributed) assets grows for a TO because of a proliferation of interconnection customers under the present PJM interconnection funding rules does not change the TO's capital structure. Contributed property does not create any liability for the TO as is created by debt. When the TO increases its level of zero-cost assets there is no risk to the TO similar to the risk of an over-leveraged company where interest and principal payments on excessive levels of debt could jeopardize returns on equity or jeopardize the ability to pay dividends.

For example, if a TO currently has $1 billion in assets financed by $550 million in equity and $450 million in debt it is certainly not thinly capitalized. If it received $1 billion in assets as contributed property from interconnection customers, its net rate base assets would still be $1 billion and its capital structure would still be made up of $550 million in equity and $450 million in debt. It is still not thinly capitalized. The Commission should reject any suggestion that contributions of Network Upgrades from interconnection customers results in thinly-capitalized or over-leveraged capital structure.

The Transmission Owners' Network Upgrade proposal, based on these specious and wholly unquantified "risks," is unjust and unreasonable.

3. The Ameren Proceeding does not mandate the acceptance of the Transmission Owners' proposal.

The Transmission Owners' filing relies heavily on their mischaracterization of *Ameren*, stating that the D.C. Circuit "found that the Commission may not 'compel transmission owners

to operate the upgrades without an opportunity to earn a return.'"[24] This is not the Court's conclusion; it made no such finding. Instead, the accurate quotation is "it <u>does not necessarily follow</u> from any incentive differences that FERC may compel transmission owners to operate the upgrades without an opportunity to earn a return."[25] Obviously, this is an intermediate piece of reasoning instead of any sort of finding. Further, the Court followed with: "Such a determination would require reasoned justification by the Commission, and consideration of any appropriately raised concerns by the parties."[26] So, in fact, the Court was explicitly permitting the Commission to conclude what the TOs now say the Commission cannot conclude, so long as the Commission justifies its reasoning. As discussed above, including in Section II.B, the circumstances of this case are distinguishable from those in *Ameren* and in this case the proposal should be denied.

Further, according to the Transmission Owners, the D.C. Circuit factually noted that "shareholders are forced to accept incremental exposure to loss with no corresponding benefit." This is another mischaracterization of the D.C. Circuit's decision. The *Ameren* Court only said that FERC "inadequately considered" this argument.[27]

Lastly, the TOs take shelter in the idea that the *Ameren* Court recognized that Transmission Owners face significant risks in owning and operating Network Upgrades.[28] Yet, to the extent the Court recognized this at all, it only recognized this was the Transmission Owners' unaddressed argument. The Court, immediately after its recitation of the TOs' argument, notes only that "<u>[i]f Petitioners are correct</u> that they face increased risk without

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[24] Proposal at 9 (citation omitted).
[25] *Ameren*, 880 F.3d at 579 (emphasis added).
[26] *Id.* at 579-580.
[27] *Id.* at 580-81.
[28] Proposal at 13.

compensation, that would be relevant and could certainly undermine FERC's conclusion."[29] Again, the *Ameren* Court routinely recognized that the TOs' arguments were insufficiently addressed, but did not go so far as to endorse any of those arguments.

The Transmission Owners return to reality when they state one half of the Commission's required balancing test: "a regulated industry is entitled to a return that is sufficient to ensure that new capital can be attracted."[30] But the conclusion the Transmission Owners ask to draw here is incomplete. The *Ameren* Court remanded the case because FERC "must explain how investors could be expected to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return."[31] *Ameren* stated there was "no need to finally decide" whether the Commission can force the Transmission Owners to construct and operate generator-funded Network Upgrades.[32]

The *Ameren* Court remanded without any findings or new legal holdings; instead, it stated that:

> . . . the Commission failed even to respond to these concerns, and because it offered neither evidence of nor motive for discrimination by non-vertically integrated transmission owners among their customers, it is sufficient now to require that it do so. On remand, FERC should provide reasoned consideration of these arguments by explaining whether all risks are truly "baked in," responding to the transmission owners' "entire enterprise" argument, and addressing the effect of these orders on the ability of transmission businesses to attract future capital.[33]

Additionally, while the D.C. Circuit stopped at the capital attraction standard of *Hope*, noting only that the Commission failed to address the TOs' legitimate concerns, once the Commission addresses those concerns, it still must perform the necessary balancing of investor

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[29] *Ameren*, 880 F.3d at 580 (emphasis added).
[30] Proposal at 10; *Ameren*, 880 F.3d at 581 (citing *Hope*, 320 U.S. at 603).
[31] *Ameren*, 880 F.3d at 581.
[32] *Id.* at 585.
[33] *Id.* at 582.

and consumer interests.[34] The Federal Power Act does not guarantee a return on investment.[35] The *Ameren* Court ended its analysis with the Commission's failure to properly address the concerns of the Transmission Owners and their argument that the Commission's ruling would endanger their access to capital. However, *Hope* is not a one-part test for access to capital. The Commission must both recognize the Transmission Owners' expectation of financial integrity and ability to attract necessary capital, but also the Commission must provide appropriate protection to existing and foreseeable public interests.[36] As discussed above, the Transmission Owners' proposal to fund Network Upgrades at their discretion provides them a greater return on their purported risk than is due. Further, the TOs neglect the transmission ratepayer interests that run contrary to their proposal as discussed above. That *Ameren* concluded FERC inadequately explored investor interests in that case should also ensure that the Commission properly evaluate consumer interests here, as *Hope* requires.

III. CONCLUSION

Wherefore, OPSI respectfully requests that the Commission reject the filing as unjust and unreasonable.

[34] *Hope*, 320 U.S. at 603 ("The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests.").
[35] *Id.*
[36] *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1177 (D.C. Cir. 1987).

Respectfully Submitted,

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Dated: July 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Gregory V. Carmean
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Newark, DE 19711
Tel: 302-266-0914

Dated at Newark, Delaware this July 28, 2021.