UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.	))	Docket No. ER18-463-000

NOTICE OF INTERVENTION AND
PROTEST OF
ORGANIZATION OF MISO STATES, INC.

On December 15, 2017, Midcontinent Independent System Operator, Inc. ("MISO") and Ameren Services Company, on behalf of its affiliate Ameren Transmission Company of Illinois ("ATXI"), filed pursuant to sections 205 and 219 of the Federal Power Act ("FPA")[1] revisions to the transmission formula rates in MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff") intended to implement transmission rate incentives for the Illinois Rivers and Mark Twain components of ATXI's Grand Rivers Project ("Project").[2] Pursuant to Rules 211[3] and 214(a)(2)[4] of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, the Organization of MISO States, Inc. ("OMS") respectfully submits this Notice of Intervention and Protest of the December 15 Filing.[5] As further explained herein, the Commission should reject the transmission rate incentives proposed in the December 15 Filing because the proposed incentives are not just and reasonable.

OMS has participated in Commission proceedings involving return on equity ("ROE") determinations for the transmission-owning utilities in MISO ("MISO TOs") in order to protect the interest of customers in its member states. Though the OMS has not intervened in all cases

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1 16 U.S.C. §§ 824d, 824s.

2 Ameren Services, Filing, Docket No. ER18-463-000, at 1 (Dec. 15, 2017) ("December 15 Filing").

3 18 C.F.R. § 385.211.

4 18 C.F.R. § 385.214(a)(2).

5 OMS reserves its right pursuant to 18 C.F.R. § 385.215(a)(1) to amend or supplement its protest.

related to section 219 transmission incentives, the Commission's determination in this proceeding may have broader precedential effects on the ROE applied to other MISO Multi-Value Projects ("MVP") that will be paid for by customers throughout the region.[6] The proposal comes after ATXI's investment in the Project is nearly complete and long after the Project was approved and other risk mitigating incentives were awarded. ATXI has not shown the proposed additional ROE incentives to be necessary to attract capital investment in the Project and its proposal is therefore not in the public interest.

The December 15 Filing is a transparent attempt by ATXI to retain a revenue stream that the Commission found to be excessive in Opinion No. 551.[7] In Opinion No. 551, the Commission reduced the MISO TOs' base ROE from 12.38% to 10.32%, for both existing and new transmission investment. As a MISO TO, ATXI presently receives the 10.32% ROE approved by the Commission in Opinion No. 551, subject to the Commission's ruling on rehearing of the first MISO ROE Complaint (Docket No. EL14-12) and ruling on exceptions in the second MISO ROE Complaint (Docket No. EL15-45), each in light of the D.C. Circuit ruling in *Emera*.[8]

ATXI has not shown that the Project faces risks and challenges that are not already accounted for in the allowed base ROE, which is already placed at the upper midpoint of the zone of reasonableness. Moreover, the Commission previously granted the Project several

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[6] *See* MISO Transmission Cost Allocation Overview, at 17 (Oct. 21, 2013) ("100% of the annual revenue requirements for Multi-Value Projects are allocated on a system-wide basis to Transmission Customers that withdraw energy from the MISO system, including export and through transactions sinking outside the MISO region (excluding PJM), and is recovered through an MVP Usage Charge, as described in Attachment MM."), *available at* https://www.misoenergy.org/Library/Repository/Communication%20Material/Key%20Presentations%20and%20Whitepapers/Transmission%20Cost%20Allocation%20Overview.pdf.

[7] *Association of Bus. Advocating Tariff Equity ("ABATE") v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 551, 156 FERC ¶ 61,234 (2016).

[8] *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).

incentives to mitigate a set of risks that have not substantially changed.[9] Nothing in the December 15 Filing justifies the need for an ROE incentive adder, particularly in light of the risk-mitigating incentives already granted by the Commission and the fact that the nature and gravity of the project risks previously considered have not changed. Instead, the December 15 Filing seeks incentives that are unjustified, as they have no nexus to the alleged risks and would effectively indemnify ATXI from disallowances arising through potential future imprudence findings.

ATXI has not met the applicable burden of proof because it relies on the fact that the total ROE will remain within the zone of reasonableness as its only support for a finding of justness and reasonableness; but, as the Commission has made clear, not all ROEs within a zone of reasonableness are just and reasonable. Commission precedent, supported by D.C. Circuit rulings, is clear that merely establishing that a proposed ROE lies within the zone of reasonableness, as ATXI has, is insufficient. Further, ATXI has not submitted a discounted cash flow ("DCF") analysis using updated financial data to determine the applicable incentive cap. As such, ATXI's filing is deficient. Accepting ATXI's proposed ROE incentive adder in the context of current Commission ROE policies would result in uncertainty regarding customer rates and utility compensation, and fail to effectively incentivize new transmission development.

I. NOTICE OF INTERVENTION

Pursuant to Rule 214(a)(2) of the Commission's Rules of Practice and Procedure, OMS submits a Notice of Intervention in this proceeding. OMS is a self-governing organization of representatives from each state regulatory body with jurisdiction over entities participating in MISO and serves as the regional state committee for MISO. The purpose of OMS is to

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[9] *Ameren Servs. Co.*, 135 FERC ¶ 61,142 (2011) (granting incentives for Illinois Rivers); *Midwest Indep. Sys. Operator, Inc.*, 141 FERC ¶ 61,121 (2012) (granting incentives for Mark Twain).

coordinate regulatory oversight among its members, to make recommendations to MISO, the MISO Board of Directors, the Commission, and other relevant government entities and state commissions, as appropriate, and to intervene in proceedings before the Commission to express the positions of the OMS member agencies.

Service of pleadings, documents, and communications should be made on:

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OMS requests, to the extent necessary, that the Commission waive the requirements of Rule 203(b)(3)[10] to permit each person named above to be placed on the official service list in order to avoid delays in responding to official documents and communications.

II. BACKGROUND

ATXI's December 15 filing proposes a 100 basis point ROE incentive adder that would apply to ATXI's portion of the Illinois Rivers and Mark Twain Project segments and associated under-build.[11] These Project segments already receive incentives that were previously approved by the Commission. In 2012, the Commission approved transmission rate incentives for the Mark Twain project that authorize: "(1) inclusion of 100 percent of prudently incurred [Construction Work In Progress ("CWIP")] in rate base; (2) recovery of 100 percent of prudently-incurred costs of transmission facilities that are cancelled or abandoned for reasons beyond the control of [ATXI]; and (3) authorization for [ATXI] to use a hypothetical capital

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[10] 18 C.F.R. § 203(b)(3).

[11] December 15 Filing at 2.

structure while the Projects are being constructed."[12] These incentives match three of the four incentives the Commission approved for the Illinois Rivers project, for which the Commission also authorized "the approval to expense and recover on a current basis all prudently incurred costs for [Illinois Rivers] pre-commercial operations."[13] ATXI receives the same base ROE approved by the Commission for the MISO TOs as a group.

III. ARGUMENT

A. ATXI Has Failed to Demonstrate That the Project Faces Risk That Is Not Addressed through Existing Incentives or That It Has Taken Appropriate Risk Mitigating Steps.

ATXI must show that: (1) the project faces risks and challenges that are not already addressed through other risk mitigating incentives that have already been granted, and (2) it has taken appropriate steps and implemented appropriate mechanisms to minimize its risks during project development.[14] ATXI has failed to make either of these showings. The Commission has already awarded incentives applicable to the Project that mitigate any legitimate risk ATXI identified in the December 15 Filing and ATXI has not adequately described the managerial measures ATXI has taken to address the allegedly extraordinary risks faced by the Project.

ATXI states that the proposed new incentives are intended to mitigate previously unforeseen risks caused by potentially unfavorable impacts on the timing and costs of the completed project.[15] ATXI claims that certain permitting and litigation risk, environmental risk, and execution risk were previously unforeseen and could increase costs or delay completion of the Project. ATXI acknowledges that the existing risk-mitigating incentives—including the

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12 *Midwest Indep. Sys. Operator, Inc.*, 141 FERC ¶ 61,121, at P 5 (2012).

13 *Ameren Servs. Co.*, 135 FERC ¶ 61,142, at P 8 (2011).

14 *Promoting Transmission Investment Through Pricing Reform*, Policy Statement, 141 FERC ¶ 61,129, at P 1 (2012) ("2012 Policy Statement").

15 December 15 Filing at 17.

CWIP, expensing of pre-commercial operating costs, and hypothetical capital structure incentives—improve cash flow and reduce rate shock,[16] but ATXI fails to explain why these risk-mitigating incentives do not already sufficiently address the risks described in the filing. In addition to these Commission-approved incentives, ATXI also may now take advantage of recently enacted tax incentives that permit expensing of 100% of certain business assets.[17]

ATXI is permitted to include 100% of CWIP in rate base as it incurs these costs and expenses as pre-commercial operating costs rather than capitalizing these costs for later recovery. To the extent ATXI faces increased costs or delays as a result of unforeseen permitting, litigation, environmental, and execution risks, ATXI begins to immediately earn a return on the associated capital investment and recovers any associated operating costs as an expense. Thus, these are exactly the type of risks intended to be mitigated by the existing incentives.

ATXI has not described in concrete terms any incremental risk that is not already mitigated in this way. The potential effect of the *Neighbors United*[18] decision on ATXI's efforts to obtain a certificate of public convenience from the Missouri Public Service Commission includes delay, increased costs, and risks of non-completion, according to ATXI.[19] ATXI cites an Illinois court ruling resulting in dismissal of certain eminent domain cases as potentially remaining unresolved for many months.[20] The need for police protection in certain areas is unfortunate, unusual, and presumably entails additional costs. But existing incentives ensure that

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16 *Id*.

17 *See* Pub. L. No. 115-97, § 13201 (2017). *See also* Ameren, EEI Financial Conference presentation, at 11 (Nov. 2017), *available at* http://s21.q4cdn.com/448935352/files/doc_presentations/2017/Nov/AEE-2017-EEI-Financial-Conf.-FINAL.pdf.

18 *Ameren Transmission Co. of Ill.*, 523 S.W.3d 21 (Mo. Ct. App. 2017).

19 December 15 Filing at 18-19 ("This process creates the potential of a continuous loop that can delay project completion and increase costs.").

20 *Id.* at 19.

ATXI will earn a return on associated capital expenditures and begin recovering associated operating expenses as it makes these outlays. In the event the Project is abandoned for reasons beyond ATXI's control, ATXI enjoys the protection of the abandonment incentive. A number of factual circumstances allegedly create unusual risks for the Project, but the only real risks ATXI identifies in support of the proposed new incentives (costs and delay)[21] are already addressed by the existing incentives. The existence of these risk mitigating incentives undercuts ATXI's passing reference to "the risk of a lower return,"[22] for which ATXI offers no explanation.

Furthermore, none of the risks described in the December 15 Filing are different from the risks the Commission evaluated in 2012. For example, the Missouri court proceedings described in the December 15 Filing[23] did not change the fact that ATXI has to seek approval from both the Missouri Public Service Commission and the affected counties.[24] Whether a judicial interpretation reversed the order in which ATXI must seek these approvals is irrelevant because this change (no matter how unexpected) does not create a new burden or requirement for obtaining project approvals. Furthermore, by ATXI's own admission, the affected counties' assents have already been obtained.[25] ATXI's statements that the current Missouri process creates a "continuous loop" of permitting and project delay[26] likewise are completely unsupported and amount to mere conjecture. ATXI has not claimed that the environmental

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[21] ATXI is not relying on abandonment risk in support of the proposed incentives. Instead, ATXI states that the proposed incentives will appropriately "align the total ROE with the risks of a project that will be completed." December 15 Filing at 17.

[22] *Id*.

[23] *Id.* at 18-19.

[24] The Missouri Public Service Commission notes without taking a position on such filings, that ATXI filed the assents in the currently pending case of *Ameren Transmission Company of Illinois, MOPSC No. EA-2017-0345,* on September 15 and 18, 2017, respectively, in the publicly available casefile "EFIS" System.

[25] *Id.* at 19 ("On September 5, 2017, ATXI, after many contentious public hearings, received the final required county assent associated with the proposed route.").

[26] *Id.* at 19.

requirements for the Project have changed, but only asserts that the company miscalculated (or failed to do proper due diligence on) the full range of permits needed and environmental requirements to be satisfied.[27] Similarly, landowner opposition and difficult condemnation proceedings are not unusual or unexpected when implementing transmission projects.

Neither is the incentive requested by ATXI justified by capital-raising needs for the Project, since it appears that most forecasted Project expenditures already have been committed. In its MISO transmission formula rate submission dated September 1, 2017, ATXI projected the expenditure of approximately $1.2 billion dollars through the end of 2017 toward completion of the Illinois Rivers project, which has an estimated total cost to ATXI of $1.324 billion.[28] These expenditures through 2017 amount to approximately 90% of the estimated costs to complete the Illinois Rivers project. It would be unjust and unreasonable at this point in time—after 90% of the Illinois Rivers project is complete in monetary terms—to approve a 100 basis point ROE incentive adder and apply it to the $1.2 billion already raised and expended.

Finally, ATXI describes problems with local permitting and obtaining rights-of-way along the route, but fails to explain what measures it has taken to mitigate these risks, such as efforts to negotiate with the relevant counties and landowners. ATXI states that "[t]he extent of [the required] permits and approvals greatly exceeded that anticipated when the Ameren Companies initiated these projects . . . ,"[29] but does not explain the source of the surprise or describe the efforts ATXI is taking to address these challenges, which could include, for example, redeploying staff to handle the additional permitting workload. ATXI further cites

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[27] *Id.* at 18, 20-21.

[28] *See* ATXI 2018 Projected Rate Calculation, Attachment MM, Supporting Data for Network Upgrade Charge Calculation (Sep. 1, 2017), *available at* http://www.oatioasis.com/woa/docs/AMRN/AMRNdocs/2018_Projected_Revenue_Requirements_ATXI.html.

[29] *Id.* at 18.

"competing demands for qualified labor," but does not describe what steps it has taken to mitigate the effects of a tight labor market.

B. Granting ATXI's Proposed Incentives Would Reward Imprudent Expenditures.

ATXI views "possible disallowances for costs deemed imprudently-incurred after the fact"[30] as one of the risks supporting the proposed incentives. As noted above, the existing CWIP, operating expense, and capital cost incentives should address risks that project costs increase due to expenses that are either over budget or relate to construction activities that may have been obviated by route changes, for example, unless those costs are determined to have been imprudently incurred. ATXI fails to explain why ATXI deserves incentives that would compensate for disallowances based on imprudence. As requested by ATXI, the proposed incentives would effectively indemnify ATXI for its imprudence and provide a windfall to the extent ATXI acts with prudence. A rate provision that would dilute or eliminate the effect of an imprudence disallowance is contrary to well-established Commission policy, as it, in practice, would encourage imprudent expenditures. This is not a new direction the Commission should take.

C. ATXI Has Failed to Show that the Project Faces Risks that Are Not Already Accounted for in the Allowed Base ROE.

ATXI must show that the Project faces risks and challenges that are not already accounted for in the base ROE it reflects in its rates. ATXI has failed to make that showing. In fact, ATXI currently is receiving a base ROE at the upper-midpoint of the DCF range applicable

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30 *Id.* at 17. *See also* December 15 Filing, Exhibit C, Martin Testimony, at 13 ("delays and other issues can lead to cost incurrence later found imprudent . . . .").

to existing and new transmission alike.[31] While the base ROE is not designed to address project-specific risks, the 10.32% base ROE established by the Commission in Opinion No. 551 operates as an implicit ROE incentive to the extent that placement at the upper midpoint is not justified by evidence in the record of that case.[32] Further, the fact that existing transmission investment receives this unusually high base ROE already results in windfalls to incumbent transmission owners such as ATXI, giving them an unfair competitive advantage over transmission developers that lack existing assets in MISO.[33]

Contrary to ATXI's contention,[34] the fact that the proxy group used in Opinion No. 551 included integrated utilities with distribution assets does not justify the need for an ROE incentive adder. What ATXI fails to acknowledge is that some of the integrated utilities in that proxy group also own generation assets, which are viewed as carrying higher levels of risk than transmission or distribution.[35] Further, the proxy group used in the MISO ROE complaint proceedings was designed to account for a broad set of risk profiles from a large number of utilities. The resulting MISO TO group ROE reflects a risk profile that is higher than ATXI's, demonstrating that a base ROE of 10.32% already over-compensates ATXI.

Bond rating data proves this. The Moody's Investors Services ("Moody's") bond rating selected for the proxy group in the Opinion No. 551 proceeding was Baa.[36] Moody's awards a Baa rating to obligations "judged to be medium-grade and subject to moderate credit risk and as

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[31] Opinion No. 551 at P 9 ("we find that the just and reasonable ROE for the MISO TOs should be set at the central tendency of the upper half of the zone of reasonableness.").

[32] *See* OMS, Request for Rehearing of Opinion No. 551, Docket No. EL14-12-003, at 43 (Oct. 28, 2016).

[33] *See id.* at 43, 49.

[34] December 15 Filing at 22-23.

[35] *See, e.g.*, *ABATE v. Midcontinent Indep. System Operator, Inc.,* 153 FERC ¶ 63,027, at P 395 (2015) (Initial Decision) ("Moody's clearly believes generation to be the riskiest component of retail sales operations.").

[36] *Id.* at P 67 ("The participants all agree that the average bond yield to be used in this proceeding is the yield for public utility bonds rated Baa (Baa Bonds) by Moody's Investor Service (Moody's).").

such may possess certain speculative characteristics."[37] A recent ATXI bond issuance, however, received an A2 rating from Moody's.[38] Moody's awards an A rating to obligations "judged to be upper-medium grade and are subject to low credit risk."[39] Moody's noted ATXI's Illinois River and Mark Twain projects and stated that "[w]e expect ATXI's metrics to be stable due to low business risk, as well as limited volume and counterparty risks."[40] Further, "ATXI's stable outlook reflects the consistency and predictability of earnings and cash flows that result from the FERC regulatory framework. It incorporates our expectation that there will be some execution risk related to completing the projects and that ATXI will manage them prudently."[41] The fact that ATXI's bond rating remains higher than that of the Opinion No. 551 proxy group, even after factoring in the risks associated with the Project, demonstrates that a base ROE of 10.32% is more than adequate for ATXI, especially in combination with the previously granted incentives.

In light of this glowing ratings report that specifically acknowledges execution risk associated with the Project, the Commission should carefully consider whether ATXI has demonstrated a need for higher returns to be able to attract capital. Failing to do so would expose customers to excessive rates. This would provide ATXI with a windfall that would be additive to the windfall it already is receiving through the base ROE established for the MISO TOs as a group. The MISO TOs' group ROE inherently cannot and does not reflect ATXI's current financial conditions, including a Moody's rating several notches higher than the proxy

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[37] Moody's Investors Service, *Rating Symbols and Definitions*, at 4 (Jul. 2017), *available at* https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_79004 ("Moody's Definitions").

[38] Moody's Investors Service, *Rating Action: Moody's assigns A2 rating to Ameren Transmission Company of Illinois, stable outlook* (Jun. 20, 2017), *available at* https://www.moodys.com/research/Moodys-assigns-A2-rating-to-Ameren-Transmission-Company-of-Illinois--PR_368447 ("ATXI Rating Action").

[39] Moody's Definitions at 4.

[40] ATXI Rating Action.

[41] *Id*.

group rating used in establishing the applicable base ROE, and prevailing financial market conditions that are generally favorable as well.

D. ATXI Has Failed to Establish a Nexus Between Project Risks and the Proposed ROE Incentives.

A transmission owner seeking project-specific incentives must demonstrate a nexus between the risks of the project and the incentives requested. In Order No. 679-A, the Commission refined the nexus requirement, finding that, "in applying the nexus test, the Commission should look at whether the total package of incentives is rationally tailored to the risks and challenges of constructing new transmission."[42] Subsequently, the Commission developed a proxy for the nexus test that focused on whether a project was "non-routine" in determining whether to award an incentive. However, in its 2012 Policy Statement, the Commission determined that it would no longer rely on a non-routine finding to confirm satisfaction of the nexus test. Instead, the Commission refocused the analysis on the necessity "for each individual incentive, and the total package of incentives . . . ."[43] Further, the Commission emphasized that, "[i]f some of the incentives would reduce the risks of the project, that fact will be taken into account in any request for an enhanced ROE."[44]

ATXI has failed to explain how a higher ROE will address the purported project-specific risks claimed in its filing, such as unexpected regulatory uncertainty at the state level, difficulties obtaining rights-of-way, or underestimated environmental requirements. ATXI has dismissed, without foundation, the effect of the existing incentives in mitigating the risks posed by the particular factual circumstances ATXI argues justify the proposed new incentives. ATXI

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[42] 2012 Policy Statement, 141 FERC ¶ 61,129 at P 7 (citing Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 27; 18 C.F.R. § 35.35(d)).

[43] 2012 Policy Statement, at P 10.

[44] *Id.*

ignored the Commission's disavowal of the "non-routine" proxy for the nexus test when citing the Commission's orders establishing the existing incentives and in asserting that the Commission found the Project's broad scope to be non-routine.[45] While ATXI mentions the nexus test in a number of places in the December 15 Filing, none of these references connect the dots between the alleged project-specific risks and the proposed incentives it requests.

E. ATXI Has Not Met the Applicable Burden of Proof Under FPA Sections 205 and 219.

ATXI claims that the Project incentive is just and reasonable because the total ROE will be capped by the top of the DCF zone of reasonableness to be established in Docket Nos. EL14-12, EL15-45 and subsequent proceedings.[46] While a total ROE that lies *outside* of the zone of reasonableness clearly is not just and reasonable, the fact that the total ROE falls *within* the zone of reasonableness does not automatically mean that such ROE is just and reasonable.[47] ATXI has failed to explain why the Project should receive a total ROE that would in all likelihood lie at the top of the zone of reasonableness for a considerable time. In fact, ATXI has made no effort to justify any particular overall ROE within the zone of reasonableness. Therefore, ATXI has failed to meet its burden of proof under sections 205 and 219 of the FPA.[48]

F. ATXI's December 15 Filing is Deficient Because ATXI Has Not Submitted a DCF Analysis to Establish a Just and Reasonable ROE for ATXI.

ATXI should submit a DCF analysis using recent data to justify the cap applicable to the requested incentive, rather than relying on a zone of reasonableness established by the

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[45] December 15 Filing at 10.

[46] December 15 Filing at 28-29.

[47] *Emera*, 854 F.3d at 24.

[48] *See, e.g., Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 43 (2006) ("Before the Commission will permit any applicant to recover incentives in its rates, the Commission will evaluate the rate impact under section 205 or 206 of the FPA. . . . The Commission will, on a case-by-case basis, require each applicant to justify the incentives it requests.").

Commission in the complaint proceedings pending in Docket Nos. EL14-12 and EL15-45.[49] The Commission's policy is to "base the zone of reasonableness on the most recent financial data in the record."[50] While ATXI implicitly recognizes that the Commission's policy is to use the most recent zone of reasonableness to cap total return after implementing ROE incentives, it failed to include an updated DCF analysis or any relevant updated financial data in its filing. Instead, ATXI intends that the Commission impose a cap on its total ROE based on a DCF zone of reasonableness established using financial data from January to June 2015.[51] ATXI has not explained why the Commission should depart from its precedent of using the most recent zone of reasonableness, and accept a rate incentive proposal capped at a point calculated using stale data from over two years ago. The Commission should reject this approach because it would result in rates that do not reflect current investor needs and it would be inconsistent with long-standing policy.[52]

In establishing public utility rates, the Commission generally utilizes cost of service data from a test period no earlier than "the most recent twelve consecutive months, or the most recent calendar year, for which actual data are available, the last day of which is no more than fifteen

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[49] December 15 Filing at 2 n.4 ("To the extent that the awarded ROE Incentive in combination with the base ROE and RTO participation adder would cause the total ROE to exceed the top end of the zone of reasonableness established by the Commission for MISO Transmission Owners, the ROE Incentive would be capped by such top end of the zone. Should a new zone be established in a future proceeding, ATXI would apply the awarded ROE Incentive not to exceed the top end of the new zone.").

[50] *Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 64 (2014).

[51] Opinion No. 551, 156 FERC ¶ 61,234, at P 19 (2016) ("the Presiding Judge determined that the DCF Study Period for calculating the zone of reasonableness should be the most recent six-month period for which there is financial data in the record, January to June 2015.").

[52] *See, e.g., Boston Edison Co. v. FERC*, 885 F.2d 962, 966 (1st Cir. 1989) ("The Commission, pointing to the 'steady improvement in stock prices over the twelve month periods used,' said it would look instead to the dividends received during the last six months of the 12–month period; and it adjusted the 'zone of reasonableness' accordingly.").

months before the date of tender for filing. . . ."[53] In determining ROE, "the Commission uses the most recent data in the record . . . 'because the market is always changing and later figures more accurately reflect current investor needs.'"[54] This policy is consistent with the Supreme Court's rulings in *Hope*[55] and *Bluefield*.[56] A just and reasonable ROE should be "commensurate with returns on investments in other enterprises having corresponding risks . . . [and] sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[57] "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."[58] Using the most recently available financial data ensures that the allowed ROE most accurately matches investors' needs on a going forward basis. ATXI's failure to demonstrate that the total return it seeks does not exceed an up-to-date range-based cap renders its filing deficient.

G. ATXI's Floating Cap Proposal Would Result in Rate Uncertainty for Customers and Does Not Properly Incentivize New Transmission Development.

ATXI has not shown that the proposed ROE incentive is just and reasonable and its proposed floating incentive cap highlights the failure of the Commission's ROE policies to provide certainty and appropriately incentivize new transmission development. The ability of

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53 18 C.F.R. § 35.13(d)(3)(i). ATXI utilizes a forward-looking formula rate. *Midwest Indep. Transmission Sys. Operator, Inc.,* 141 FERC ¶ 61,121, at P 77 (2012).

54 *Portland Natural Gas Transmission Sys.*, Opinion No. 510, 134 FERC ¶ 61,129, at P 242 (2011) (quoting *Trunkline Gas Co.*, 90 FERC ¶ 61,017, at 61,117 (2000)).

55 *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (Hope).

56 *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) (Bluefield).

57 *Hope*, 320 U.S. at 603. *See also Bluefield*, 262 U.S. at 693 ("The return should be reasonably 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 the money necessary for the proper discharge of its public duties.").

58 *Bluefield*, 262 U.S. at 693.

ratepayers to guarantee transmission owners' returns is not unlimited. In fact, the Commission rightfully caps total ROE at the top of the DCF range to ensure compliance with the requirements of FPA sections 205 and 219 that the total ROE be just and reasonable.[59]

When a developer applies for incentives—such as the incentive ATXI requests here— the utility will not be able to fully implement its incentive if the total requested ROE exceeds the range-based cap.[60] This cap, however, could change if the range is recalibrated due to Commission findings in subsequent proceedings under section 205 or section 206.[61] As a result, the impact an ROE project adder can have on customers' rates is uncertain and the incentive utilities will actually receive is uncertain.

Ratepayers are already bearing the costs of a base ROE that provides a windfall to transmission owners with existing transmission assets in MISO (such as ATXI).[62] Opinion No. 551 placed the base ROE for the MISO TOs at the upper midpoint without any justification in the record of that proceeding[63] and placement at the upper midpoint is questionable in light of *Emera*. Further, this base ROE applies to all of a transmission owner's transmission assets, including existing assets. This windfall thus provides incumbent transmission owners like ATXI

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[59] Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 43.

[60] Opinion No. 531, 147 FERC ¶ 61,234 at P 164 ("Based on the Commission's policy that the total ROE including any incentive ROE is limited to the zone of reasonableness, the Commission has found in the past that an incentive ROE may not be implemented in full by the utility if the total ROE exceeds the zone of reasonableness."), *reh'g denied*, Opinion No. 531-B, 150 FERC ¶ 61,165, at P 139 (2015).

[61] Opinion No. 531 at P 165 ("when a public utility's ROE is changed, either under section 205 or section 206 of the FPA, that utility's total ROE, inclusive of transmission incentive ROE adders, should not exceed the top of the zone of reasonableness produced by the two-step DCF methodology.").

[62] *See* OMS, Request for Rehearing of Opinion No. 551, Docket No. EL14-12-003, at 43 (Oct. 28, 2016).

[63] *Id.* ("Given the speculative character of the record evidence suggesting that 'too big' an ROE reduction would impair transmission investment, the conclusion becomes inescapable that what drove the Commission to set the base ROE well above the DCF midpoint was simply the magnitude of the ROE reduction itself.").

an advantage over other transmission developers that do not have existing assets in MISO.[64] In addition, the Commission grants RTO participation adders and transco adders that OMS believes are unnecessary.[65] At a minimum, the Commission should account for these various windfalls when deciding the level of ROE incentive (if any) that the ATXI Project requires.

The better long-term approach, however, would include a thorough reassessment of the Commission's policies regarding base ROE placement and ROE adders. Elimination of the RTO participation and transco adders and judicious use of other basis point adders only in cases of exceptional risk would provide more appropriate incentives for new transmission investment. Awarding base ROE at the midpoint (rather than the upper midpoint) of the zone of reasonableness would avoid overcompensating transmission developers and would provide more room under the ROE cap that would make it more likely that any adders the Commission awards will provide meaningful incentives for new transmission development.

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64 *See* OMS, Request for Rehearing of Opinion No. 551, at 49 ("the overcompensation described above may deter entry and produce less competition in transmission planning and development than would otherwise be the case.").

65 *See* OMS, Request for Rehearing, Docket No. EL14-12-001, at 5-6 (Nov. 14, 2014).

IV. CONCLUSION

The OMS submits this pleading because it is consistent with the policy positions approved by a majority of its Board of Directors. WHEREFORE, for the reasons stated herein, OMS respectfully requests that the Commission reject the December 15 Filing.

Respectfully submitted,

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Dated: January 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 5th day of January, 2018.

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