

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Electric Transmission Incentives Policy Under)
Section 219 of the Federal Power Act)

Docket No. RM20-10-000

**COMMENTS OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

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Pursuant to the Notice of Proposed Rulemaking (“NOPR”) issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on March 20, 2020, the New England States Committee on Electricity (“NESCOE”) files comments in response to the Commission’s proposed revisions to its regulations that implemented section 219 of the Federal Power Act (“FPA”).¹

I. DESCRIPTION OF COMMENTER

NESCOE is the Regional State Committee for New England. It is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff that ISO New England Inc. (“ISO-NE”) administers.² NESCOE’s mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest possible price over the long term, consistent with maintaining reliable service and environmental quality.³ These comments represent the collective view of the six New England

¹ 16 U.S.C. § 824s.

² *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

³ See Sept. 8, 2006 NESCOE Term Sheet (“Term Sheet”) that was filed for information as Exhibit A to the Memorandum of Understanding among ISO-NE, the New England Power Pool (“NEPOOL”), and NESCOE (the “NESCOE MOU”). Informational Filing of the New England States Committee on Electricity, Docket No.

states. NESCOE filed comments⁴ last year on the Commission’s Notice of Inquiry (“NOI”)⁵ in which the Commission sought comment on the scope and implementation of its electric transmission incentives regulations and policies.

II. INTRODUCTION AND SUMMARY

In 2018, NESCOE submitted a letter to the Commission urging it to adopt reforms to its transmission incentives policies.⁶ Given the maturation of Regional Transmission Organization (“RTO”) and Independent System Operator (“ISO”) markets and the vast amounts of transmission built since the Commission first adopted its transmission incentives policies in Order No. 679,⁷ NESCOE stated that it was time to revisit whether all or some of the transmission incentives were still needed. The Commission issued its NOI in March 2019 and received over a hundred sets of comments from all segments of the industry.

NESCOE explained in its NOI comments that it agreed with the Commission “that a reevaluation of its transmission incentives policy is timely”⁸ and expressed support for reforms to the Commission’s incentives policies. That support was for reforms “that are appropriate

ER07-1324-000 (filed Nov. 21, 2007). Pursuant to the NESCOE MOU, the Term Sheet is the binding obligation of ISO-NE, NEPOOL and NESCOE.

⁴ Comments of the New England States Committee on Electricity, Docket No. PL19-3-000 (filed June 26, 2019) (“NESCOE Initial Comments”); Reply Comments of the New England States Committee on Electricity, Docket No. PL19-3-000 (filed Aug. 26, 2019) (“NESCOE Reply Comments”).

⁵ *Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208 (2019).

⁶ NESCOE Letter to the Commission, New England States’ Comments on Transmission Incentive Rates (Dec. 20, 2018) (“NESCOE Incentives Letter”), at 2, available at http://nescoe.com/wp-content/uploads/2018/12/NESCOE_IncentiveRatesLetter_20Dec2018.pdf.

⁷ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh’g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007).

⁸ NESCOE Initial Comments at 7.

based on fundamental changes to the transmission planning process since Order 679 and the Commission's obligation to ensure just and reasonable rates.”⁹

Transmission owners advocated for more types, higher levels, and easier to obtain transmission incentives. NESCOE and others representing consumers urged the Commission to consider costs as an important factor and to ensure that transmission incentives policies were appropriately designed to do what Congress specified in FPA section 219, to “benefit[] consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”¹⁰

Unfortunately, much of the NOPR favors creating new incentives, increasing existing incentives that have never been demonstrated in the first instance as necessary to achieve their stated goal, and tossing aside decades of precedent on how to ensure that incentive rates remain just and reasonable. Among other proposed revisions, NESCOE strongly opposes the Commission's proposed approach to ensuring the reasonableness of return on equity (“ROE”) transmission incentive adders and the changes to the RTO participation incentive adder. As it stands, the NOPR is legally deficient and represents a stark retreat from the Commission's commitment to fulfilling its statutory obligation to ensure just and reasonable rates.

Other than proposing to eliminate the ROE incentive adder available to stand-alone transmission companies (“Transcos”), and a proposal to collect some additional information from some transmission incentive applicants through FERC Form 730, the NOPR, if adopted, would needlessly impose excessive rates on consumers. These rate increases would be approved without any evidence in the record that more incentives are needed to achieve the Commission's

⁹ *Id.* at 8.

¹⁰ 16 U.S.C. § 824s(a).

stated goals, that incentive adders need to be increased in order to achieve those goals, or that the vast majority of the proposed changes to the Commission’s incentive policies will, in fact, benefit consumers as FPA section 219 requires. NESCOE urges the Commission not to implement the NOPR’s legally deficient and factually unsupported proposals.

III. COMMENTS

A. The NOPR Fails To Demonstrate a Need To Retain, Let Alone Increase the Levels of, Transmission ROE Incentive Adders.

1. The NOPR Ignores Transmission Investment That Has Occurred and Planning Processes of RTOs/ISOs.

The Commission contends that its proposed reforms “will both help to reflect recent changes in the industry and transmission planning and more closely align with the statutory language of FPA section 219.”¹¹ The NOPR points to the following factors as supporting the need for new transmission, and hence, a need for its proposals: a changing resource mix with more use of natural gas and renewable resources and declining use of coal;¹² a higher incidence of “more types of resources” currently participating in FERC-jurisdictional markets;¹³ and changing load growth patterns.¹⁴ While the Commission states that it is “encouraged by the investment in transmission infrastructure to date,” it summarily concludes, nonetheless, that “additional reform may be necessary to continue to satisfy our obligations under FPA section 219 in this new transmission planning landscape.”¹⁵

¹¹ NOPR at P 24.

¹² *Id.* at P 27.

¹³ *Id.* at P 28.

¹⁴ *Id.* at P 29.

¹⁵ *Id.* at P 31.

Conspicuously absent from this discussion about the need for these proposed changes is any meaningful analysis of the levels of transmission investment that have taken place since the Commission adopted its transmission incentive policies in Order No. 679. Nor has there been any analysis of the correlation between transmission investment and the Commission’s revised approach to its incentive policies adopted in its 2012 Policy Statement.¹⁶ As a result, the proposals in the NOPR are being made without evidence in the record that the current array of incentives has failed to encourage sufficient transmission investment.

As NESCOE previously pointed out,¹⁷ several commenters, including transmission developers, confirmed that existing Commission policies succeed in attracting sufficient capital for new transmission investments.¹⁸ NOI commenters also highlighted that the earlier trend in lower levels of transmission investments had been reversed, pointing out that transmission investment had been increasing since the 1990s.¹⁹ One entity characterized this shift as a “resurgence” in infrastructure spending.²⁰ In New England alone, regional investments in

¹⁶ *Promoting Transmission Investment through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (“2012 Policy Statement”).

¹⁷ NESCOE Reply Comments at 3.

¹⁸ Initial Comments of NextEra Energy Transmission, LLC, Docket No. PL19-3-000 (June 25, 2019) (“NextEra Initial Comments”), at 5; Initial Comments of LSP Transmission Holdings II, LLC, Docket No. PL19-3-000 (filed June 26, 2019), at 2. *See also* Initial Comments of the American Wind Energy Association, Docket No. PL19-3-000 (filed June 26, 2019), at 2 (“[P]otential transmission investments are not typically sidelined by inadequate rates of return. Rather, in most cases, substantial private capital is already available for new transmission development, even at current rates of return, and it is other barriers that stand in the way of the projects.”).

¹⁹ Comments of Southern New England State Agencies, Docket No. PL19-3-000 (filed June 26, 2019) (“Southern New England State Comments”), at 4-7; Comments of Massachusetts Municipal Wholesale Electric Company, *et al.*, Docket No. PL19-3-000 (filed June 26, 2019) (“Public Systems Comments”), at 5; Initial Comments of the Joint Commenters, Docket No. PL19-3-000 (filed June 26, 2019) (“Joint Commenters Initial Comments”), at 4; NextEra Initial Comments at 5. *See also* Initial Comments of Eversource Energy Service Company, Docket No. PL19-3-000 (filed June 26, 2019) (“Eversource Initial Comments”), at 10-11 (describing billions of dollars in transmission investments in New England since 2002 and substantial reductions in congestion).

²⁰ Initial Comments of WIRES, Docket No. PL19-3-000 (filed June 26, 2019) (“WIRES Initial Comments”), at 3.

transmission identified to promote system reliability have topped \$10 billion over the last two decades, with over a billion more planned over the next several years.²¹

Indeed, competitive solicitations in several of the RTOs over the past several years reveal that there are plenty of transmission owning entities that are eager to invest substantial sums in new transmission without incentive adders.²² In regions like New England, where competitive processes have been established to meet new transmission needs,²³ competing transmission developers have the opportunity to provide the revenue requirements, financial incentives, and risk mitigation measures that they need to invest in new transmission facilities. Moreover, the reasons the Commission cites in support of the need for new and enhanced incentives do not warrant the extraordinary rate treatment that it proposes. The fact that regions are seeing changing resource mixes, additions of new resources and changing load growth patterns does not justify bolstering transmission incentives. The NOPR does not adequately account for existing tools that RTOs/ISOs employ to address an evolving grid.²⁴

²¹ NESCOE Initial Comments at 5. *See also* ISO-NE 2019 Regional System Plan (Oct. 31, 2019), at 8 (“Overall, the estimated investment in New England to maintain reliability was \$10.9 billion from 2002 to June 2019, and another \$1.3 billion is planned over the planning horizon.”), available at https://www.iso-ne.com/static-assets/documents/2019/10/rsp19_final.docx.

²² *See, e.g.*, Comments of Transmission Dependent Utility Systems, Docket No. PL19-3-000 (filed June 26, 2019) (“TDU Systems Comments”) at 21-22 (explaining that winning project in one of the Midcontinent Independent System Operator, Inc. (“MISO”) transmission project solicitations, Republic Transmission (a wholly owned subsidiary of LS Power Associates, L.P. and its subsidiaries and affiliates), committed to capping upfront project costs and other elements of the transmission revenue requirement costs, including a 9.8% ROE, *inclusive* of incentives).

²³ ISO-NE OATT, Attachment K, §§ 4.3 and 4A.5-4A.8.

²⁴ *See, e.g.*, ISO-NE’s Transmission Planning Technical Guide (Rev. 6.1, Effective Date June 15, 2020), at 15 (“The ISO is collecting load flow, stability and short circuit models for generators 5 MW and greater that are new or being modified. Additional models... are collected as necessary. For example, a PSCAD model is often required for solar and wind generation connecting to the transmission system.”), available at https://www.iso-ne.com/static-assets/documents/2020/06/transmission_planning_technical_guide_rev6_1.pdf; *id.* at 15 (“Generators less than 5 MW are modeled explicitly, either as individual units, the equivalent of multiple units, or netted to load.”); *id.* at 28-32 (explaining that the ISO models various types of resources, including combined cycle generation, wind generation, conventional hydro and pumped hydro generation, solar photovoltaic generation, demand resources and behind-the-meter mill generation); *id.* at 18-20 (explaining that the ISO models various load conditions, current and forecasted several years out); and *id.* at 21 (ISO-NE also

2. The NOPR Fails To Give Adequate Consideration to Consumer Costs in Balancing Consumer and Transmission Owner/Investor Interests.

The Commission has an obligation to balance investor and consumer interests. “[S]etting a just and reasonable rate necessarily ‘involves a balancing of the investor and the consumer interests.’”²⁵ Commission precedent explains an incentive is just and reasonable if it appropriately balances the risk assumed by transmission developers with that assumed by ratepayers.²⁶ As the Commission recognized, “[i]t is not enough to ensure that investors are properly compensated, and it is not enough to ensure that consumers are protected against excessive rates. Our policies must ensure both outcomes and, in doing so, strike the appropriate balance between these twin objectives.”²⁷

With little exception, the NOPR fails to balance these interests, and, instead seems to focus on increasing revenue opportunities for transmission owners. While proposing a vast array of new and expensive ROE incentive adders, the NOPR largely fails to consider whether the increased costs will actually benefit consumers, as is required by FPA section 219. This one-sided treatment thwarts the Commission’s statutory obligation under FPA to ensure just and reasonable rates.²⁸ NESCOE recognizes that this is only a proposed rule, but urges the

incorporates large station service and other loads as appropriate in its modeling); ISO New England, Update on Draft 2020 CELT Forecast, Planning Advisory Committee (Mar. 18, 2020), at Slides 8-15 (providing details of ISO-NE’s heating electrification forecast) and Slides 16-25 (providing details on the electric vehicle load forecast), available at https://www.iso-ne.com/static-assets/documents/2020/03/a6_03-18-2020_update_on_celt_2020.pdf.

²⁵ *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 262 (D.C. Cir. 2007) (per curiam) (quoting *Federal Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)).

²⁶ *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009, at P 75 (2016) (“we have similar concerns as some protesters that the conditional ROE incentive proposal does not strike the appropriate balance between the risk assumed by NEET West and the risk assumed by ratepayers”).

²⁷ Order No. 679 at P 21.

²⁸ *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 781 (2016) (one of the FPA’s core objectives is “protecting against excessive prices”) (cleaned up); *NextEra Energy Res. v. FERC*, 898 F.3d 14, 21 (D.C. Cir. 2018) (“The Commission must protect . . . consumers from excessive rates and charges.”) (cleaned up); *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (“*Xcel*”) (“It is long-established that the primary aim [of the

Commission not to make the same mistake of ignoring customer costs and ignoring arguments made by consumer interests in any final rule it adopts. The United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) “has not hesitated to reject agency determinations under APA’s substantial evidence standard when an agency ignores factual matters or fails to respond adequately to meritorious arguments raised in opposition to the agency’s action.”²⁹

3. The NOPR Inappropriately Discards the Concept of Incentives in Favor of Perpetual Increases to ROEs.

A glaring problem with several aspects of the NOPR’s proposals is the abandonment of the basic principle that an incentive must incentivize something that would not happen absent the incentive. Failure to adhere to this principle is blatantly at odds with the provision of the Energy Policy Act of 2005 (“EPAAct 2005”)³⁰ that amended FPA section 219 to provide for incentives. “[T]he NOPR omits what should be a bedrock principle of any effort to administer section 219: That incentives must actually incentivize something. A payment that does not incentivize anything is a handout, not an incentive. Handing out customers’ money to transmission owners

FPA] is the protection of consumers from excessive rates and charges.”) (cleaned up); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) (“It is indisputable that, under established ratemaking principles, rates that permit excessive profits are not just and reasonable.”); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1207 (D.C. Cir. 1987) (Starr, J., concurring) (“The Commission stands as the watchdog providing a complete, permanent and effective bond of protection from excessive rates and charges.”) (cleaned up).

²⁹ *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 68 (D.D.C. 2016) (citing *Nat’l Ass’n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1136-38, (D.C. Cir. 2013) (“rejecting agency rule under APA substantial evidence standard where group challenging rule presented credible evidence contrary to agency findings and agency offered only ‘mere assertion’ that rule accounted for contrary evidence in reply); citing *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (cleaned up) (“rejecting agency finding under APA substantial evidence standard where agency failed to ‘articulate a satisfactory explanation’ and agency ‘ignore[d] evidence contradicting its position;’); and citing *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007) and quoting *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991)) (“rejecting agency decision where ‘the FAA has provided absolutely no evidence to back it up’ since ‘[a]s we have said many times before, ‘[a]n agency’s unsupported assertion does not amount to substantial evidence.’”).

³⁰ Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1241, 119 Stat. 594 (2005).

without a strong belief that that money will induce beneficial conduct is unjust and unreasonable and inconsistent with Congress' intent behind section 219.”³¹

Finally, the Commission's proposal with respect to Form 730 shines a spotlight on the fact that earlier changes to the Commission's regulations failed to set up any meaningful way to measure whether incentives would accomplish their purpose when it issued Order No. 679. As a result, there is a dearth of evidence in the record supporting the vast majority of the changes the Commission now proposes.

B. The NOPR's Proposals Purporting To Ensure the Reasonableness of ROE Incentives Are Legally Deficient.

The Commission's proposal to establish a 250-basis point cap on total ROE incentives in place of its current policy of limiting ROE incentives to public utility's zone of reasonableness³² is simultaneously an extreme proposal and one of the least supported aspects of the NOPR. The Commission's characterization of limiting ROE incentives to the top of the zone of reasonableness as its *current* policy ignores core components of the Commission's incentive rule first adopted in Order No. 679; ignores the language of the EAct 2005 itself; and ignores the Commission's precedent predating EAct 2005. While the Commission may depart from its own precedent, it must articulate a reasoned explanation for doing so.³³ The NOPR provides no such reasoned explanation for this stark and unjust and unreasonable departure.

³¹ Glick, Commissioner, *dissenting in part* (“Glick Dissent”), at P 4 (citing *Cal. Public Util. Comm'n v. FERC*, 879 F.3d 966, 974-79 (9th Cir. 2018) (“*CPUC v. FERC*”) (“explaining that the Commission has a ‘longstanding policy’ that incentives must incentivize something ‘and that there must be a connection between the incentive and the conduct meant to be induced.’”).

³² NOPR at PP 10, 76. As discussed below, the NOPR's proposal to change the Commission's policy seems more accurately characterized as a proposal to change the law.

³³ *See, e.g., TransCanada PipeLines Ltd. v. FERC*, 24 F.3d 305, 311 (D.C. Cir. 1994) (FERC “faltered in its antecedent duty to explain how incremental pricing relates to the prohibition against discriminatory rates.”).

Additionally, the timing of this proposal is ill-advised given that the Commission has just recently modified the method for setting the zone of reasonableness—an opinion that is pending rehearing and review at the D.C. Circuit.³⁴

1. Departing from Reliance on the Upper End of the Zone of Reasonableness Is Contrary to Longstanding Commission and Court Precedent and Is Not Supported by any Evidence.

FPA section 219(c) provides that incentive rates “are subject to the requirements of sections 824d and 824e that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”³⁵ In Order No. 679, the Commission explained:

[B]ecause the approved ROE, including the impact of an incentive, will be within the zone of reasonableness, we consider this provision consistent with section 205 of the FPA. *We will not create specific ROE adders (e.g., 100 basis points); the Commission has always considered a range of returns in determining the appropriate ROE and we see no reason to depart from this practice.* Though some commenters assert that the incentive need not be cost-based and therefore can justifiably be above the upper-end of the zone of reasonableness, we believe a return *within the zone* will be adequate to attract new investment and consistent with the intent of Congress in section 219.^[36]

The Commission clarified in Order No. 679-A that although it “has broad discretion to establish returns on equity anywhere *within the zone of reasonableness*, we must be careful in the manner we exercise this discretion....[E]ach applicant will, first, be required to justify a higher

³⁴ See *Ass’n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569, 169 FERC ¶ 61,129 (2019), Opinion No. 569-A, 171 FERC ¶ 61,154, at P 190 (2020) (granting rehearing and modifying the methodology set in Opinion No. 569 for calculating the “ranges of presumptively just and reasonable base ROEs”), *reh’g pending, appeal docketed, MISO Transmission Owners v. FERC*, Case No. 16-1325, consolidated with Case No. 20-1182 (D.C. Cir. June 1, 2020).

³⁵ 16 U.S.C. 824s(c).

³⁶ Order No. 679 at P 93 (emphasis supplied).

ROE under the required nexus test and, second, to justify where *in* the zone of reasonableness that return should lie.”³⁷

The Commission’s justification for this 180-degree turnabout from its long-standing policy of requiring ROEs—*inclusive* of incentive adders—to remain within the zone of reasonableness is curt. It is simply that this change is needed “[d]ue to changing investment conditions.”³⁸ The Commission does not proceed to describe with any specificity what these changed investment conditions are that would warrant upending decades of consistent precedent. Indeed, it cannot, because the record is devoid of any analysis indicating that the Commission’s existing incentive policies have resulted in insufficient transmission. As explained above, there has been robust investment in transmission over the past 15 years.³⁹ The Commission summarily concludes that “given [its] experience with the transmission incentives policy under FPA section 219, we believe that this existing limit on ROE incentives may no longer be adequate to attract new investment in transmission facilities[,]”⁴⁰ but provides no support for this conclusion. The Commission points to nothing in the extensive NOI record to support its changed view. And the Commission fails to point to any evidence that reliance on the upper limit of the zone of reasonableness has prevented in the past or may prevent in the future investment in transmission facilities.

³⁷ Order No. 679-A at P 7 (emphasis supplied).

³⁸ NOPR at P 76.

³⁹ See Section A.1, *supra*. See also NESCOE Reply Comments at 3.

⁴⁰ NOPR at P 79.

Instead, the Commission focuses on what seems to be a results-oriented approach, under which its discounted cash flow (“DCF”) method may be producing results that are too low for high-risk utilities:

[T]he traditional starting point for analyzing the base ROEs of a group of utilities with above average risk is the upper midpoint of the zone of reasonableness, but, if the Commission were to retain ROE incentive limits based on the upper end of the zone of reasonableness, the proximity of the base ROEs of such average utilities to that upper end may prevent them from receiving the incentives granted by the Commission under FPA section 219 in order to provide a rate of return that attracts new investment.^[41]

The Commission goes on to conclude that “[w]e do not believe it was the intent of Congress to preclude utilities with above-average risk profiles from receiving ROE incentives[,]”⁴² although it provides no specific detail for this conclusion. Nor does the Commission point to anything in the legislative record that supports its new view. Although the Commission now speculates that Congressional intent in adopting FPA section 219 supports this change in policy, it does not explain what led the Commission to change its mind about its prior interpretation of Congressional intent. The Commission stated in Order No. 679-A:

“[C]onsistent with Congress’ direction in section 219, we are obligated to establish ROEs for public utilities that both reflect the financial and regulatory risks attendant to a particular project and that are sufficient to actively promote capital investment. We will do so *within* the zone of reasonableness, including above the midpoint where appropriate, to accomplish these regulatory responsibilities.”⁴³

⁴¹ *Id.*

⁴² *Id.*

⁴³ Order No. 679-A at P 15 (emphasis supplied) (citing Order No. 679 at P 93).

In six short paragraphs, the Commission proposes to dismantle decades of long-standing precedent. The Commission’s proposal hinges on its theory that “the returns provided by base ROE serve a different purpose than the separate grant of authority in FPA section 219(b)(2) to provide a return on equity that attracts new investment in transmission facilities.”⁴⁴ Assuming *arguendo* that a base ROE does in fact serve a “different purpose” than “an incentive ROE adder,” this does not lead to the conclusion that “ROE incentives may meet a different test for just and reasonable rates than for a base ROE, and ROE incentives that are added to the base ROE are, therefore, not required to be bound by the zone of reasonableness in order to be just and reasonable and not unduly discriminatory.”⁴⁵ As Commissioner Glick explained, “[c]ontrary to the Commission’s suggestion in the NOPR, the incentives provided pursuant to section 219 do not have an entirely distinct capital attraction purpose than the base ROE. Indeed, as the Commission’s recitation of the *Hope/Bluefield* standard indicates, the base ROE itself is supposed to permit a transmission owner to “maintain its credit and *attract capital*.”⁴⁶

Regardless of whether a base ROE serves a “different purpose” than an ROE incentive adder designed to attract new investment in transmission facilities, there is only one just and reasonable standard in the Federal Power Act. And as applied to ROEs, the Commission’s long-standing precedent relies on the upper end of the DCF zone of reasonableness to determine the total ROE cap, inclusive of incentives.⁴⁷ As just one of many examples, the Commission held in 2008 that “the combined package of incentives will be capped at the high end of the zone of

⁴⁴ NOPR at P 78.

⁴⁵ *Id.*

⁴⁶ Glick Dissent at P 27 (citing NOPR at P 78 and supplying emphasis; and citing *Hope*, 320 U.S. at 603 (“holding that the ROE a regulated utility is permitted to earn ‘should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.’”)).

⁴⁷ Order No. 679 at PP 93-93.

reasonableness and, therefore, is just and reasonable.”⁴⁸ The Commission has not justified overturning its own long-standing precedent that has consistently relied on capping incentives at the top of the zone of reasonableness.

The Commission’s logic that suddenly the upper bound of the zone of reasonableness is irrelevant is without any basis in sound policy or precedent. The Commission is not proposing to simply tweak a “current policy.”⁴⁹ Having returns on equity remain within the zone of reasonableness has been a core means of ensuring that incentives remain just and reasonable since the Commission adopted its transmission incentives policies in Order No. 679. In fact, this policy predates Order No. 679 and EPart 2005. As the D.C. Circuit held, “[a]s long as the rate selected by the Commission *is within the zone of reasonableness*, FERC is not required ‘to adopt as just and reasonable any particular rate level.’”⁵⁰ *Emera* relies on several cases that predate EPart 2005 and were thus part of the regulatory and legal landscape at the time Section 1251 of EPart was enacted.⁵¹ “As we have held, ‘[a]bsent procedural or methodological flaws, the court may only set aside a rate that is outside a zone of reasonableness’”⁵²

⁴⁸ *Northeast Utils. Serv. Co.*, 124 FERC ¶ 61,044, at P 71 (2008). *See also Central Maine Power Co.*, 125 FERC ¶ 61,079, P 73 (2008) (“Our granting of a 125 basis point adder, in conjunction with its 11.64 percent base level ROE as determined by the Opinion No. 489 Rehearing Order, results in a 12.89 percent ROE (10.4 + 0.5 + 0.74 + 1.25) and falls within the upper range of the zone of reasonableness of 7.3 percent to 13.5 percent.”); *Desert Southwest Power, LLC*, 135 FERC ¶ 61,143, at P 96 (2011) (“Our determination here is subject to Desert Southwest’s overall ROE, including the incentive ROE adders granted here, falling within the zone of reasonable returns.”); *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,078, at P 33 (2019) (“We condition our approval on the adder being applied to a base ROE that has been shown to be just and reasonable, and subject to the resulting ROE being within the applicable zone of reasonableness, as may be determined in the hearing and settlement judge procedures ordered below”) (footnotes omitted).

⁴⁹ NOPR at P 76.

⁵⁰ *Emera Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) (“*Emera*”) (citation omitted).

⁵¹ *See id.* (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968)).

⁵² *Emera*, 854 F.3d at 23 (quoting *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002)). *See also id.* at 24 (“while showing that the existing rate is entirely outside the zone of reasonableness may illustrate that the existing rate is unlawful, that is not the *only* way in which FERC can satisfy its burden under section

At the time of passage of EPAct 2005, the current state of FERC’s and the Courts’ interpretation of the Federal Power Act was that ROEs – inclusive of incentives – must be within zone of reasonableness. For example, in a case initiated prior to EPAct 2005,⁵³ the Court found that the Commission had adequately “explained that it had ensured that the ROE would result in reasonable rates by making them ‘subject to a cap on the overall ROE...equal to the top of the range of reasonable ROEs...’”⁵⁴ In upholding the incentive adder, the Court relied on the fact that the Commission had ensured that it did not exceed the zone of reasonableness: “In FERC’s words on rehearing... ‘it is appropriate . . . to adjust the allowed return for [TOs] that undertake commitments designed to enhance the overall competitiveness and efficiency of the wholesale markets, *so long as the resulting rate of return is within the range of reasonable returns.*’ Given the expertise implicated in FERC’s determination, *and the measures it took to explain and cabin the adder*, the court can conclude that the determination meets this minimum standard for reasonableness.”⁵⁵

The Commission’s use of the top of the zone of reasonableness to ensure that ROEs, inclusive of adders, remain just and reasonable was the current (and long-standing) state of the law at the time Congress passed EPAct 2005. In the absence of any evidence to the contrary—and the NOPR points to none—there is no reason to believe that Congress relied on anything

206.”) (emphasis in original) (citing *Pub. Serv. Comm’n of N.Y. v. FERC*, 642 F.2d 1335, 1350 n.27 (D.C. Cir. 1980)).

⁵³ *ISO New England Inc., et al.*, 109 FERC ¶ 61,147 (2004), *pet. for review denied sub nom., Maine PUC v. FERC*, 454 F.3d 278 (D.C. Cir. 2006) (“*Maine PUC*”). While this case was decided by the Court after the passage of EPAct 2005, FERC’s orders on review were issued before EPAct 2005 and before FERC issued Order No. 679.

⁵⁴ *Maine PUC*, 454 F.3d at 288 (citing *Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid*, 102 FERC ¶ 61,032, at 61,062 (2003)).

⁵⁵ *Maine PUC*, 454 F.3d at 289 (quoting *ISO New England, Inc.*, 109 FERC ¶ 61,147, at P 207 (2004) (emphasis supplied) (additional citation omitted)).

other than the current, long-standing state of the law regarding the zone of reasonableness in enacting FPA section 219. There is no basis for inferring, as the NOPR does, that Congress intended something completely different when reading the mandate in FPA section 219(a) that incentive rates remain just and reasonable.

The Commission’s proposal in this respect is also contrary to its stated intent throughout the NOPR of wanting to more closely align with the statutory language of FPA section 219.⁵⁶ Here, the Commission ignores the part of FPA section 219 that directed the Commission to establish incentive-based rate treatments “*for the purpose of benefitting consumers* by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”⁵⁷ The Commission fails to explain how its proposal to discard the use of the zone of reasonableness to ensure that rates inclusive of ROE incentive adders remain just and reasonable and serves “the purpose of benefitting consumers.” FERC’s proposal “to change the current policy of interpreting FPA section 219(d) to require that the ROE, inclusive of any incentives, remain with the zone of reasonableness”⁵⁸ “[d]ue to changing investment conditions”⁵⁹ seems to be results-oriented. It ignores long-standing precedent under which an ROE outside the zone of reasonableness is, by definition, unjust and unreasonable.

⁵⁶ See NOPR, *e.g.*, at P 2 (“we now propose to revise our transmission incentives policy to more closely align it with the statutory language of FPA section 219”); *see also id.* at PP 24, 32, 36.

⁵⁷ 16 U.S.C. § 824s(a) (emphasis supplied).

⁵⁸ NOPR at P 76.

⁵⁹ *Id.*

2. Declaring ROE Incentives That Are Below a 250-Basis-Point Cap Just and Reasonable Is Arbitrary and Capricious.

The Commission proposes that “ROE incentives up to and including this [250-basis-point cap] *will be* just and reasonable as required by section 219(d).”⁶⁰ This declarative change is not reasoned decision-making. There is no basis on which to conclude that this proposal complies with the FPA’s just and reasonable requirement. The Commission misses a fundamental step: a case-by-case analysis of whether the ROE incentive adders are individually or collectively just and reasonable. The Commission held in Order No. 679 that case-by-case analyses are needed, and this holding has been upheld by the Courts.⁶¹ A generic declaration that a 250-basis-point increase to a utility’s ROE is just and reasonable is the very epitome of arbitrary and capricious decision-making.

The NOPR appears to suggest that it would be acceptable for there to be no analysis on a case-by-case basis evaluating whether a 250-basis-point cap on ROE adders is just and reasonable with respect to a particular public utility’s rates. This does not comport with FERC’s obligation under FPA sections 205 and 206 to ensure that rates are just and reasonable. To the extent the NOPR’s characterization of the 250-basis-point cap suggests that the Commission need not undertake any case-by-case analysis so long as the incentive adders remain under a cumulative cap of 250 basis points, this proposal violates the requirement in FPA section 219(d) that “[a]ll rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates,

⁶⁰ *Id.* at P 80 (emphasis supplied).

⁶¹ *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 141 (D.C. Cir. 2019) (“the Commission grants incentive rate authority ‘when justified’ on a ‘case-by-case-basis’ in orders tailored to the demonstrated needs of each project”) (citing Order No. 679 at P 20; Order No. 679-B at P 18).

charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”⁶²

The only practical means available for the Commission to make such a determination is to address the awarding of ROE adders on a case-by-case basis. If the Commission were to automatically find that ROE adders were just and reasonable simply because they added up to less than 250 basis points, the Commission would be shirking its statutory obligation to ensure that rates are just and reasonable. Such a predetermined finding would mean that the Commission is not intending to evaluate incentive adders that are less than 250 basis points. Without such case-by-case review, there is no way for the Commission to discharge its statutory duty to ensure that the overall return remains just and reasonable.

The Commission recognizes, to a degree, its statutory obligation in the NOPR: “Consistent with Congressional directive in FPA section 219(d), all ROE incentives must be just and reasonable.”⁶³ The statute clearly requires that all incentive rates approved under the incentive rules adopted pursuant to FPA section 219, including any revisions to the rules, are “subject to the requirements of sections 824d and 824d of this title that all rates, charges, terms and conditions be just and reasonable...”⁶⁴ The Commission’s proposal to make up out of thin air a new way of determining whether rates are just and reasonable pursuant to FPA sections 205 and 206 that is untethered to the zone of reasonableness is arbitrary and capricious.

⁶² 16 U.S.C. § 824s(d).

⁶³ NOPR at P 37.

⁶⁴ 16 U.S.C. § 824s(d).

3. If the Commission, Nonetheless, Adopts This Proposal, It Must Ensure There Are Adequate Safeguards to Protect Consumers.

Even if the Commission were to adopt this ill-advised and unsupported proposal, it should not permit applicants to remove existing zone-of-reasonableness conditions.⁶⁵ To start with, “FERC has a longstanding policy that rate incentives must be prospective.”⁶⁶ Allowing applicants to remove existing zone-of-reasonableness restrictions would in essence be permitting them to modify previously granted incentives. The Commission recognizes this prospective principle when it stated that with the NOPR “we aim to set clear expectations for how the Commission will analyze *future applications* for incentives treatment.”⁶⁷ Allowing transmission owners to increase the level of previously granted incentives would directly go against this principle. Granting any such requests could well sanction collateral attacks on orders previously limiting the level of the incentive. Additionally, if the Commission were to permit transmission owners to increase the level of previously granted ROE incentive adders without examining whether the resulting ROE is just and reasonable, that would be an abdication of the Commission’s responsibility to ensure that rates are not unjust and unreasonable.

C. The Commission’s Proposed Incentive Adders for RTO Participation Are Unsupported, Ignore Consumer Costs and Should Not Be Adopted.

NESCOE strongly opposes the proposals to modify what the NOPR refers to as the “RTO-Participation Incentive”⁶⁸ so that (i) it is available regardless of whether participation in the RTO/ISO is voluntary; (ii) it would be available in perpetuity; and (iii) it would be,

⁶⁵ See NOPR at P 81.

⁶⁶ *CPUC v. FERC*, 879 F.3d at 977.

⁶⁷ NOPR at P 32 (emphasis supplied).

⁶⁸ An incentive is defined as “[a] thing that motivates or encourages one to do something.” See <https://www.lexico.com/en/definition/incentive>. Providing an “incentive” regardless of whether participation in the RTO/ISO is voluntary is inconsistent with the very definition of incentive. See Section III.C.4, *infra*.

inexplicably, doubled in size. This triple whammy of a proposal is unsupported by anything in the record that demonstrates that the adder is needed to continue to incentivize participation in RTOs, is contrary to precedent and is inconsistent with the provision in EPCRA 2005 that directed the Commission to “provide for incentives to each [transmission owner] that joins a Transmission Organization”⁶⁹ initially to adopt incentives for RTO participation. These proposals do not square with the lack of any demonstration in the record why long-standing RTO membership justifies continued ROE bonus rates.

1. Nothing in the Record, Including Evidence of RTO Benefits, Justifies Continuing the RTO Incentive Adder.

The Commission premises its “reforms” to the RTO-Participation incentive adder on its belief that this incentive “has not only encouraged the formation of and participation in RTOs/ISOs, but also has resulted in significant benefits for consumers.”⁷⁰ The Commission follows this sentence by citing benefits to customers that PJM Interconnection, L.L.C. (“PJM”), Southwest Power Pool, Inc. (“SPP”) and MISO estimate accrue to their customers. The Commission thus ignores the billions of dollars of benefits that transmission owning members of RTOs have received,⁷¹ focusing instead on a concern that transmission owners need to be compensated “for the ongoing duties and responsibilities of RTO/ISO membership.”⁷²

The NOPR cites to comments of the Edison Electric Institute but ignores the comments of consumer-interests discussing the substantial benefits accruing to transmission owners and the substantial costs of RTOs to consumers.⁷³ The Commission ignores comments questioning

⁶⁹ EPCRA 2005 Section 1241; 16 U.S.C. § 824s(c).

⁷⁰ NOPR at P 93.

⁷¹ Joint Commenters Initial Comments at 71-72.

⁷² NOPR at P 93.

⁷³ *See, e.g.*, Joint Commenters Initial Comments at 71-72.

whether even a 50-basis point adder remains supportable in light of the maturation of RTOs and adoption of other Commission reforms promoting transmission investments.⁷⁴ Notwithstanding the plethora of comments filed in response to the NOI on this issue, the NOPR points to no evidence in the record that the RTO adder ever played or currently plays a factor in the formation of and continued participation in RTOs/ISO. Given the dearth of evidence on the role that the RTO adder played in the past, there is nothing that forms a reasonable basis to believe that the RTO adder might play a future role in the formation of and participation in RTOs/ISOs. The Commission certainly provides no reasoning for such a leap of faith.

Unfortunately, the Commission seems to have fallen into the trap that NESCOE warned against, that the Commission should not conflate RTO benefits with the need for perpetual RTO-participation incentive adders.⁷⁵ The NOPR does precisely this without considering the cost impact on consumers. Transmission owners and their trade organizations echoed a common theme in defense of the *status quo* for RTO membership incentives in their NOI comments.⁷⁶ This chorus of support included lengthy attestations of the benefits that RTOs provide to consumers. As NESCOE explained, while an examination of RTO benefits may be part of the Commission's examination into whether it should grant an RTO-participation adder, it cannot be the end of the inquiry.⁷⁷ An applicant must justify the specific bonus rate it seeks, and the

⁷⁴ See NESCOE Initial Comments at 26-27; NESCOE Reply Comments at 7-9; see also TDU Systems Comments at 25-30; Southern New England State Comments at 37-39; Public Systems Comments at 5-6.

⁷⁵ See NESCOE Reply Comments at 7-9.

⁷⁶ See, e.g., Initial Comments of the Edison Electric Institute, Docket No. PL19-3-000 (filed June 26, 2019), at 5, 17-24; WIRES Initial Comments at 6-7; Eversource Initial Comments at 14-17; Comments of National Grid USA, Docket No. PL19-3-000 (filed June 26, 2019), at 39-41; Comments of American Electric Power Company, Inc., Docket No. PL19-3-000 (filed June 26, 2019), at 1; Initial Comments of the MISO Transmission Owners, Docket No. PL19-3-000 (filed June 26, 2019), at 16.

⁷⁷ See NESCOE Reply Comments at 7.

attendant cost to consumers, as truly necessary to influence a utility’s decision to join an RTO. The NOPR fails to address these comments.

In his dissent, Commissioner Glick notes that he believes that “RTOs provide massive benefits, including more efficient coordination and dispatch of generation, enhanced reliability, and more effective integration of renewable resources.”⁷⁸ However, as he points out, “[t]hose efficiencies, not to mention the costs of quitting an RTO, are why transmission owners remain in RTOs, not the section 219(c) incentive.[⁷⁹]... By piling an additional ROE on top of the already compelling RTO value proposition, we are forcing customers to pay extra for benefits that they would get anyway. That is not just and reasonable.”⁸⁰

The Commission’s attempt to hew to the language of FPA section 219(c) misses the mark. Reading the statute literally, section 219(c) does not even contain a requirement for an ROE *adder*—just incentives. And there are a plethora of non-ROE adder incentives that the Commission has made available to transmission owning RTO/ISO members.⁸¹ In addition to the array of risk-reducing incentives available (such as the Abandoned Plant Incentive), transmission

⁷⁸ Glick Dissent at P 21.

⁷⁹ *Id.* (citing Consumer Organizations Reply Comments at 12 (“Utilities join RTOs for the benefits of membership, not to subject themselves to new burdens in exchange for a half point on their returns.”); Joint Commenters Reply Comments at 25 (“Even in situations where a transmission owner’s participation in an RTO/ISO is not legally required, the decision to join or remain in an RTO is not solely a decision of transmission owners – the decision is also influenced by other stakeholders and state regulators based on assessments that benefits are likely to outweigh the costs.”); Public Interest Organizations Comments at 30-31).

⁸⁰ Glick Dissent at P 21 (quoting OPSI Comments at 10 (“[I]f a utility would be reasonably likely to continue its participation in the Transmission Organization even if its previously granted incentive were to be discontinued, the ongoing costs to consumers of maintaining the incentive would arguably exceed the ongoing benefit of doing so.”); and citing N.J. Board of Public Utilities and N.J. Rate Counsel Initial Comments at 22 (suggesting that FERC’s interpretation of the 219(c) is an example of “what drives stakeholders to refer to the RTO adder as ‘FERC Candy’”)).

⁸¹ *See* TDU Systems Comments at 26-27 (explaining that nothing in FPA section 219 requires the use of ROE adders to incentivize RTO participation, and that there are many other types of incentives the Commission can (and does) use to promote membership).

owners are, for example, able to obtain relief from the requirement to purchase energy and capacity from Qualifying Facilities.⁸² Transmission owning members of RTOs also get the benefit of being able to charge market-based rates for power because the geographic region over which their market power is measured is much larger.⁸³ Given that there are a number of other types of incentives that could just as likely encourage RTO participation and would better target the incentive to the intended benefit of participation in a regional market, *i.e.*, expanding access to cheaper or more economically-dispatched sources of supply, the proposal to extend the RTO Participation Incentive adder is unfounded.

2. The Proposal To Retain the RTO Participation Incentive Adder in Perpetuity, Let Alone at Double Its Current Level, Cannot Be Squared with the Commission’s Obligation to Ensure Just and Reasonable Rates.

The NOPR fails to explain why it believes the Commission can ignore its obligation to closely scrutinize requests for RTO participation adders consistent with its duty under the Federal Power Act to ensure that consumers are not charged excessive costs.⁸⁴ This aspect of the NOPR ignores that “[t]he Commission stands as the watchdog providing ‘a complete, permanent and effective bond of protection from excessive rates and charges.’”⁸⁵ Quite the

⁸² *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078 (2006), *order on reh’g*, Order No. 688-A, 119 FERC ¶ 61,305 (2007).

⁸³ *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 235 (2004) (“As a general matter, sellers located in and members of the RTO/ISO may consider the geographic region under the control of the RTO/ISO as the default relevant geographic market for purposes of completing their horizontal analyses, unless the Commission already has found the existence of a submarket.”), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh’g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh’g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

⁸⁴ *See Xcel*, 815 F.3d at 952.

⁸⁵ *Jersey Cent. Power*, 810 F.2d at 1207 (quoting *Atl. Ref. Co. v. Pub. Service Comm’n*, 360 U.S. 378, 388 (1959)).

opposite of standing as a watchdog, with this proposal, the Commission would open the gates wide and look the other way.

As explained by several commenters, the need to reevaluate the reasonableness of the RTO participation adder is especially acute in the case of transmission owners that joined RTOs many years ago. In the time since the Commission implemented its transmission incentives policies, it has issued major orders removing barriers to transmission investments such as Order 1000, Order No. 890,⁸⁶ and Order No. 845.⁸⁷ NESCOE also shares the understanding of other NOI commenters that utilities have rarely exited RTOs in light of the benefits membership accords them,⁸⁸ and NESCOE is unaware of any transmission company exiting or seeking to exit ISO-NE.

The failings of the NOPR's RTO participation adder proposals are well documented by Commissioner Glick's dissenting opinion: "The question before us now is not whether RTOs and ISOs are good or bad—in my view, that question is settled—but whether, in light of those obvious benefits, it is just and reasonable to require customers to pay hundreds of millions of dollars per year in higher rates to get transmission owners to join *and remain* in an RTO. The answer is no."⁸⁹ Commission Glick continued: "the biggest head scratcher in this proposal is the notion that we should double the size of the current section 219(c) incentive, from 50 basis

⁸⁶ *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁸⁷ *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (2018), *order on reh'g*, Order No. 845-A, 166 FERC ¶ 61,137 (2019).

⁸⁸ See TDU Systems Comments at 28.

⁸⁹ Glick Dissent at PP 18-19 (citing TAPS Comments at 97 ("The direct cost of a 50 basis point ROE adder is roughly \$400 million per year, and growing.") (additional citations omitted)).

points to 100.”⁹⁰ Commissioner Glick rightly sees through the NOPR’s flimsy reasoning that “because the duties and benefits that flow from RTO membership have increased,” the RTO participation adder should be doubled. “If anything, the increased benefits would suggest that a further incentive is *not* needed to get transmission owners to join or remain in an RTO.”⁹¹

If the Commission insists on retaining the RTO-participation incentive adder, it should not be a permanent give-away. If the purpose of the RTO-participation incentive adder is indeed to encourage membership in an RTO, then that purpose can be accomplished by providing an incentive to *new* members. However, neither the statute nor logic requires that the RTO-participation incentive be permanent. Section 219 of the Federal Power Act required the Commission to establish by rule incentive-based rate treatments,⁹² and specified what the rule needed to accomplish.⁹³ With respect to the RTO-participation incentive, FPA section 219 provides that “[i]n the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that *joins* a Transmission Organization.”⁹⁴ In Order No. 679, the Commission’s rule implementing FPA section 219, the Commission interpreted this language as applying to “public utilities that join and/or continue to be a member of an ISO, RTO, or other Commission-approved Transmission Organization.”⁹⁵

⁹⁰ Glick Dissent at P 24.

⁹¹ *Id.* (emphasis supplied).

⁹² 16 U.S.C. § 824s (a).

⁹³ 16 U.S.C. § 824s (b).

⁹⁴ 16 U.S.C. § 824s(c) (emphasis supplied).

⁹⁵ Order No. 679 at P 326.

There is an obvious distinction between the level of incentive needed to encourage a public utility to join a transmission organization versus that necessary to remain in one. As a general matter, utilities that join transmission organizations are unlikely to leave because of the significant cost savings in the form of congestion cost relief or less expensive power due to access to economic dispatch of supply gained in joining an RTO,⁹⁶ and do not need an ROE adder to remain. Indeed, the RTOs may have exit fees for transmission-owning utilities that seek to depart.⁹⁷ The Commission fails to address the comments of a number of entities that urged the Commission to phase down the level of the adder as years pass.⁹⁸ “A time-limited adder is consistent with Section 219(c)’s mandate to provide an incentive *for joining* an RTO; it does not require an incentive *for remaining* in an RTO. If Congress had intended the incentive be permanent, it would have so required.”⁹⁹

As former Commissioner Kelliher explained:

The purported purpose behind the 50 basis point adder is to provide an incentive for transmission owners to join an RTO. However, under the proposal, the 50 basis point adder would be given not only to new PJM members, but also to transmission owners who were already members of PJM when this policy was announced. I fail to see how granting a 50 basis point adder to existing members of PJM, some of whom joined over fifty years ago, accomplishes the goal of creating an incentive for new members to join. Self-evidently, a 50 basis point adder is not necessary to entice existing members of PJM to join, since they

⁹⁶ Cases of utilities leaving RTOs altogether are rare. See TDU Systems Comments at 28, n.68.

⁹⁷ *Louisville Gas and Electric Co., et al.*, 114 FERC ¶ 61,282, at PP 57-60 (2006) (addressing exit fee).

⁹⁸ See, e.g., TDU Systems Comments at 28 (suggesting that the 50-point adder could gradually be phased out over a five-year period. The phase-down would be based on the total number of years that the utility is a member of any transmission organization, such that a utility that exits one transmission organization and joins another would only be eligible for the level of incentive it would have received by remaining in the former. This would eliminate the Commission’s concern (in Order No. 679 at P 331) about “perverse incentives” to switch organizations).

⁹⁹ Comments of Transmission Access Policy Study Group, Docket No. PL19-3-000 (filed Jun. 26, 2019), at 99 (emphasis in original).

already are members. Nor do I see any nexus between providing an incentive to longstanding members of PJM and the goal of providing an incentive for non-members to join an RTO. Instead, this strikes me as merely providing a windfall to existing members of PJM, many of whom decided long ago to sign up as members.¹⁰⁰

The Commission ignores altogether the comments of states and customer groups urging FERC to eliminate or phase it down.¹⁰¹ The Commission's failure to address these comments would not withstand scrutiny at the courts and NESCOE respectfully requests the Commission to reconsider its proposals and to take into account the consumer perspective as well. To accomplish this, a final rule in this proceeding should include a requirement that utilities with longstanding relationships as transmission-owning members of an RTO/ISO demonstrate why a continued RTO participation adder is warranted.

3. Setting a Fixed 100-Basis-Point RTO Participation Incentive Adder Would Impair the Commission's Ability To Ensure That Rates Are, on a Case-by-Case Basis, Just and Reasonable.

FPA section 219(c) requires the Commission to "provide for incentives to each transmitting utility or electric utility that joins an" RTO/ISO. In Order No. 679-A, the Commission found that "an inducement for utilities to join, and remain in" ISOs/RTOs promoted section 219's objectives of providing consumer benefits "by ensuring reliability and reducing the cost of delivered power."¹⁰² The Commission stated that "the best way to ensure those benefits

¹⁰⁰ *Allegheny Power System Operating Companies, et al.*, 111 FERC ¶ 61,308 (2005) (Kelliher, Commissioner, dissenting in part).

¹⁰¹ *See, e.g.*, Joint Commenters Initial Comments at 72-73 ("No justification exists to continue any adder in perpetuity after a public utility has joined an RTO/ISO. The continued availability of an RTO adder long after a public utility has joined an RTO/ISO results in an unjustified windfall to the public utility at the expense of transmission customers. As discussed below, the Commission should consider reducing the size of the ROE incentive for RTO membership after a specified number of years from a public utility's membership start date and eliminating the incentive altogether after a public utility has remained a member for a certain number of years."). *See also* NESCOE Initial Comments at 26-27; Southern New England States Comments at 37-39.

¹⁰² Order No. 679-A at P 86.

are spread to as many consumers as possible is to provide an incentive that is widely available to member utilities of [ISOs/RTOs] and is effective for the entire duration of a utility's membership in the" RTO/ISO.¹⁰³ The NOI noted that the Commission did not "make a finding on the appropriate size or duration of the" RTO adder incentive.¹⁰⁴ The Commission also declined in Order No. 679 to include a "generic adder" for membership in an RTO/ISO.¹⁰⁵

While the Commission has found that it would only award an RTO participation incentive adder "when justified,"¹⁰⁶ in practice, the Commission "typically has awarded a 50 basis-point ROE adder to utilities that either join or are already members of an RTO or ISO."¹⁰⁷ In New England, the Commission approved in 2004 a 50-basis-point adder for RTO membership and this adder is included as part of the stated ROE rate.¹⁰⁸ Given that there is no demonstration that more than 15 years after this Commission order, even a 50 basis-point adder is a necessary and appropriate inducement to join or continue participating in ISO-NE or that inclusion of this adder remains just and reasonable, there is certainly no basis for increasing the RTO adder to 100 basis points.

With its proposal to double an incentive adder that has itself not been justified, the Commission ignores its obligation to ensure that rates are just and reasonable and not excessive. "If the Commission contemplates increasing rates for the purpose of encouraging exploration and

¹⁰³ *Id.*

¹⁰⁴ NOI at P 38 (citing Order No. 679 at P 331).

¹⁰⁵ Order No. 679 at P 326.

¹⁰⁶ Order No. 679-A at P 79.

¹⁰⁷ *Promoting Transmission Investment Through Pricing Reform*, Notice of Inquiry, 135 FERC ¶ 61,146 at P 34 (2011).

¹⁰⁸ *Bangor Hydro-Elec. Co., et al.*, 106 FERC ¶ 61,280, at P 245 (2004). See ISO-OATT, Attachment F Implementation Rule, Section II.A.2.(a)(iii).

development... it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose.”¹⁰⁹ NESCOE respectfully requests that the Commission withdraw this proposal and instead reaffirm the burden it placed on utilities in Order No. 679 to demonstrate, on a case-by-case basis, that the level of RTO participation adder is appropriate.¹¹⁰

4. There is No Basis for the Proposal To Remove Voluntary Participation in an RTO/ISO as an Eligibility Requirement for the RTO Participation Incentive Adder.

The Commission’s statement in the NOPR that “FPA section 219(c) contains no requirement that participation in an RTO/ISO must be voluntary to merit the incentive”¹¹¹ has no basis in the statute. This seems to be an attempt to sidestep recent court cases rejecting Commission decisions for allowing incentives in situations where the transmission owners were obligated to join the RTO. As Commission Glick states, “[u]nfortunately, the NOPR takes a very different path, doubling down on the flaws in the current section 219(c) incentive” by, among other things, proposing “to eliminate the requirement that RTO membership be voluntary for a transmission owner to be eligible for the section 219(c) incentive.”¹¹²

The proposal is contrary to the Commission’s own precedent¹¹³ and represents an unexplained departure from its general practice since Order No. 679. By proposing to remove

¹⁰⁹ *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955); *see also City of Charlottesville v. FERC*, 661 F.2d 945, 950, 953-54 (D.C. Cir. 1981).

¹¹⁰ Similarly, in response to the Commission’s request for comment on what process it should adopt to implement a 100-basis point RTO participation incentive adder for existing rates (NOPR at P 99), NESCOE suggests that this should be addressed on a case-by-case basis with each individual transmission owner bearing the burden to demonstrate that it should be awarded the additional 50 basis points.

¹¹¹ NOPR at P 95.

¹¹² Glick Dissent at P 23.

¹¹³ *See, e.g., American Transmission Co. LLC, et al.*, 105 FERC ¶ 61,388, at P 31 (2003) (“incentive rates for independent operation of facilities and investment in new transmission are just and reasonable only as long as the transmission owner remains a member of an approved RTO. Should ATC leave the Midwest ISO, the justification for the incentive rates would no longer apply and at that time, ATC must revert back to rates that do not contain such incentives.”).

the voluntary component, the Commission is in essence proposing to create an automatic generic RTO participation adder. In so doing, the Commission would be retreating from its stated commitment in Order No. 679 in which the Commission expressly declined to adopt a generic adder for transmission organization participation and instead explained that it would “consider specific incentives on a case-by-case basis.”¹¹⁴

Additionally, the Commission’s proposal appears to be attempting to circumvent the Courts’ rulings. As the U.S. Court of Appeals for the Ninth Circuit recently found, “[t]o satisfy Order 679’s case-by-case analysis requirement and to avoid creating a generic adder, FERC needed to inquire into PG&E’s specific circumstances.”¹¹⁵ Because the Commission has not conducted any such analysis, the NOPR would “create[] a generic adder in violation of”¹¹⁶ Order No. 679.

NESCOE respectfully requests the Commission to reform its approach so that it implements the RTO-participation incentive adder as the Commission indicated it would in Order No. 679—on a case-by-case basis, addressing the individual circumstances of each particular utility. And if a transmission owner is required by law or, for example, as a condition of a merger, to join an RTO, it should not reap the benefit of this adder. Finally, NESCOE suggests that the Commission expressly condition the grant of any RTO-participation incentive adders upon continued voluntary participation in the RTO.¹¹⁷

¹¹⁴ Order No. 679 at P 326.

¹¹⁵ *CPUC*, 878 F.3d at 979.

¹¹⁶ *Id.* at 973.

¹¹⁷ *See* TDU Systems Comments at 28-29 (arguing, among other things, that if a transmission owning entity withdraws from an RTO for which it obtained an ROE adder for joining, the Commission should issue an order eliminating such ROE adders).

D. Shift from Risks and Challenges to Benefits.

1. The Commission Should Not Eliminate the “Nexus Test.”

While NESCOE is not necessarily opposed to shifting from a “risks and challenges” approach, doing so does not mean the Commission should obliterate the “nexus test” altogether.¹¹⁸ The “nexus test” “required that applicants demonstrate a connection between the total package of incentives sought and the proposed investment, in light of the risks and challenges facing a transmission project seeking incentives under FPA section 219.”¹¹⁹ Eliminating the nexus test altogether would eliminate any requirement for an applicant to demonstrate any connection whatsoever between the total package of incentives sought and the proposed investment.

As explained by Joint Commenters:

The Commission’s 2012 Policy Statement appropriately reframed the nexus test to focus more directly on the requirements of Order No. 679, setting the expectation that applicants will take all reasonable steps to mitigate the risks of a project, including requesting risk-reducing incentives and considering project alternatives, before seeking an incentive ROE based on a project’s risks and challenges.

Prior to the issuance of the 2012 Policy Statement, the Commission routinely awarded ROE incentive adders that, Joint Commenters submit, were not justified by any need to promote investment in the relevant transmission projects. The Commission’s post-2012 approach has resulted in fewer individual transmission projects being granted incentive ROE adders, while still allowing the Commission to address project risks and challenges through risk-reducing incentives where they are shown to be warranted.^[120]

¹¹⁸ See NOPR at PP 34-35.

¹¹⁹ *Id.* at P 35. See also *San Diego Gas*, 913 F.3d at 135 (discussing the Commission’s “nexus test, which requires the applicant ‘to demonstrate that the incentives are rationally related with the investments being proposed.’”) (quoting *PJM Interconnection, LLC*, 142 FERC ¶ 61,156, at P 16 (2013)).

¹²⁰ Joint Commenters Initial Comments at 9.

The Commission has not explained why it is now no longer “necessary to analyze the need for each individual incentive, and the total package of incentives...”¹²¹ The Commission cannot ensure that the resulting rate is just and reasonable if it eliminates this inquiry. “If the Commission contemplates increasing rates for the purpose of encouraging exploration and development...it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose.”¹²²

The Commission fails to explain why it proposes to abandon its policy: “risk-reducing incentives may mitigate risk not accounted for in the base ROE and we therefore expect incentives applicants to first examine the use of risk-reducing incentives before seeking an incentive ROE based on a project’s risks and challenges.”¹²³ Such failure to adequately explain its departure from precedent, if repeated in a final rule, would constitute arbitrary and capricious decision-making. “It is textbook administrative law that an agency must ‘provide a reasoned explanation for departing from precedent or treating similar situations differently.’”¹²⁴ If the Commission adopts a new policy that “rests upon factual findings that contradict those which underlay its prior policy,” it must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.”¹²⁵ The NOPR fails this test.

¹²¹ 2012 Policy Statement at P 10.

¹²² *City of Detroit*, 230 F.2d at 817.

¹²³ 2012 Policy Statement at P 11 (and *see id.* at P 16). *See also id.* at P 18 (“...incentive ROEs likely put more upward pressure on transmission rates than risk-reducing incentives. Therefore, incentive applicants should first examine risk-reducing incentives.”).

¹²⁴ *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)).

¹²⁵ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

E. ROE Incentives for Economic and Reliability Benefits

1. ROE Incentive for Economic Benefits

- a. Use of a 75th Percentile Threshold Standardized Across RTOs/ISOs Is Arbitrary, May Be Ill-Suited For Some Regions, and Does Not Ensure That Rates Will Be Just and Reasonable.

The Commission’s proposal to offer public utilities a 50-basis point ROE incentive for transmission projects that provide sufficient economic benefits, *i.e.*, projects that meet an *ex-ante* economic benefit-to-cost ratio in 75th percentile of transmission projects examined over a sample period¹²⁶ is arbitrary and unsupported. As Commissioner Glick points out in his dissent, using a top percentile approach simply grants extra money to those projects that would get built anyway.¹²⁷ Additionally, use of an RTO benefit-to-cost ratio may not be an appropriate means to determine which projects merit economic benefit incentives.¹²⁸

As NESCOE explained in its NOI comments, a focus on expected project benefits, rather than special risks and challenges, also does not appear to accord with the FPA section 219 requirement that the Commission establish infrastructure incentives within the confines of a just and reasonable rate.¹²⁹ The possibility that a project can benefit consumers does not establish the need for consumers to fund incentivized investments through regulatory recovery beyond what is provided through the base ROE and cost-of-service ratemaking. The proposal to rely on economic benefits departs from the Commission’s prior finding “that the most compelling case for incentives are new projects that present special risks or challenges, not routine investments made in the ordinary course of expanding the system to provide safe and reliable transmission

¹²⁶ NOPR at PP 4, 57-58.

¹²⁷ Glick Dissent at P 8.

¹²⁸ *Id.* at PP 8-9.

¹²⁹ *See* NESCOE Initial Comments at 12.

service.”¹³⁰ Compensating projects based on the economic benefits of the project would accomplish nothing more than a wealth transfer from ratepayers to developers.

The Commission’s proposal that a transmission project be “classified as ‘economic’ if it reduces the total system cost by an amount that justifies its cost, usually by establishing net positive benefits, and sometimes surpassing a defined benefit-to-cost threshold”¹³¹ is perplexing. Each RTO has its own set of modeling and thresholds for what allows a transmission project to move forward in the regional planning process, and the Commission should not set an alternative standard through its incentives policies.

The Commission’s choice of the 75th percentile is also arbitrary. Just because a project is in the 75th percentile does not mean it should automatically be entitled to a 50-basis point ROE adder. A project could be in the 90th percentile and still provide only a low benefit-to-cost ratio. It would not be just and reasonable to allow an adder in such a case.

While NESCOE has concerns about this proposal in the first instance, if the Commission insists on adopting such an incentive, it is unclear that the incentive should be based on standardized data from PJM, MISO and CAISO.¹³² If there must be an economic incentive that is handed out based on a benefit-to-cost ratio, the method forming the basis for any percentile approach warrants further scrutiny. And importantly, such threshold calculations must include the costs of the ROE incentives.¹³³ Ignoring the costs of the incentives would ignore an important component of the overall costs.

¹³⁰ Order No. 679-A at P 23. *Accord United Illuminating Co.*, 167 FERC ¶ 61,126, at P 62 (2019) (“*United Illuminating*”).

¹³¹ NOPR at P 48.

¹³² *Id.* at P 57.

¹³³ *See id.*

b. The Proposal To Give Incentives on an *Ex Ante* Basis, With Potentially Extra Incentives on an *Ex Post* Basis, Ignores Consumer Costs and May Lead to Unjust and Unreasonable Rates.

Another problematic aspect of this proposal is that the Commission proposes to dole out these incentive adders on an *ex ante* basis,¹³⁴ ignoring entirely that projects may have cost overruns and the ratio may change. The Commission's proposal could encourage lowballing cost estimates.

There should be a mechanism in place to reduce or remove the adder if the costs end up being higher or the benefits do not materialize. If a project is selected as the most cost-effective solution based on a low-cost estimate, but the cost of that project later increases significantly, a legitimate question arises as to whether that project was, in fact, a cost-effective solution and whether it should continue to receive ROE adders. Substantial cost overruns are likely to significantly erode any cost benefits for transmission customers that were projected when the project was selected in the regional transmission planning process. If the Commission does proceed with this aspect of the NOPR, it should require transmission owners receiving this ROE-adder incentive to submit periodic reports on the actual costs so that the premise on which the economic incentive is awarded may be reassessed.

The Commission's proposal to provide this economic incentive adder on an *ex ante* basis without any possibility of revoking it should the cost estimates be substantially lower than the actual costs is troubling in light of the Commission's proposal to offer *an additional* 50 basis-point incentive for economic benefits as measured on an *ex-post* basis to those projects in the top 90th percentile.¹³⁵ As a starting point, if the Commission proceeds with this proposal, it should

¹³⁴ *Id.* at P 50.

¹³⁵ *Id.* at P 59.

adopt a symmetrical provision requiring projects that fall out of the top 75th percentile to return the 50 basis point adder. And to be truly symmetrical, the Commission should impose a 50 basis-point penalty for those in the bottom 10th percentile. Absent such protections, the result would be the piling on of additional adders to projects that will more than likely be constructed in any event.

The Commission's proposal to ignore *ex-post* benefits and focus only on *ex-post* costs¹³⁶ undermines its own proposal to use a benefit-to-cost threshold on an *ex ante* basis. Benefits are half of the equation. If the purported benefits do not materialize, even if the costs are kept under control, there is no basis to award a 50-basis point adder on top of a 50-basis point adder. Furthermore, the Commission should not adopt the NOPR's proposal to exclude costs resulting from factors beyond a developer's control from the *ex-post* analysis for an *ex-post* economic benefits ROE.¹³⁷ The Commission seems to imply that good intent should be rewarded. The issue is not whether cost overruns result from good or bad intent. If the benefit-to-cost threshold is not met because of cost overruns due to circumstances outside of the applicant's control, transmission customers still end up paying excessive costs. The just and reasonable standard of the FPA is not intent-based. Under the Commission's proposal, transmission customers would end up paying excessive rates: first, they would have already paid more than what the transmission project cost because of the *ex-ante* economic incentive adder; next, they would have to pay extra because the cost estimates were too low or there were project cost overruns. They

¹³⁶ NOPR at P 59 (“the burden of determining and measuring such benefits, and the potentially significant amount of potential changes in transmission project benefits for reasons outside of the control of developers, makes such *ex-post* review inappropriate. By contrast, application of actual cost information is relatively uncontroversial and straight-forward”).

¹³⁷ NOPR at P 60 (“However, regardless of cost overruns, an applicant would remain eligible for the *ex-ante* economic benefit ROE incentive”).

should not be forced to pay yet even more because cost overruns that were out of the transmission developer's control (and also out of the customers' control) were deducted from the costs making the project eligible for an ex-post incentive.

2. Incentive for Reliability Benefits

- a. The Commission Should Ensure That Incentives Are Not Awarded for Reliability Projects That Are Routine or Otherwise Mandatory.

The Commission has not attempted to reconcile its current proposal – allowing for ROE incentives for projects that “produce significant and demonstrable reliability benefits above and beyond the requirements of the NERC reliability standards”¹³⁸ – with its prior statement that “reliability-driven projects may be considered for an incentive ROE based on a project's risks and challenges, but only if they present specific risks and challenges not otherwise mitigated by available risk-reducing incentives.”¹³⁹

The Commission has previously recognized a distinction between reliability projects developed to comply with North American Electric Reliability Corporation (“NERC”) standards and those presenting special risks and challenges: “[R]outine investments made to comply with existing reliability standards may not always qualify for an incentive-based ROE. These are the types of investments that have, as a general matter, been adequately addressed through traditional ratemaking because there is an obligation to construct them and high assurance of

¹³⁸ *Id.* at P 64.

¹³⁹ 2012 Policy Statement at P 22.

recovery of the related costs.”¹⁴⁰ In addition, as the Commission has stated, most risks and challenges can and should be addressed in the first instance through risk reducing incentives.¹⁴¹

A framework focusing on how a project’s special risks and challenges distinguish that project from “routine investments made in the ordinary course of expanding the system” provides a greater assurance that consumers are not paying more for transmission than is needed to make those investments. This framework appropriately places emphasis on an inquiry into why consumers should bear additional costs for a project and the need for developers to justify those costs.

The ISO-NE planning process illustrates the need for continued focus on special risks and challenges. Under this process, ISO-NE conducts transmission system planning in accordance with NERC standards and potentially more stringent Northeast Power Coordinating Council and ISO-NE reliability standards and criteria.¹⁴² ISO-NE identifies violations of standards and criteria for system reliability and evaluates solutions to those system needs, with selected reliability projects placed in its regional system plan. These projects do not necessarily present special risks or challenges. For example, asset condition upgrades are an emerging category of transmission investment in New England.¹⁴³ These projects replace or refurbish existing facilities due to damage or deterioration. In assessing the need for an asset condition project, transmission owners will inspect structures for a range of issues including woodpecker and insect

¹⁴⁰ Order No. 679 at P 94. *See also* Order No. 679-A at P 23 (“The Commission reaffirms that the most compelling case for incentives are new projects that present special risks or challenges, not routine investments made in the ordinary course of expanding the system to provide safe and reliable transmission service.”); *id.* at P 60 (same).

¹⁴¹ 2012 Policy Statement at P 11.

¹⁴² *See, e.g.*, ISO-NE, Transmission Planning Process Guide (Sept. 20, 2018), available at https://www.iso-ne.com/static-assets/documents/2018/05/transmission_planning_process_guide_1_30_2018.pdf.

¹⁴³ *See* ISO-NE, New England Asset Management Key Study Area, available at <https://www.iso-ne.com/system-planning/key-study-areas/new-england-asset-management/>.

damage, pole top rot, and common hardware failures.¹⁴⁴ Special incentives should not be necessary to spur the replacement of current assets that continue to be needed to serve consumers in the normal course of business. Providing incentives for reliability projects that are required—and that qualify for the base ROE and cost-of-service rate recovery—risks imposing excessive costs on consumers.

Finally, even if the Commission proceeds with its proposal for the reliability incentive, it must not ignore the impact on consumer costs. NESCOE agrees with the NOPR that it is difficult to quantify reliability benefits.¹⁴⁵ While the NOPR gives examples of several different types of reliability benefits,¹⁴⁶ it ignores the other half of the equation discussed with respect to the economic incentive—cost. In evaluating whether a reliability incentive is appropriate, the Commission should meaningfully consider the costs involved in providing the claimed “enhanced” reliability benefits. Where incremental reliability benefits are low but the costs to achieve such benefits are high, adding an ROE incentive adder on top of the already high costs would not be justified.

F. Non ROE Incentives

1. The NOPR Fails To Justify Changing Its Longstanding Practice of Making the Effective Date for the Abandoned Plant Incentive the Date of a Commission Order Approving the Transmission Owner’s Section 205 Filing.

The Commission should not adopt its proposal to “change the start of the effective date for the Abandoned Plant Incentive from the date that the Commission issues an order granting

¹⁴⁴ See, e.g., Eversource Energy, Eversource 345-kV Structure Replacement Projects, ISO-NE Planning Advisory Committee (Dec. 2017), at Slides 10-14, available at https://www.iso-ne.com/static-assets/documents/2017/12/a9_eversource_345kv_structure_replacement_projects.pdf.

¹⁴⁵ NOPR at P 65.

¹⁴⁶ *Id.* at PP 68-73.

100 percent recovery of abandoned plant costs to the date that transmission projects are selected in regional transmission planning process for purposes of cost allocation.”¹⁴⁷ The NOPR fails to justify departing from its long-standing practice of setting the effective date of the Abandoned Plant Incentive as the date of a FERC order accepting a section 205 filing requesting the incentive—a practice that was affirmed by the D.C. Circuit just last year.

Prior to Order No. 679, the Commission permitted utilities to seek recovery of abandoned plant costs on a 50-50 sharing basis between the transmission owner and its customers.¹⁴⁸ In Order No. 679, the Commission adopted an incentive under which transmission owning utilities could seek up to 100 percent recovery of abandoned plant costs (incurred prudently and outside of their control).¹⁴⁹ In a number of orders over recent years, the Commission has “limited recovery of the incentive to prospective costs.”¹⁵⁰ The D.C. Circuit explained: “[t]he Commission takes the position that the Abandonment Incentive supports recovery of 100 percent of costs prudently incurred only *insofar as those costs were incurred after the effective date of the order approving the utility's application.*”¹⁵¹ The Court went on to find that the FERC order

¹⁴⁷ *Id.* at P 84.

¹⁴⁸ Order No. 679 at n. 105 (“the Commission’s policy with respect to recovery of cancelled plant costs provided that 50 percent of the prudently incurred costs of a cancelled generating plant should be amortized as an expense over a period reflecting the life of the plant if it had been completed and that the remaining 50 percent of the prudently incurred costs of the cancelled plant should be written off as a loss. Under this policy, ratepayers are entitled to the income tax deduction associated with that portion of the loss for which they are paying. In addition, they are entitled to a rate base reduction to reflect the accumulated deferred income tax amounts associated with 50 percent of the abandonment loss.”) (citing *New England Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016 at 61,068, 61,081-83, *order on reh’g*, 43 FERC ¶ 61,285 (1988); *Public Service Company of New Mexico*, 75 FERC ¶ 61,266 at 61,859 (1996)).

¹⁴⁹ Order No. 679 at P 163.

¹⁵⁰ *San Diego Gas*, 913 F.3d at 134 (citing *Pac. Gas & Elec. Co.*, 163 FERC ¶ 61,187 at P 14 (2018); *Citizens Energy Corp.*, 162 FERC ¶ 61,161 at P 26 (2018); *S. Cal. Edison Co.*, 161 FERC ¶ 61,107 at P 44 (2017); *Republic Transmission, LLC*, 161 FERC ¶ 61,036 at P 29 (2017); *DCR Transmission, LLC*, 153 FERC ¶ 61,295 at P 42 (2015)).

¹⁵¹ *San Diego Gas*, 913 F.3d at 133 (citing *PJM Interconnection, LLC*, 142 FERC ¶ 61,156 (2013)) (emphasis supplied).

under review “aligns with its ‘longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced.’”¹⁵²

The NOPR does not explain its retreat from this longstanding policy.

It is also unclear that the NOPR’s proposal is consistent with the rule against retroactive ratemaking. As the Commission is well aware, rates charged by utilities regulated under the FPA may not exceed those on file with the Commission.¹⁵³ When a public utility wishes to alter the rates it charges, it must provide 60-days’ notice to the Commission and file new rate schedules “stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.”¹⁵⁴ The Commission may waive the 60-day notice requirement for good cause, but the Commission has no authority under the FPA to allow a retroactive change in the rates charged to consumers.¹⁵⁵ Pursuant to the filed rate doctrine, “‘a regulated seller of [power]’ is prohibited ‘from collecting a rate other than the one filed with the Commission,’ and ‘the Commission itself’ cannot retroactively ‘impos[e] a rate increase for [power] already sold.’”¹⁵⁶ Similarly, the rule against retroactive ratemaking

¹⁵² *San Diego Gas*, 913 F.3d at 138 (citing *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 977 (9th Cir. 2018) (additional citations omitted). The Court went on to state: “Indeed, the Commission made clear in a policy statement nearly three decades ago that ‘[i]ncentive rate plans must be prospective.’” *Id.* (citing *Incentive Rate Making for Interstate Natural Gas Pipelines, Oil Pipelines, and Elec. Utils.*, 61 FERC ¶ 61,168, at 61,599.

¹⁵³ *Towns of Concord, Norwood, and Wellesley Mass. v. FERC*, 955 F.2d 67, 68 (D.C. Cir. 1992).

¹⁵⁴ 16 U.S.C. § 824d(d).

¹⁵⁵ *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-796 (D.C. Cir. 1990); see also *Consolidated Edison Co. v. FERC*, 958 F.2d 429, 434 (D.C. Cir. 1992); *AEP Appalachian Transmission Co., Inc., et al.*, 164 FERC ¶ 61,180, at P 18 (2018) (“granting the effective date requested by AEP Transmission would result in a retroactive revision to its formula rates that would result in the retroactive recovery of costs related to a past service.”) (citation omitted).

¹⁵⁶ *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223, 1227 (2018) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

“prohibits the Commission from adjusting current rates to make up for a utility’s over- or undercollection in prior periods.”¹⁵⁷

There is no good cause for the Commission to waive, ahead of time on a generic across-the-board basis, the requirement that the effective date of a rate, including an Abandoned Plant Incentive rate, go into effect 60 days from the date of the FPA section 205 filing made by that utility. The Commission recently reiterated that “[u]nder FPA section 205, rate changes may be prospective only, and, under the rule against retroactive ratemaking, the Commission is prohibited ‘from imposing a rate increase for [power] already sold’ or ‘adjusting current rates to make up for a utility’s over- or undercollection in prior periods.’”¹⁵⁸

The NOPR does not provide any legal justification for subjecting customers to costs of abandoned plant incurred potentially even before the transmission owner has even made a FPA section 205 filing seeking to recover such costs. The Commission’s justification is policy-based: “Starting the eligibility period for the Abandoned Plant Incentive at the date of approval by the Commission leads to the exclusion of costs incurred between approval of the transmission project by the regional transmission planning process and Commission approval of the incentive, and this delay is not warranted for purposes of cost control, because the transmission planner has made the decision to undertake the transmission project.”¹⁵⁹ The Commission cites to comments

¹⁵⁷ *Towns of Concord, et al.*, 955 F.2d at 71, n. 2. That otherwise categorical prohibition against retroactively charging rates that differ from those that were on file during the relevant time period yields in only two limited circumstances: (i) when a court invalidates the set rate as unlawful, and (ii) when the filed rate takes the form not of a number but of a formula that varies as the incorporated factors change over time. See *West Deptford Energy*, 766 F.3d at 22-23. Neither of those exceptions would apply here.

¹⁵⁸ *ISO New England Inc.*, 171 FERC ¶ 61,160, at P 27 (2020), *reh’g pending* (quoting *Towns of Concord, et al.*, 955 F.2d at 75, and *id.* at 71 n.2).

¹⁵⁹ NOPR at P 84.

of several public utilities in support of this statement.¹⁶⁰ Yet the Commission conspicuously fails to address consumer-side comments on the issue of the Abandoned Plant Incentive.¹⁶¹

The Commission’s proposal also raises concerns about symmetry. If a customer were to challenge an Abandoned Plant Incentive pursuant to FPA section 206, its challenge would be effective only as of the date of the filing of the complaint. Thus the proposal ignores the Regulatory Fairness Act,¹⁶² which “was ‘intended to add symmetry’ between the Commission’s treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases.”¹⁶³ The NOPR’s proposal would be even more troubling if the Commission intends for it to apply to all currently pending Abandoned Plant Incentives, rather than those that are pending as of the date of a Final Rule.

G. The Proposal To Eliminate the Transco Incentive Is Well Supported.

NESCOE supports the Commission’s proposal to eliminate the Transco ROE Incentive and the Transco ADIT Adjustment.¹⁶⁴ NESCOE does not believe that the evidence demonstrates that the Transco model provides sufficient benefits to customers to warrant special incentives.

¹⁶⁰ *Id.* (citing American Electric Power Company, Inc., Docket No. PL19-3-000, Comments, at 18 (filed June 26, 2019); Pacific Gas & Electric Company and San Diego Gas & Electric Company, Comments, Docket No. PL19-3-000, at 11-13 (filed June 26, 2019)).

¹⁶¹ *See* Joint Reply Comments of Consumer Organizations, Docket No. PL19-3-000, at 15 (filed Aug. 26, 2019) (“Many commenters believe it is unfair to tie the date of Commission approval of the incentive to recovery of 100% of the costs, with expenditures made before the approval date recoverable at only 50%. They claim it produces uncertainty, affects decisions, and delays projects until 100% recovery is granted. This begs an examination of how uncertainty is reduced when the utility is spending other people’s money (OPM), instead of its own, to compare spending levels before and after 100% abandonment recovery is granted.... We suggest that the abandonment incentive be amended to require the submission of an individual project-spending schedule at application, to be reviewed for prudence and approved by the Commission. Such a schedule can later be used during a prudence review of project spending in the event of abandonment.”).

¹⁶² Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988).

¹⁶³ *Golden Spread Elec. Coop. Inc. v. Southwestern Public Serv. Co.*, 151 FERC ¶ 61,126, at P 21 (2015) (citing *Consumer Advocate Div. of the Pub. Serv. Comm’n of W.V. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 at 62,000 (1994) (additional internal citation omitted), *order on reh’g*, 68 FERC ¶ 61,207 (1994)).

¹⁶⁴ *See* NOPR at P 91.

Indeed, as pointed out by some commenters, Transcos face *less* risk than vertically integrated utilities, thus making the award of higher ROE incentives dubious.¹⁶⁵ In connection with this proposal, NESCOE commends the Commission for taking into consideration concerns regarding costs and acknowledging comments raising concerns regarding elevated rates among Transcos.

In response to the Commission’s query regarding how it should treat Transco ROE Incentives that were previously granted,¹⁶⁶ NESCOE suggests that to the extent FERC decides to modify existing policies on ROE caps, for example, that it similarly require the elimination of previously granted Transco ROE Incentives.

H. Incentives for Transmission Technologies Should Be Evaluated on a Case-by-Case Basis.

The Commission proposes to offer incentives for transmission technologies that “enhance reliability, efficiency, and capacity, and improve the operation of new or existing transmission facilities.”¹⁶⁷ Both (1) stand-alone 100 basis point ROE incentive on costs of specified transmission technology project; and (2) specialized regulatory asset treatment.”¹⁶⁸

As NESCOE explained in its NOI comments, as a general matter, a prudent utility would seek to adopt new technologies as appropriate. The Commission has recognized that only technology that is truly novel or innovative should be eligible for incentives related to the deployment of advanced technology.¹⁶⁹

¹⁶⁵ See, e.g., Comments of the National Rural Electric Cooperative Association, Docket No. PL19-3-000 (filed June 26, 2019), at 34-35.

¹⁶⁶ NOPR at P 91.

¹⁶⁷ *Id.* at P 101.

¹⁶⁸ *Id.* at PP 9, 101.

¹⁶⁹ See *United Illuminating* at P 63 (citing *NSTAR Elec. Co.*, 125 FERC ¶ 61,313, at P 77 (2008), *order on reh’g*, 127 FERC ¶ 61,052 (2009)).

NESCOE has concerns about the Deployment Incentive¹⁷⁰ which would provide two-year regulatory asset treatment, on top of the 100-basis-point ROE Transmission Technology Incentive.¹⁷¹ The Commission should proceed cautiously before implementing such a radical change on a generic basis; this type of incentive seems more appropriate to be sought on a case-by-case basis. Under the Commission's traditional cost-of-service ratemaking, O&M costs are, of course, generally not capitalized. Increasing the category of O&M costs that would be eligible for rate base treatment would represent a fundamental shift in the Commission's traditional cost-of-service ratemaking principles. It would also likely significantly increase the cost of a transmission project over its useful life, requiring consumers to pay a return on investments that have historically been treated as expenses in the normal course of providing reliable service.

The Commission's existing framework already provides a vehicle to incent utility investments in new technologies and other innovative practices. Utilities have the ability to request incentives on a case-by-case basis to address the special risks and challenges that a project presents,¹⁷² including the need to deploy novel or innovative technologies, which distinguish an investment from those made in the ordinary course of providing reliable service.¹⁷³ This framework appropriately directs the Commission's inquiry, as provided in section 219(d), to ensuring that incentive rates are just and reasonable. The Commission has the existing tools to

¹⁷⁰ NOPR at PP 108-109.

¹⁷¹ *Id.* at P 105.

¹⁷² NESCOE notes that this is a reason for the Commission to reconsider its departure from the risks and challenges approach it proposes. NOPR at PP 34-40.

¹⁷³ See NESCOE Initial Comments at 12-14. See also *United Illuminating* at PP 62-63 (2019) (examining incentive request for smart grid technology to account for risks and challenges in using a novel or innovative technology).

encourage utilities to pursue advanced technologies and innovative practices for the benefit of customers.

I. Requiring Public Utilities To Disclose Anticipated Incentives Would Be a Very Useful Tool in Ensuring Transmission Costs Are Transparent.

NESCOE supports the proposal to require public utility seeking incentives to disclose all reasonably anticipated incentives to transmission planning regions as part of public utility's transmission project proposal.¹⁷⁴ Knowing the *full* costs of a transmission project is critical. This transparency is vital to facilitate the ability of a region's states and stakeholders to determine which projects should move forward. Costs should not be kept hidden and then sprung upon customers later. Incentives—particularly if the Commission starts to allow up to 250 basis points, even exceeding the top of the zone of reasonableness¹⁷⁵—are not just *a* part of the costs, they may start to become *a significant part* of the costs.

This proposal is especially important if the Commission decides to adopt any form of benefit-to-cost ratio, as discussed above, to be used in conjunction with an economic project incentive.¹⁷⁶ It would be illogical to permit a transmission owner to obtain economic project incentives on the basis of a favorable benefit-to-cost ratio, but then allow the transmission owner to subsequently seek 150-basis points of another type of adder.

The Commission has long supported the need for transparency,¹⁷⁷ and NESCOE urges it to continue to affirm its commitment to transparency in transmission costs here.

¹⁷⁴ NOPR at P 114.

¹⁷⁵ See Section III.B, *supra*.

¹⁷⁶ See Section III.E.1, *supra*.

¹⁷⁷ See, e.g., Order No. 890 at P 51.

J. The Commission’s Program Management – FERC Form 730 Reporting Requirements Should Be Sufficiently Robust to Enable the Commission to Evaluate its Transmission Incentives Policies.

The Commission’s proposal to require additional information to be collected from transmission incentive applicants in FERC Form 730¹⁷⁸ is a good start. However, NESCOE suggests that it may not be sufficient to enable the Commission to robustly analyze whether its proposed new incentives and approaches are accomplishing their goal. It is unclear that the reporting addresses incentives for economic projects based on benefit-to-cost ratios, and it should. Transmission incentive recipients should have to report on actual vs. estimated costs; and on actual vs. estimated benefits.

NESCOE supports the Commission’s proposal to eliminate the Order No. 679 threshold that requires only projects that are \$20 million or more to submit reports.¹⁷⁹ However, the proposal to retain the \$3 million threshold for public utilities that receive only the RTO adder (*i.e.*, all transmission owners in RTOs) is unsupported. Customers still pay a 50-basis-point adder (potentially soon to be 100 basis points if the Commission adopts its proposal) on these smaller projects. Reporting will inform whether the Commission’s incentives are effective. As the Commission states, its reporting requirement is designed to “enable the Commission to evaluate the effectiveness of the incentives program and ensure that the Commission is meeting the statutory requirement of FPA section 219.”¹⁸⁰ There is no reason to exempt aspects of the Commission’s incentives programs from this reporting.

¹⁷⁸ NOPR at P 118.

¹⁷⁹ *See id.* at P 122.

¹⁸⁰ *Id.* at P 123.

NESCOE requests that the Commission not adopt its proposal that the required reporting on benefits calculations should only apply to transmission projects only \$25 million or more in scale to reduce reporting burden.¹⁸¹ That proposal is arbitrary. The Commission's obligation is to ensure that rates are just and reasonable, not to ensure that transmission owning public utilities that are receiving generous transmission incentives have a reduced reporting burden.

Finally, the Commission's proposal to limit the reporting of the benefits of projects to five years¹⁸² is inconsistent with its proposal to allow ROE adders for projects to continue for the life of the project.

As the Commission takes a step back to reassess its incentives policy, now is an ideal opportunity for the Commission to put reporting requirements in place that will enable it to measure the effectiveness of its policies. Nearly fifteen years after issuing Order No. 679, the Commission now contends that its incentives policies are not fully working as intended and thus incentives must be increased substantially in type and magnitude. While the Commission cannot go back in time and establish meaningful ways to examine the effect of its incentives and incentives policies on transmission investment,¹⁸³ it can rectify this on a going-forward basis.

IV. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission consider its comments in developing any final rule on transmission incentives.

¹⁸¹ *Id.* at P 124.

¹⁸² *Id.* at P 125.

¹⁸³ See TDU Systems Comments at 4 (“there has been no systematic study evaluating the effect of these incentives on transmission investment, and thus there is no evidence demonstrating that ROE-adder incentives are needed to get new transmission built.”).

Respectfully Submitted,

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