

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
TRANSMISSION ACCESS POLICY STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to support the Commission’s April 15, 2021 Supplemental Notice of Proposed Rulemaking.¹ As an association of transmission dependent utilities (“TDUs”) in thirty-five states promoting open and non-discriminatory transmission access, we have taken an active role in response to the Notice of Inquiry² and Notice of Proposed Rulemaking,³ filing extensive comments strongly advocating the reduction and/or phase-out of the Return on Equity (“ROE”) adder currently available to transmitting and electric utilities that are members of a regional transmission organization or independent system operator (collectively referred to as “RTO”) to which they have turned over operational control of their facilities, and strongly opposing the 2020 NOPR’s proposal to double the current Transmission Organization Incentive.⁴

¹ *Elec. Transmission Incentives Policy Under Section 219 of the Fed. Power Act*, 175 FERC ¶ 61,035 (2021) (“Supplemental NOPR”).

² *Inquiry Regarding the Commn’s Elec. Transmission Incentives Pol’y*, 166 FERC ¶ 61,208 (2019) (“NOI”).

³ *Elec. Transmission Incentives Policy Under Section 219 of the Fed. Power Act*, 170 FERC ¶ 61,204 (2020) (“2020 NOPR”), *corrected*, 171 FERC ¶ 61,072 (2020); Statement by Commissioner Glick dissenting in part (Mar. 25, 2020), eLibrary No. 20200325-3084 (“Glick Dissent”).

⁴ Comments of Transmission Access Policy Study Group, *Inquiry Regarding the Commission’s Elec. Transmission Incentive Pol’y*, Docket No. PL19-3-000 (June 26, 2019), eLibrary No. 201900626-5264 (“TAPS 2019 NOI Comments”); Reply Comments of Transmission Access Policy Study Group, *Inquiry*

TAPS strongly supports the Supplemental NOPR's proposal to limit the amount and duration of the Transmission Organization Incentive. In these comments, TAPS explains:

- A perpetual financial incentive for remaining in an RTO is no longer appropriate. Transmission owners and their shareholders benefit significantly from RTO membership without an ROE adder. It is therefore unjust and unreasonable to continue charging ratepayers in excess of \$400 million annually for an incentive that is not needed to induce continued RTO membership.
- The Supplemental NOPR's proposal stands on strong legal footing. The Commission's reading of Federal Power Act Section 219(c) as focusing on an incentive only for *joining* an RTO, and not for *remaining* in an RTO, is consistent with the provision's language. The Supplemental NOPR's proposal is further bolstered by its Section 219(c) authority to limit the amount and duration of the Transmission Organization Incentive. Indeed, given changed circumstances since Order 679⁵ was adopted, the Supplemental NOPR's interpretation of Section 219 is far better because it adheres to Section 219(d)'s over-arching requirement that the resulting rates from the incentive be just and reasonable.
- The Commission should retain its longstanding policy that the Transmission Organization Incentive is available only to utilities that join an RTO voluntarily, and the applicant for the incentive must bear the burden of demonstrating that voluntariness. Where the question of voluntariness turns on state law, the Commission should defer to the state public utility commission's interpretation of state law.
- TAPS generally prefers the use of non-ROE incentives rather than ROE incentives, but in this instance replacement of the proposed, limited-duration ROE incentive with a perpetual non-ROE incentive may not be in the best interest of consumers. If, nevertheless, the Commission determines that in lieu of the proposed three-year ROE incentive, it is more appropriate to provide for a non-ROE incentive, the least burdensome option for ratepayers would be

Regarding the Commission's Elec. Transmission Incentive Pol'y, Docket No. PL19-3-000 (Aug. 26, 2019), eLibrary No. 20190826-5116 ("TAPS 2019 NOI Reply Comments"); Comments of Transmission Access Policy Study Group (July 1, 2020), eLibrary No. 20200701-5410 ("TAPS 2020 NOPR Comments").

⁵ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 ("Order 679"), *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006) ("Order 679-A"), *clarified*, 119 FERC ¶ 61,062 (2007).

to automatically grant recovery of 100% Construction Work in Progress (“CWIP”) for any project selected in an RTO’s regional transmission plan for regional cost allocation.

- The three-year limitation on the Transmission Organization Incentive should be applied in a manner that prevents circumvention by creation of new affiliates or other organizational structures, or by constructing new facilities in the same or other RTOs. At the same time, TAPS urges the Commission to create a narrow exception to strict application of some of those restrictions where it would promote inclusive joint ownership arrangements, which can be instrumental to achieving the Commission’s objective of getting needed transmission built. Under this exception, a transmission owner that already received its three-year Transmission Organization Incentive would not be barred from eligibility for an additional three-year Transmission Organization Incentive as applied to a new project in which TDUs in the footprint that will bear the cost of the relevant facilities have been provided a meaningful opportunity for joint ownership on reasonable and comparable terms. At minimum, TAPS asks the Commission to express a willingness to consider transmission owner applications for such limited exceptions from the three-year duration restriction as applied to a new project that qualifies as a new inclusive joint ownership arrangement.

COMMENTS

I. TAPS STRONGLY SUPPORTS THE SUPPLEMENTAL NOPR'S PROPOSAL TO LIMIT THE AMOUNT AND DURATION OF THE TRANSMISSION ORGANIZATION INCENTIVE

TAPS supports the Supplemental NOPR’s proposal to limit the Transmission Organization Incentive to 50 basis points and to the first three years after a transmitting utility⁶ or electric utility⁷ (collectively referred to as “utilities”) transfers operational control of its transmission facilities to an RTO. TAPS agrees that the Commission’s existing practice of granting a perpetual incentive to those remaining in an RTO no longer complies with Section 219’s requirement that incentive rates be just and reasonable.

⁶ See 16 U.S.C. § 796(23).

⁷ See *id.* § 796(22).

A. *Transmission Owners Benefit from RTO Membership and no Longer Require a Perpetual Financial Incentive for Remaining in an RTO*

When Congress enacted Section 219 of the Federal Power Act (“FPA”) to provide incentives to utilities that join a transmission organization, RTOs were in their infancy.⁸ Order 679 established the original Transmission Ownership Incentive to be applicable to existing and new members in “recognition of the benefits that flow from [RTO] membership” and the fact that “continuing membership is generally voluntary.”⁹

Circumstances have changed dramatically since then. Currently, “two-thirds of the nation’s electricity load is served in RTO regions.”¹⁰ The six RTOs are now mature markets, with well-entrenched membership and a much-expanded footprint. They have established a track record of efficiently and reliably operating transmission assets. And they provide massive benefits to both ratepayers and the utilities that participate in them.

The Supplemental NOPR correctly identifies the many types of benefits that RTO membership provides, including access to competitive markets, optimization of the transmission system, and reserve sharing.¹¹ These benefits are enjoyed not just by consumers, but by transmission owners themselves. For example, a utility may want to ensure its generation function continued access to RTO markets (with the utility’s

⁸ ISO-NE and SPP were approved as RTOs in 2004. *See ISO New England Inc.*, 106 FERC ¶ 61,280, P 3, *corrected*, 107 FERC ¶ 61,051, *on reh’g*, 109 FERC ¶ 61,147 (2004); *Sw. Power Pool, Inc.*, 109 FERC ¶ 61,009, P 15 (2004), *on reh’g*, 110 FERC ¶ 61,137 (2005). While some RTOs had been acting as transmission providers for years, the wholesale markets and services currently offered by RTOs were still in development in 2005. *See, e.g., Devon Power LLC*, 115 FERC ¶ 61,340, *on reh’g*, 117 FERC ¶ 61,133 (2006) (approving settlement establishing ISO-NE’s Forward Capacity Market); MISO, *MISO History* (last visited June 1, 2021), <https://www.misoenergy.org/stakeholder-engagement/training2/learning-center/miso-history/> (MISO launched its Energy Markets 2005, and launched its Ancillary Services Market in 2009).

⁹ Order 679, P 331.

¹⁰ FERC, *Electric Power Markets: National Overview* (last visited June 2, 2020), <https://ferc.gov/industries-data/market-assessments/electric-power-markets>.

¹¹ Supplemental NOPR P 14; *see also* 2020 NOPR P 94 (describing similar benefits).

authority to make market-based sales generally evaluated on an RTO-wide basis).¹² The Commission has recently enhanced that advantage by eliminating the need for those in RTOs to submit market power screens in many cases.¹³

RTO membership also benefits utilities and their shareholders by facilitating achievement of their corporate greenhouse gas reduction pledges (beyond currently applicable requirements), which utilities have made because achieving those reductions is in the long-term financial interest of utility shareholders. More than seventy electric utilities, including many in RTOs, have publicly stated carbon reduction goals.¹⁴ And utilities are telling their investors that these pledges, and the transition to a clean energy future, are in shareholders' interests. For example, in response to a shareholder proposal questioning the financial benefits of Xcel Energy's goal to provide carbon-free electricity by 2050, the company told shareholders that it "is a wholly appropriate business decision — and one consistent with our investors' interests — to provide our customers more of

¹² See *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, PP 231, 235, *clarified*, 121 FERC ¶ 61,260 (2007), *on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *on reh'g and clarification*, Order No. 697-C, 127 FERC ¶ 61,284, *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 130 FERC ¶ 61,206, *clarified*, 131 FERC ¶ 61,021 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011), *reh'g denied*, 143 FERC ¶ 61,126 (2013), *review denied sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 567 U.S. 934 (2012). Outside RTOs, market power screens focus on the seller's balancing authority area and first tier balancing authority areas (*id.* P 232), a test that can be challenging for vertically integrated utility.

¹³ See *Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg'l Transmission Orgs. & Indep. Sys. Operator Mkts.*, Order No. 861, 168 FERC ¶ 61,040 (2019), *reh'g denied*, Order No. 861-A, 170 FERC ¶ 61,106 (2020).

¹⁴ See John Romankiewicz et al., *The Dirty Truth About Utility Climate Pledges*, The Sierra Club, at 19-20 (table listing the climate goals of fifty corporate parents that own seventy-nine utility operating companies) (Jan. 2021), https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/Final%20Greenwashing%20Report%20%281.22.2021%29.pdf?_ga=2.119826955.286936763.1621878626-1408122279.1621878626; see also Smart Electric Power Alliance, *Utility Carbon Reduction Tracker* (last visited on June 1, 2021) (providing a database of publicly announced utility commitments to emission reduction), <https://sepapower.org/utility-transformation-challenge/utility-carbon-reduction-tracker/>.

the resources they prefer” and that “many of our investors view exposure to carbon resources as a business risk that needs to be effectively managed.”¹⁵ Similarly, after adopting a climate pledge in 2019, Duke Energy CEO Lynn Good touted to investors the benefits of Duke’s “climate strategy, sustainable practices, and ongoing investments in cleaner generation” and noted that Duke’s Commercial Renewables business has “line of sight to nearly all of our growth prospects for 2019 and 2020, and 70% over the five-year plan.”¹⁶ RTO membership can help utilities achieve the goals that their shareholders demand. As Commissioner Chatterjee recognizes, “RTOs provide a platform for a successful energy transition.”¹⁷ Thus utility *shareholders* (in addition to utility customers) benefit from RTO membership.

Even where a transmission owner could withdraw without state approval, the existing benefits of RTO membership to the utility and its customers serves as a powerful inducement to remain in an RTO. A perpetual ROE adder has not been shown necessary to induce utilities to remain in RTOs.

B. The High Consumer Cost of a Perpetual Transmission Ownership Incentive Does Not Produce Customer Benefits

The unjustness and unreasonableness of the current Transmission Organization Incentive is especially true because the cost to ratepayers of the existing incentive is enormous. TAPS estimated, based on data from 2017, that the annual cost of the existing

¹⁵ Xcel Energy Proxy Statement at 70 (Schedule 14A) (Apr. 6, 2021); *see also* AEP Earnings Call (Apr. 22, 2021) at 1:06 (describing AEP’s carbon reduction strategy “as a \$15 billion to \$20 billion investment opportunity” that makes sense even without a federal price on carbon).

¹⁶ *Edited Transcript – Q3 2019 Duke Energy Corporation Earnings Call*, Duke Energy, at 3, 4 (Nov. 8, 2019), https://desitecoreprod-cd.azureedge.net/_/media/pdfs/our-company/investors/news-and-events/2019/3qresults/q3-2019-earnings-transcript.pdf?la=en&rev=bf46e696357143f3a004e5856be2fcd3.

¹⁷ Supplemental NOPR P 8 (Chatterjee, Comm’r, dissenting).

Transmission Ownership Incentive was approximately \$400 million.¹⁸ That hefty annual cost continues to grow as utilities add to their transmission rate base in RTO regions. Statements that the annual cost is “pennies on the dollar when compared to the more than \$10 billion of annual benefits to ratepayers generated from RTO/ISO membership,”¹⁹ ignore the evidence that ratepayers would obtain those benefits even without paying for the incentive. Because consumers are required to pay utility shareholders more than \$400 million a year but get nothing in return, the existing Transmission Ownership Incentive has become unjust and unreasonable.

Some might argue that limiting the Transmission Organization Incentive to three years will be inadequate to motivate utilities to join an RTO.²⁰ But in practice, the opposite may be true: limiting the incentive could *increase* RTO participation. A state regulator that has authority to approve a utility’s application to join an RTO might be more willing to do so if the ratepayer impact of joining is lower due to the limited duration of the Transmission Organization Incentive. Thus, Congress’s intent to encourage RTO participation would be enhanced by the Supplemental NOPR’s proposal.

II. THE SUPPLEMENTAL NOPR'S PROPOSAL IS CONSISTENT WITH FPA SECTION 219

The Supplemental NOPR’s proposal to limit the duration of the Transmission Organization Incentive stands on strong legal footing. Not only is the proposal supported by a permissible interpretation of Section 219(c)’s requirement that the Commission provide for incentives to utilities that *join* an RTO, but it is a far better interpretation

¹⁸ TAPS 2020 NOPR Comments at 107 & n.234.

¹⁹ Supplemental NOPR P 6 (Chatterjee, Comm’r, dissenting).

²⁰ *See, e.g.*, WIRES Reply Comments 4-5 (July 16, 2020), eLibrary No. 20200716-5038 (“WIRES Reply Comments”).

because it is also consistent with Section 219(d)'s over-arching requirement that the resulting rates be just and reasonable given changed circumstances.

A. *Congress Focused its Incentive on Joining an RTO and Gave the Commission Broad Discretion to Establish—and Change—the Size and Duration of the Transmission Organization Incentive*

TAPS agrees with the Supplemental NOPR that Section 219(c) requires the Commission to provide an incentive only for *joining* an RTO and not for *remaining* in an RTO in perpetuity.²¹ As Commissioner Danly recognizes, the statute “does not address the issue of whether [utilities] ‘remain’ in the RTO.”²² Order 679 and subsequent orders nevertheless interpreted the statute to permit a perpetual ROE adder for utilities that remain in an RTO. While arguably a permissible interpretation of the statute when it was adopted in Order 679, the Commission is free to adopt the Supplemental NOPR’s better interpretation of the statutory language, as long as it acknowledges the change and offers good reasons for that change.²³ As discussed in Part I above, changed circumstances over the past fifteen years provide ample reason for the Commission to reassess and revise its interpretation.

The dissenting Commissioners (and some transmission owners in earlier comments) state that limiting the duration of the Transmission Organization Incentive contradicts the statutory text.²⁴ Section 219(c) obliges the Commission to “provide for

²¹ Supplemental NOPR P 6; *accord* TAPS 2020 NOPR Comments at 105 & n.229.

²² Supplemental NOPR P 5 (Danly, Comm’r, dissenting).

²³ *See Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)); *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-26 (applying the same standard of review when an agency changed its interpretation of an ambiguous statutory term).

²⁴ Supplemental NOPR PP 2-4 (Chatterjee, Comm’r, dissenting); Supplemental NOPR PP 1-7 (Danly, Comm’r, dissenting); WIRES Reply Comments at 5.

incentives” to each utility “that joins a Transmission Organization.”²⁵ Limiting the incentive’s duration, they say, amounts to denying the incentive for some utilities “that join[ed] a Transmission Organization.” That argument is incorrect.

The Commission has broad discretion to determine the nature, the amount, and the duration of the required incentive. Congress included the ambiguous statutory term “provide for incentives” with the express intention that the Commission would define that term by rule. When Congress leaves such ambiguity in a statute administered by an agency, the Supreme Court has held that Congress “desired the agency . . . to possess whatever degree of discretion the ambiguity allows.”²⁶ Because Section 219(c) speaks “in capacious terms,”²⁷ the Commission has the authority to decide—reasonably and based on substantial evidence—whether the required incentive should be an ROE incentive or a non-ROE incentive, whether it should be 25 basis points or 50 basis points, and whether it should be paid as a one-time incentive or spread out over multiple years. The proposal to limit the duration of the Transmission Organization Incentive to three years is well within the language of FPA Section 219(c).

B. Given Changed Circumstances, the Supplemental NOPR’s Statutory Interpretation is More Consistent with Section 219 Read as a Whole

When read in conjunction with the rest of the statutory text and taking into account changed circumstances, the Supplemental NOPR’s proposal to limit the duration

²⁵ 16 U.S.C. § 824s(c).

²⁶ *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996)).

²⁷ *Id.*

of the Transmission Organization Incentive is not only consistent with FPA Section 219(c), but it is more consistent with Congressional intent and sound policy making.

FPA Section 219(d) provides that incentives granted under Section 219(c) “are subject to the requirements of sections [205] and [206] of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”²⁸ Section 219(d) makes no exception for incentives authorized pursuant to Section 219(c). By adding the just and reasonable standard into Section 219 as an overriding limitation on all Section 219 incentives, Congress incorporated the Commission’s long-standing precedents that require incentive rates to materially affect voluntary, prospective behavior.²⁹ A just and reasonable incentive is one that is “in fact needed and . . . no more than is needed, for the purpose.”³⁰

The Commission and the courts have recognized these core principles of just and reasonable incentives in the context of Section 219. In Order 679-A, the Commission justified its nexus test as necessary to “ensure that incentives are not provided in circumstances where they do not materially affect investment decisions.”³¹ The D.C. Circuit has characterized the requirement that incentives must induce voluntary,

²⁸ 16 U.S.C. § 824s(d).

²⁹ See *City of Charlottesville v. FERC*, 661 F.2d 945, 953-54 (D.C. Cir. 1981) (rejecting award of an incentive treatment where the factual record did not demonstrate that level of investment had changed as a result of the incentive policy); see also *Incentive Ratemaking for Interstate Nat. Gas Pipelines, Oil Pipelines, & Elec. Utils.*, 61 FERC ¶ 61,168, at 61,594 (1992), *reh’g denied*, 63 FERC ¶ 61,110 (1993).

³⁰ *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955); see also *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir. 1984) (rejecting incentive rates because the Commission “‘must see to it that the increase is in fact needed, and is no more than is needed, for the purpose.’” (quoting *City of Detroit*, 230 F.2d at 817)). Cf., *Hope Nat. Gas v. FPC*, 320 U.S. 591, 652-53 (1944) (“The function which an allowance for gas in the field should perform for society in such circumstances is to be enough and no more than enough to induce private enterprise completely and efficiently to utilize gas resources, to acquire for public service any available gas or gas rights and to deliver gas at a rate and for uses which will be in the future as well as in the present public interest.”).

³¹ Order 679-A, P 25.

prospective conduct as an “obvious proposition.”³² And the Ninth Circuit, when discussing the Transmission Organization Incentive, explained that an “incentive cannot ‘induce’ behavior that is already legally mandated.”³³

In light of the statutory requirements, the Commission must consider whether continuing the perpetual ROE adder is necessary to induce RTO membership. The record here indicates that it is not. Certainly, indefinitely paying significant incentives to utilities that already joined an RTO rewards past decisions to join an RTO, not prospective action. And, as discussed in Part I above, utilities that have joined RTOs have powerful reasons to remain participants, regardless of whether they continue receiving an extra 50 basis points of ROE.³⁴

III. UTILITIES MUST SHOW THEIR PARTICIPATION IS VOLUNTARY BEFORE OBTAINING THE INCENTIVE

The Supplemental NOPR seeks comment on “whether the Transmission Organization should be available only to transmitting utilities that join a Transmission Organization voluntarily.”³⁵ The answer is yes.

As discussed in Part II above, the Transmission Organization Incentive can satisfy Section 219(d)’s requirement that incentives be just and reasonable only if it prospectively induces voluntary conduct. The Commission should therefore continue its

³² *Me. Pub. Utils. Comm’n v. FERC*, 454 F.3d 278, 289 (D.C. Cir. 2006).

³³ *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 974 (9th Cir. 2018).

³⁴ In some cases, utilities are required under state law to remain in their RTO. And even where not legally required to do so, a utility would give up significant benefits by leaving an RTO. *See* Part I, *supra*.

³⁵ Supplemental NOPR P 19.

longstanding policy of including a voluntariness requirement for the Transmission Organization Incentive.³⁶

The Supplemental NOPR also asks how it should apply the voluntariness standard.³⁷ The Supplemental NOPR implicitly recognizes that it can be difficult, in the abstract, to specify what actions are voluntary and which are not. Utilities may be required to join RTOs due to state laws or regulations, merger conditions, or other contractual obligations. The situations are myriad. TAPS therefore urges the Commission to evaluate the voluntariness requirement on a case-by-case basis, and to place the burden on the applicant to demonstrate that its decision to join the RTO is voluntary.

In addition, when a case presents a question of whether state laws or regulations require a utility to join an RTO, the Commission should defer to the state public utility commission's interpretation of state law. State commissions, which are often responsible for administering the relevant state statutes, are better placed than the Commission to determine the meaning of state law. As a matter of comity, the Commission should not contradict well-reasoned interpretations of state law that are presented by state commissions.

IV. NON-ROE INCENTIVES

The Supplemental NOPR asks for comment on “whether there are alternative, non-ROE incentives that are more appropriate for the Transmission Organization Incentive.”³⁸ TAPS appreciates this question. As noted in Section II above, the

³⁶ See 879 F.3d at 978 (discussing the Commission's “longstanding policy that incentives should only be awarded to induce voluntary conduct”); *see also* TAPS 2020 NOPR Comments at 38-41, 109-10 (discussing at length why the Commission should retain the voluntariness requirement).

³⁷ Supplemental NOPR P 19.

³⁸ *Id.* P 16.

Commission has discretion under the statute to grant non-ROE incentives. And TAPS agrees with Commissioner Christie that “an ROE adder is a subsidy.”³⁹ Nevertheless, some non-ROE incentives can also increase consumer cost,⁴⁰ so they too should be approached with caution. While non-ROE incentives are often better tailored to reducing risk and inducing desired investments, in this particular case replacement of the proposed, limited-duration ROE incentive with a perpetual non-ROE incentive may not be in the best interest of consumers.

Over the past fifteen years, ratepayers have paid utility shareholders billions of dollars in subsidies, in the form of the ROE adders. Under the Supplemental NOPR’s proposal, that subsidy will end for the many transmission owners that have already been in an RTO for three years or more. The result will be significant consumer savings going forward. Because the utilities that joined RTOs more than three years ago have already received their incentive for joining, TAPS see no reason to continue rewarding them with non-ROE incentives. In fact, granting a new, ongoing non-ROE incentive without any showing that such an incentive will materially affect voluntary, prospective conduct to join an RTO would violate the requirement that incentives be just and reasonable.⁴¹

If, nevertheless, the Commission determines that it is more appropriate to provide for a non-ROE incentive in lieu of the proposed three-year ROE incentive, TAPS urges

³⁹ *Id.* P 10 (Christie, Comm’r, concurring).

⁴⁰ *See, e.g., PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,147 (2014) (approving settlement for customers to pay \$80.5 million in costs associated with the abandonment of the Mid-Atlantic Power Pathway (MAPP) project, which had received the Abandoned Plant incentive); *see also Potomac-Appalachian Transmission Highline, LLC*, 122 FERC ¶ 61,188 (2008) (granting the Abandoned Plant Incentive for the PATH Project, which was subsequently abandoned and has resulted in years of litigation over PATH’s request to recovery \$121 million in abandoned plant costs), *on reh’g*, 133 FERC ¶ 61,152 (2010).

⁴¹ *See* Part I, *supra* (discussing the requirement that incentives be just and reasonable).

the Commission to adopt the non-ROE incentives that would be least burdensome to ratepayers. Of Order 679's non-ROE incentives, the least burdensome is the CWIP Incentive, which allows utilities to recover 100% of CWIP for non-pollution control/fuel conversion construction costs rather than the maximum 50% CWIP allowed under the Commission's non-incentive ratemaking policy.⁴² Because the CWIP Incentive is theoretically designed to relieve pressures on utility cash flows but not increase the total project cost over its lifetime,⁴³ the CWIP Incentive is preferable to other, cost-increasing, non-ROE incentives. TAPS would therefore not oppose a final rule that, as an incentive for joining an RTO, automatically grants the CWIP Incentive for any project selected in the RTO's regional transmission plan for regional cost allocation.⁴⁴ Such an incentive would benefit transmission owners in RTOs, compared to transmission owners who choose not to join an RTO, because the incentivized utility would not need to apply for or justify the need for the incentive.

V. SUBJECT TO A NARROW EXCEPTION TO PROMOTE INCLUSIVE JOINT OWNERSHIP, UTILITIES SHOULD NOT BE ALLOWED TO AVOID THE THREE-YEAR LIMITATION

As described above, the Supplemental NOPR proposes to limit the application of the existing 50-basis point Transmission Organization Incentive to three years after the

⁴² Order 679, P 103 n.70.

⁴³ *Id.*

⁴⁴ TAPS would not support, however, support automatically granting the CWIP Incentive to projects not selected by an RTO for regional cost allocation, such as PJM Supplemental Projects. A very significant amount of transmission investment within RTOs continues to be concentrated in projects *not* subject to the full regional planning requirements per Order 890 and 1000. *See* Johannes P. Pfeinberger, et al., *Transmission Competition Under FERC Order No. 1000: What We Know About Cost Savings to Date*, Brattle Group, 8 (Oct. 25, 2018), https://brattlefiles.blob.core.windows.net/files/14786_brattle_competitive_transmission_wires_10-25-18.pdf. It would not be just and reasonable to incentivize utilities to avoid the transparent planning processes that are one of the important benefits of RTO participation.

utility joins an RTO and transfers operational control of its facilities to the RTO, and to make it available only if the utility has not previously been a member of an RTO,⁴⁵ which TAPS supports. The Supplemental NOPR seeks comment on incentive eligibility restrictions related to sales, corporate restructurings, and transmission plant constructed by new affiliates, and asks “whether new utility affiliates that build transmission, either within or outside of the service territory of existing operating companies, should be eligible for the [incentive].”⁴⁶ TAPS urges the Commission to express and enforce the three-year limitation in a manner that prevents circumvention by creation of new affiliates or other organizational structures, or construction of new projects in the same or a different RTO. At the same time, we urge the Commission to create a narrow exception to that limitation to promote inclusive joint ownership, a policy objective that advances the important policy goal of getting needed transmission built.

A. The Commission Should Prevent Circumvention of the Proposed Three-Year Limit on the Transmission Organization Incentive

TAPS strongly supports the Supplemental NOPR’s proposed three-year limit on the Transmission Organization Incentive and urges that it be defined in a manner that avoids creative circumvention. Doing so would include making explicit the following limitations in the final rule:

First, as proposed in the Supplemental NOPR,⁴⁷ *a utility should not receive the Transmission Organization Incentive for transmission plant if the asset was already*

⁴⁵ Supplemental NOPR PP 9-10, 20.

⁴⁶ *Id.* P 21.

⁴⁷ *Id.* P 21.

under the operational control of an RTO, whether as part of an affiliate or a separate owner. To do otherwise would invite gaming.

Second, the final rule should make explicit what we believe is implicit in the Supplemental NOPR's proposal: *once the initial three-year period during which a utility is eligible to receive the Transmission Organization Incentive has concluded, that utility cannot receive the adder for new transmission plant in that RTO, either directly or through an affiliate.* To do otherwise would be contrary to the Supplemental NOPR's stated intent to achieve an appropriate balance—inciting utility membership in RTOs through a duration-limited Transmission Organization Incentive, while ensuring that the resulting rates remain just and reasonable, and not unduly discriminatory or preferential, as required by FPA Section 219(d).

Third, *if a utility has already received the three-year Transmission Organization Incentive for joining one RTO, it should not be permitted (either directly or through an affiliate) to obtain a new Transmission Organization Incentive for building new transmission facilities in a different RTO.* This limitation would be consistent with the Supplemental NOPR's proposal that a utility should not be eligible for the Transmission Organization Incentive if it has previously joined an RTO.⁴⁸ And it would avoid inciting utilities to focus their investments away from their "home" transmission system that they know the best. There is no reason to provide financial inducements for utilities to favor investment in one RTO over others.

Fourth, *if a utility that has already received the Transmission Organization Incentive for three years has partial ownership, either directly or through an affiliate, of*

⁴⁸ *Id.* P 20.

a new corporate entity (or other form of joint venture) that is seeking the Transmission Organization Incentive, the amount of the incentive for the new entity should be reduced to exclude the ownership share of the incumbent utility. For example, if the utility were to own a 25% share of a new corporate entity that is investing in new transmission facilities in either the utility's RTO or another RTO, and the remaining 75% share was held by an entity that had no affiliation with a utility in an RTO that had already received its three-year Transmission Organization Incentive, then the three-year Transmission Organization Incentive to which the new corporate entity would be entitled for becoming a member of an RTO would be reduced by 25%. In this example, if the new corporate entity was investing \$100 million in a new transmission facility, the three-year Transmission Organization Incentive would apply to \$75 million. The intent would be to ensure a utility that has already received the three-year limited Transmission Organization Incentive cannot evade that limitation through participation in new corporate entities or other joint ventures.

B. To Spur Inclusive Joint Ownership Arrangements, the Commission Should Allow for Application of the Three-Year Transmission Organization Incentive to Qualifying Projects

1. Need for a Limited Joint Ownership Exception to the Proposed Three-Year Limit for the Transmission Organization Incentive

TAPS strongly supports the Supplemental NOPR, including its proposal to restrict the duration of the Transmission Organization Incentive, and (as discussed in Part A) asks the Commission to provide clarifications that prevent circumvention of this limitation. TAPS, however, urges the Commission to allow for a narrow exception to the second through fourth restrictions discussed in Part A, in order to incentivize inclusive joint ownership arrangements with transmission dependent utilities which can play an

important role in enhancing the RTO's ability to make sure the right transmission gets built, and in providing valuable local support that facilitates siting of transmission needed to support our changing resource mix.

As discussed in detail in TAPS 2020 NOPR Comments,⁴⁹ arrangements that provide for inclusive joint ownership with transmission dependent utilities—whether structured as an inclusive transco,⁵⁰ a shared system,⁵¹ or joint ownership of new transmission facilities⁵²—result in collaborative and inclusive planning, development, and siting of transmission, and have proven highly effective in getting transmission built to meet the needs of all load-serving entities. These significant benefits are summarized at pages 31-33 of the TAPS 2020 NOPR Comments.⁵³ And as described at pages 33-34

⁴⁹ TAPS 2020 NOPR Comments at 29-38. For convenience, we have attached those pages (along with the cover page) to these comments.

⁵⁰ The American Transmission Company LLC (“ATC”), for example, is a Transco jointly owned by twenty-nine utilities: four investor-owned utilities (which contributed their transmission systems) and twenty-two public power and cooperative utilities (which contributed their transmission facilities or, if TDUs, cash to buy in at net book value) in Wisconsin, Michigan, Minnesota and Illinois. All received equity stakes in ATC, with limited governance rights; ATC's board includes both independent members and representatives of the owners. ATC has grown from \$550 million in assets in 2001 to \$5.5 billion, with more than 710 miles of new line.

⁵¹ In shared system arrangements (including a number long in place), transmission facilities of two or more utilities are planned and operated jointly, as a single system, pursuant to a long-term agreement in which ownership is generally shared in proportion to each participant's load ratio share of connected customer load. *See* TAPS 2020 NOPR Comments at 31 n.74.

⁵² For example, CapX2020 (now Grid North Partners), a joint transmission-planning process in the northern Midwest, is a recent joint ownership success story. The eleven investor-owned, municipal, and rural cooperative utilities in Minnesota, North Dakota, South Dakota, and Wisconsin that were CAPX2020 members (ten remain in Grid North Partners) jointly planned needed transmission upgrades and had opportunities to jointly own those facilities. The result was nearly \$2 billion invested by the CapX2020 members in 800 miles of new high-voltage transmission infrastructure—the largest development of new transmission in the upper Midwest in forty years. Each of the projects is jointly owned by project-specific subgroup of CapX2020 utilities, with a lead entity for each project that serves as construction manager on behalf of the owners.

⁵³ The need for, and benefits of, an enhanced TDU role in planning transmission was recently recognized in Commissioner Clements' concurring decision in *GridLiance High Plains LLC*, 174 FERC ¶ 61,078, P 2 (2021) (Clements, Comm'r, concurring), which identified the need for new mechanisms to empower transmission customers to conduct their own transmission planning “as part of broader transmission planning reform, to ensure that TDNPU are given fair and adequate service, and more broadly to ensure

of those Comments, joint ownership arrangements have a long history of success, producing impressive results for the grid as a whole. Unfortunately, despite these advantages, many investor-owned utilities continue to be reluctant to share transmission ownership with TDUs, preferring to keep transmission investments at Commission-approved ROEs to themselves, and creating barriers even where non-incumbent transmission developers have sought to partner with TDUs. *See* TAPS 2020 NOPR Comments at 34-35.

As the nation embarks on a new round of major transmission investments to transform the grid, the Commission should assure that the efficiency and equity benefits of joint ownership are an integral part of the path forward. The Commission has long recognized the benefits of inclusive joint ownership arrangements and repeatedly sought to encourage them, highlighting the value of “increasing opportunities for investment in the transmission grid, as well as ensuring nondiscriminatory access to the grid by transmission customers.”⁵⁴ It has recognized that TDU participation is consistent with Section 219’s goals of “encouraging a deep pool of participants,”⁵⁵ and benefits consumers as well as TDUs that can use revenues from transmission ownership to offset

that all transmission system plans—local, regional, and interregional—succeed in identifying cost-effective solutions to established system needs and thereby ensure that any new infrastructure is money well spent by customers.” These are exactly the types of benefits that result from joint ownership arrangements with TDUs. *See* TAPS 2020 NOPR Comments at 31-32.

⁵⁴ *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, P 776 (2011) (“Order 1000”) (citing *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, P 593 (2007)), *reh’g denied*, Order No. 1000-A, 139 FERC ¶ 61,132 (“Order 1000-A”), *on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *review denied sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (*per curiam*). *See also* Order 1000-A, P 81.

⁵⁵ Order 679, PP 354, 357. *See also* Order 679-A, P 102.

increasing transmission rates.⁵⁶ Going beyond mere encouragement, the 2012 Policy Statement⁵⁷, in expressing the Commission’s expectation that an applicant for ROE incentives demonstrate that it is minimizing its risks during project development, identified joint ownership arrangements as a risk-reducing measure to be considered:⁵⁸

[A]pplicants may take measures to mitigate risks associated with siting and environmental impacts by pursuing joint ownership arrangements. The Commission encourages incentives applicants to participate in joint ownership arrangements and agrees with commenters to the NOI that such arrangements can be beneficial by diversifying financial risk across multiple owners and minimizing siting risks.³³

³³ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at PP 354, 357; Order No. 679-A FERC Stats. & Regs. ¶ 31,236, at P 102. *See also Central Maine Power Company*, 125 FERC ¶ 61,182, at P 61 (2008); *Xcel Energy*, 121 FERC ¶ 61,284 at P 55 (2007). Evidence regarding whether an applicant for incentives considered joint ownership arrangements may be relevant in assessing whether the applicant took appropriate steps to minimize its risks during project development.

This existing inducement to inclusive joint ownership, however, may become collateral damage in the 2020 NOPR’s proposal to move from a risks-and-challenges approach to benefits-based incentives. While proposing to maintain (with some expansion) risk-reducing non-ROE *incentives* because they “remain vital in facilitating the investment in and the development of transmission projects as they remove regulatory barriers and other impediments to investment” (2020 NOPR P 38), the 2020 NOPR does

⁵⁶ For example, in granting municipal joint owners the ability to utilize hypothetical capital structures, the Commission stated: “[A]llowing Central Minnesota to receive a revenue requirement . . . that reflects the higher capital costs of the investor-owned utilities’ will offset the Midwest ISO transmission rates that its members pay, which largely reflect those investor-owned utilities’ higher capital costs, thereby allowing Central Minnesota and its members to effectively reduce their future transmission rates to reflect their lower capital costs to mitigate their investment risks associated with the project.” *Cent. Minn. Mun. Power Agency*, 134 FERC ¶ 61,115, P 31 (2011). It also “noted that encouraging public power participation in such projects is consistent with the goals of section 219 of the FPA by encouraging a deep pool of participants.” *Id.* P 19 n.23.

⁵⁷ *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (“2012 Policy Statement”).

⁵⁸ *Id.* P 24 & n.33.

not mention any obligation by applicants to take risk-reducing *measures*, including joint ownership. Nor does consideration of risk-reducing incentives or risk-reducing measures factor into to the proposed evaluation of the qualifications for, or level of, benefit-based incentives proposed to be awarded. And the 2020 NOPR never mentions joint ownership.

In its 2020 NOPR Comments, TAPS urges the Commission to fulfill its statutory responsibilities by at least maintaining, if not enhancing, the inducement to joint ownership, whether or not it moves away from a risks-and-challenges approach to incentives. As discussed in TAPS 2020 NOPR Comments at 29-31, Section 219's purposes are thwarted if a needed project does not get built because it faces greater financial or siting risk without joint ownership. And Section 217(b)(4) directs the Commission to exercise its "authority . . . under [the Act] in a manner that facilitates the planning and expansion of the transmission facilities to meet the reasonable needs of load-serving entities," imposing a "requirement for the Commission"⁵⁹ that is significantly furthered by joint ownership arrangements.

Recognizing that the remainder of the 2020 NOPR is still pending, TAPS asks the Commission to consider including an inducement to inclusive joint ownership in its final rule with regard to the Transmission Organization Incentive. While TAPS has long preferred inducements to joint ownership through means that do not increase rates,⁶⁰ the proposed inclusive joint ownership exception requested here is necessary and warranted. Serious consideration of such an inducement is needed given its limited nature, the

⁵⁹ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 90 (D.C. Cir. 2014) (quoting 16 U.S.C. § 824q(b)(4)).

⁶⁰ See Reply Comments of Transmission Access Policy Study Group 5, *Inquiry Regarding the Comm'n's Elec. Transmission Incentive Pol'y*, Docket No. PL19-3 (Aug. 26, 2019), eLibrary No. 20190826-5116. See also proposals included in the TAPS 2020 NOPR Comments at 37-38.

significant planned build-out of transmission anticipated to accommodate our changing resource mix, the benefits joint ownership arrangements can bring to getting needed transmission additions sited and built, and the potential that the 2020 NOPR threatens to eliminate the 2012 Policy Statement's existing inducement for joint ownership.

2. The Final Rule Should Provide for an Inclusive Joint Ownership Exception or, at Minimum, Leave the Door Open to Applications for such Exceptions

Specifically, TAPS proposes an Inclusive Joint Ownership Exception to the proposed three-year limit on the Transmission Organization Incentive. Under this proposal, the second through fourth limitations on the Transmission Organization Incentive described in Part A will not apply when a utility—either directly or through an affiliate—seeks the Transmission Organization Incentive for a new project, if the utility demonstrates that the new project offered Inclusive Joint Ownership. “Inclusive Joint Ownership” in a new transmission project means: TDUs in the footprint that will bear the cost of the relevant facilities have been provided a meaningful opportunity for joint ownership on reasonable and comparable terms (i.e., “inclusive joint ownership”). Inclusion of TDU participants in the project would provide evidence of the meaningfulness of the offered opportunity; the absence of TDU participants would make the claim for a joint ownership exception suspect.

For a project to qualify for this exception to the Transmission Organization Incentive's three-year duration, the amount of TDU ownership that is offered must be meaningful; tokenism is not sufficient. While a “meaningful” amount can vary depending on the project (compare, e.g., a local project aimed at reinforcing weak portions of the network near TDUs to very large interregional projects), the amount must be sufficient to yield the full advantages of joint ownership that warrant this project-based exception to

the three-year limit on the Transmission Organization Incentive (e.g., enlisting a wide range of support in the siting process; getting TDUs at the grownup table in identifying needs and scoping the facilities). For example, a joint ownership offer of less than a load-ratio share for facilities within a pricing zone should raise questions, particularly if the transmission owner cannot show that the offer has been accepted by a sufficient number of TDUs to make TDU participation more than mere window dressing.

TAPS proposes that the Inclusive Joint Ownership Exception should be available to new project-specific inclusive joint ownership agreements among transmission owners and TDUs, and new corporate entities (e.g., LLCs or single-asset corporations) with an inclusive joint ownership structure for its sole (or initial) project. This restriction is consistent with TAPS' intent to create only a narrow exception to the proposed three-year limit on the Transmission Organization Incentive (which TAPS strongly supports) and avoid inviting long-term evasion of that limitation. To be consistent with that objective, the Joint Ownership Exception would exclude new projects undertaken by existing long-term shared system arrangements and transcos where inclusive joint ownership has long been "baked into" the arrangement.⁶¹ We urge the Commission to seek other opportunities to encourage such highly beneficial long-term inclusive joint ownership arrangements.

⁶¹ For example, most utilities participating in Grid North Partners have used up their three-year Transmission Organization Incentive, and would generally be ineligible to receive an additional three-year Transmission Organization Incentive on their new transmission projects. However, if such utilities were to participate in a new, separately contracted joint ownership arrangement for an additional project, they may be eligible for a new three-year Transmission Organization Incentive for that project if it satisfies the exception's Inclusive Joint Ownership criteria. TAPS is *not* recommending extending the limited Joint Ownership Exception to all future projects undertaken by existing inclusive transcos such as ATC.

For the same reason, the proposed Inclusive Joint Ownership Exception to the proposed three-year limit on the Transmission Organization Incentive would be project based, and would be limited to three years for each qualifying project. Specifically, unlike the Transmission Organization Incentive as currently applied (or as is proposed in the Supplemental NOPR), the Inclusive Joint Ownership Exception would not allow application of the Transmission Organization Incentive to the entirety of transmission assets owned by the qualifying entity but would be limited to the new project (or initial project, in the case of new longer term inclusive ownership arrangements that may include additional projects).

To the extent a project qualifies for the Joint Ownership Exception, TAPS proposes that all joint owners of the project would be equally entitled to apply for the Transmission Organization Incentive for that project. Allowing participating TDUs to share in the three-year Transmission Organization Incentive made available to the transmission owners (or their affiliates) involved in the project is necessary to ensure comparability to utilities subject to this exception to the proposed Transmission Organization Incentive's three-year limit and to hedge the cost burden the TDUs must otherwise bear for the transmission upgrades.

At minimum, the Commission should make clear that it will consider applications by utilities that have already used up their three-year Transmission Organization Incentive (and new corporate entities affiliated with such utilities) for an exception from the bar against that entity seeking a new three-year Transmission Organization Incentive for projects that qualify as new inclusive joint ownership arrangements, as described above. If granted, the exception would enable the utility or its affiliate (along with the

participating TDUs) to receive a three-year Transmission Organization Incentive for new projects that can be demonstrated to qualify as Inclusive Joint Ownership arrangements. By leaving the door open to consideration of such applications, the Commission could promote this important means of getting new transmission built.

CONCLUSION

TAPS urges the Commission to adopt the Supplemental NOPR's proposal, with the clarifications and modifications discussed in these comments.

Respectfully submitted,

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Attachment

Excerpt of TAPS 2020 NOPR Comments
Cover Page and Pages 29-38

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 TRANSMISSION ACCESS POLICY
STUDY GROUP**

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July 1, 2020

project. Multiple ROE adders totaling up to 250 basis points could fire up local opposition. By creating an environment in which siting—the most significant risk that transmission developers must face—is harder and more contentious, the NOPR makes it less likely that projects providing consumer benefits get built, undermining Section 219.

III. TO ACHIEVE SECTION 219’S PURPOSES, THE COMMISSION NEEDS TO RETAIN IF NOT EXPAND ITS INDUCEMENT TO INCLUSIVE JOINT OWNERSHIP WITH PUBLIC POWER

A glaring omission in the NOPR is any effort to promote or leverage joint ownership with public power and other TDUs, which the Commission has repeatedly encouraged, highlighting the value of “increasing opportunities for investment in the transmission grid, as well as ensuring nondiscriminatory access to the grid by transmission customers.”⁶⁷ The Commission has recognized that TDU participation is consistent with Section 219’s goals of “encouraging a deep pool of participants,”⁶⁸ and benefits consumers as well as TDUs that can use revenues from transmission ownership to offset increasing transmission rates.⁶⁹ Going beyond mere encouragement, the 2012 Policy Statement, in expressing the Commission’s expectation that an ROE incentives

⁶⁷ Order 1000, P 776 (citing Order 890 P 593). *See also* Order 1000-A, P 81.

⁶⁸ Order 679, PP 354, 357. *See also* Order 679-A, P 102.

⁶⁹ For example, in granting municipal joint owners the ability to utilize hypothetical capital structures, the Commission stated: “[A]llowing Central Minnesota to receive a revenue requirement . . . that reflects the higher capital costs of the investor-owned utilities’ will offset the Midwest ISO transmission rates that its members pay, which largely reflect those investor-owned utilities’ higher capital costs, thereby allowing Central Minnesota and its members to effectively reduce their future transmission rates to reflect their lower capital costs to mitigate their investment risks associated with the project.” *Cent. Minn. Mun. Power Agency*, 134 FERC ¶ 61,115, P 31 (2011). It also “noted that encouraging public power participation in such projects is consistent with the goals of section 219 of the FPA by encouraging a deep pool of participants.” *Id.* P 19 n.23.

applicant demonstrate it is minimizing its risks during project development, identified joint ownership arrangements as a risk-reducing measure to be considered:⁷⁰

[A]pplicants may take measures to mitigate risks associated with siting and environmental impacts by pursuing joint ownership arrangements. The Commission encourages incentives applicants to participate in joint ownership arrangements and agrees with commenters to the NOI that such arrangements can be beneficial by diversifying financial risk across multiple owners and minimizing siting risks.³³

³³ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at PP 354, 357; Order No. 679-A FERC Stats. & Regs. ¶ 31,236, at P 102. *See also Central Maine Power Company*, 125 FERC ¶ 61,182, at P 61 (2008); *Xcel Energy*, 121 FERC ¶ 61,284 at P 55 (2007). Evidence regarding whether an applicant for incentives considered joint ownership arrangements may be relevant in assessing whether the applicant took appropriate steps to minimize its risks during project development.

In moving from a risks and challenges approach to benefits-based incentives, however, the NOPR never mentions joint ownership. While proposing to maintain (with some expansion) risk-reducing non-ROE *incentives* because they “remain vital in facilitating the investment in and the development of transmission projects as they remove regulatory barriers and other impediments to investment” (NOPR P 38), the NOPR does not mention risk-reducing *measures* including joint ownership.

TAPS urges the Commission to fulfill its statutory responsibility by correcting that omission and at least maintaining, if not enhancing, the inducement to joint ownership. As discussed, joint ownership advances Section 219(b)(1)’s goal of promoting capital investment in the grid “regardless of the ownership of the facilities,” opening up the TO club. Section 219’s purposes are thwarted if a needed project does not get built because it faces greater financial or siting risk without joint ownership. And Section 217(b)(4) directs the Commission to exercise its “authority . . . under [the Act] in

⁷⁰ 2012 Policy Statement P 24 & n.33.

a manner that facilitates the planning and expansion of the transmission facilities to meet the reasonable needs of load-serving entities,” imposing a “requirement for the Commission”⁷¹ that is significantly furthered by joint ownership arrangements. Thus, Section 219(b)(1), coupled with Section 217(b)(4), call for targeted inducements for inclusive joint ownership arrangements whether or not the Commission departs from the risks and challenges approach.

As TAPS previously described,⁷² inclusive joint ownership arrangements, whether structured as an inclusive Transco,⁷³ a shared system,⁷⁴ or joint ownership of new transmission facilities,⁷⁵ result in collaborative and inclusive planning, development, and siting of transmission, and have proven highly effective in getting transmission built to meet the needs of all LSEs. Benefits include:

1. *Inclusive joint ownership makes joint planning real.* Although the Commission has issued rules to promote open and transparent planning, there is a big practical

⁷¹ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 90 (D.C. Cir. 2014).

⁷² See TAPS Initial NOI Comments at 6-14; TAPS, *Inclusive Joint Transmission Ownership Arrangements: An Effective Means to Getting Needed Transmission Sited and Built*, TAPS Policy Papers (Sept. 7, 2012), <https://tapsgroup.org/wp-content/uploads/2013/01/TAPS-Joint-Ownership-White-Paper.pdf> (“TAPS White Paper”). For more details, see TAPS, *Effective Solutions for Getting Needed Transmission Built at Reasonable Cost*, TAPS Policy Papers (June 2004), <https://tapsgroup.org/wp-content/uploads/2013/01/effectivesolutions.pdf>, filed with the Commission in *Promoting Transmission Investment Through Pricing Reform*, Docket No. RM06-4-000 (TAPS Comments, Attach 1 (Jan. 11, 2006), eLibrary No. 20060111-5132).

⁷³ E.g., Vermont Electric Power Company (“VELCO”), formed in 1956, which features municipal and cooperative participation, is an early example. See TAPS White Paper at 2. The ownership structure contributes to VELCO’s ability to influence legislation and secure regulatory and siting approvals. It also is an important vehicle for collaboration among all Vermont utilities for purposes of VELCO’s project planning, operations, and cost allocation decisions. See *History*, VELCO (last accessed June 23, 2020), <https://www.velco.com/about/history>.

⁷⁴ In shared system arrangements (include those long in place in Georgia, Indiana, Minnesota, North Dakota and South Dakota), transmission facilities of two or more utilities are planned and operated jointly, as a single system, pursuant to a long-term agreement. Ownership in the joint system generally is in proportion to each participant’s load ratio share of the customer load connected to the system, although there are a variety of ways this ownership share can be achieved, e.g., through owning an undivided share of the entire joint system; owning discrete facilities; owning new facilities. See TAPS White Paper at 2-3.

⁷⁵ E.g., CapX2020, discussed below and in the TAPS White Paper at 3.

difference when all LSEs are at the table as owners, aligning the ownership structure with the reality of the way the network operates and should be planned. When diverse parties are owners, greater openness and transparency, and more balanced decisionmaking flow automatically.

2. *Inclusive joint ownership results in a better and more efficient transmission system planned to meet multiple needs.* This has been the experience of TAPS members in Wisconsin, where combining multiple systems into one jointly owned Transco (American Transmission Company, LLC (“ATC”)) has led to a more rationally developed system than balkanized planning and construction. We also see it in CapX2020, which currently consists of ten investor-owned, municipal, and rural cooperative utilities in Minnesota, North Dakota, South Dakota, and Wisconsin that jointly plan needed transmission upgrades and have opportunities to jointly own those facilities.⁷⁶ This approach is far better than reactively planning for discrete transmission or interconnection service requests after the requests are made.
3. *The diverse support that joint ownership provides is very important in siting.* By meeting the needs of multiple utilities, a joint project is able to demonstrate multiple benefits. Although municipal and cooperative participation may be relatively small percentage-wise, these utilities bring a wealth of political support to state approval processes, which can make all the difference in speeding up permitting and addressing local concerns.
4. *Inclusive joint ownership arrangements provide the critical alignment of interests that makes it easier for state regulators to approve proposed transmission projects.* When state commissions are presented with projects that are least-cost because they meet multiple needs, when they see unity among the utilities on need, and when they are faced with a broad base of support from diverse stakeholders, it is far easier for them to grant requested authorizations.
5. *Inclusive joint ownership makes cost allocation easier to resolve, although it still remains a thorny issue.* TDUs face adverse competitive impacts from the obligation to pay the increasing costs of transmission, while transmission-owning LSEs have an earnings opportunity, rather than simply an obligation to pay. Joint ownership arrangements can provide TDUs a comparable opportunity to hedge those cost increases. For instance, although transmission rates paid by ATC customers have materially increased because of ATC’s major construction program, municipal and cooperative owners have been able to partially offset that increase. This ability has made it much easier for them to support ATC’s build-out.
6. *Inclusive joint ownership spreads the risk of major projects broadly and provides a variety of sources of capital for projects.* The financial diversity and strength

⁷⁶ CapX2020, CapX2020 (last accessed June 23, 2020), <http://www.capx2020.com/> (“CapX2020 Webpage”).

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achieved through joint ownership arrangements should be increasingly valuable. Rating agencies have recognized that ATC's inclusiveness is a significant benefit.

7. *The broad base of support achieved through joint ownership arrangements can be essential to securing state legislative action required to better align retail rate recovery with the need for supporting major transmission investment, as has occurred in Minnesota with the full support of the CapX2020 group.*
8. *Inclusive joint ownership arrangements reduce the need for the Commission to referee rate and other disputes.*
9. *Inclusive joint ownership arrangements can reduce transmission rates.* Where public power ownership is direct, transmission ratepayers receive several rate-reducing benefits. Public power utilities are not subject to income taxes, and they flow their tax savings through to ratepayers. Their lower debt cost further reduces rates. Even when set on a hypothetical basis, public power utilities' capital structures commonly include less equity than investor-owned utilities' actual capital structures. While not all these rate-reducing attributes apply to inclusive Transcos, some may depending on the particular corporate structure. For example, the lack of tax allowance for public power owners reduces ATC's rates.
10. *Inclusive joint ownership arrangements benefit consumers.* The benefits listed above work together to produce transmission better designed to meet all needs, and that can be sited and built more quickly. As a result, inclusive joint ownership arrangements benefit consumers and reduce costs.

Joint ownership arrangements have a long history of success,⁷⁷ and results of recent joint ownership arrangements are impressive. For example, ATC grew from \$550 million in assets in 2001 to \$5 billion, building more than 710 miles of new transmission, and connecting more than 6,220 MW of new generation.⁷⁸ CapX2020 has completed nearly \$2 billion of investment in 800 miles of transmission including four 345 kV lines, making it the largest development of new transmission in the upper Midwest in 40 years.⁷⁹ As then-President of Otter Tail Power Company described in 2017:⁸⁰

⁷⁷ See TAPS White Paper at 2.

⁷⁸ *What We Do*, ATC (last accessed June 23, 2020), <https://www.atellc.com/about-us/what-we-do/>.

⁷⁹ *CapX2050 Transmission Vision Report*, CapX2020, 8 (Mar. 2020), http://www.capx2020.com/documents/CapX2050_TransmissionVisionReport_FINAL.pdf.

CapX2020 is a great example of collaboration. Investor-owned electric utilities, electric cooperatives, and municipally-owned electric utilities all worked together in an unprecedented way through transmission expansion to ensure we can continue to provide safe, reliable, and affordable energy to our customers. In this respect, we're a model for the rest of the country in transmission development. We've accomplished much more together than we ever could do alone.

Despite these significant benefits, investor-owned utilities continue to be reluctant to share transmission ownership with TDUs, preferring to keep transmission investments at Commission-approved ROEs to themselves.⁸¹ Several TAPS members have sought to achieve joint ownership by partnering with GridLiance GP, LLC ("GridLiance") to propose non-incumbent projects through the Order 1000 competitive process, or in investments to improve service reliability for TDU communities; only one has moved forward.⁸² Even where a TAPS member secured state commission approval of an investor-owned utility's stipulation and agreement that it "agrees to co-ownership,"⁸³ the

⁸⁰ *CapX2020 Transforms Upper Midwest Electric Grid* (2017), <http://www.capx2020.com/bss/Completion%20of%20Final%20CapX2020%20project.pdf>.

⁸¹ See TAPS White Paper at 5 n.6 (discussing several instances where TDU offers to invest have been rebuffed).

⁸² Under the co-development agreement between TAPS member Kansas Power Pool, the City of Winfield is partnering with GridLiance to meet the City's Southwest Power Pool, Inc. ("SPP") reliability upgrade obligations and provide the City an opportunity to invest in those upgrades. See *GridLiance and City of Winfield Announce Transmission Partnership*, GridLiance (Jan. 29, 2019), <http://www.gridliance.com/2019/01/29/gridliance-and-city-of-winfield-announce-transmission-partnership/>.

⁸³ See *In the Matter of the Application of Sw. Power Pool, Inc. for a Certificate of Convenience and Auth. For the Limited Purpose of Managing and Coordinating the Use of Certain Transmission Facilities Located Within the State of Kan.*, No. 06-SPPE-202-COC, Order Adopting Stipulation and Agreement and Granting Applications PP 62-63 & Ordering Paragraph D (State Corp. Comm'n of Kan. Sept. 19, 2006), <http://estar.kcc.ks.gov/estar/ViewFile.aspx/20060919090818.pdf?Id=c7e09bc4-6d81-46d1-98ff-d501bc6c3ec5> (approving TDU participation in ownership of transmission facilities). See also *In the Matter of the Application of Sw. Power Pool, Inc. for a Certificate of Convenience and Auth. For the Limited Purpose of Managing and Coordinating the Use of Certain Transmission Facilities Located Within the State of Kan.*, No. 06-SPPE-202-COC, Stipulation and Agreement § 15 (State Corp. Comm'n of Kan. July 14, 2006), <http://estar.kcc.ks.gov/estar/ViewFile.aspx/20060714163903.pdf?Id=a06a90d9-0957-4763-ae7b-4b9377b09eeb> ("Westar agrees with co-ownership with Kansas Municipals and/or Kansas municipal

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Memorandum of Understanding to implement that commitment (contemplated to have been completed within fifteen days in 2006) has never been executed, despite years of negotiations.

In its Incentives NOI comments, GridLiance, supported by an affidavit from James Pardikes, MCR Performance Solutions, likewise demonstrated the role of public power participation in transmission ownership in creating a more reliable transmission grid and more competitive wholesale markets. It showed the significant barriers to such participation⁸⁴ and documented the resulting public power under-investments,⁸⁵ despite the interest of many in increasing their investment.⁸⁶ The GridLiance Comments and the Pardikes Affidavit show that the transmission planning disadvantage faced by public power entities significantly impacts reliability, resulting in service not comparable to what public utility TOs provide their own end-users and at higher cost. “Grid reliability and resilience should not depend on who provides the wholesale and retail service to an end-user if their circumstances are otherwise similar.”⁸⁷

energy agencies in projects within the service territories of Westar Energy, Inc. and Kansas Gas and Electric Company to allow the cities and/or the municipal energy agencies to meet requests for Network Integration Transmission Service (NITS) . . . and that the cities and/or municipal energy agencies can invest in new transmission projects and /or upgrades within the service territories of Westar Energy, Inc. and Kansas Gas and Electric Company for such purposes” and further describing the Memorandum of Understanding to be entered to implement the joint ownership rights).

⁸⁴ Initial Comments of GridLiance 11-17, *Inquiry Regarding the Commission’s Electric Transmission Incentive Policy*, Docket No. PL19-3-000 (June 26, 2019), eLibrary No. 20190626-5308 (“GridLiance Comments”), *Id.*, Attach. A at 41-42 (“Pardikes Affidavit”).

⁸⁵ Pardikes Affidavit at 5-23.

⁸⁶ *Id.* at 26.

⁸⁷ GridLiance Comments at 9-10; Pardikes Affidavit at 24-26. *See also* Pardikes Affidavit at 29-35 (describing other barriers to public power transmission ownership).

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While the 2012 Policy Statement has been helpful in some cases,⁸⁸ continued and amplified inducements to joint ownership are required in order for the Commission to fulfill its responsibilities under Sections 217(b)(4) and Section 219. The need for such inducements is heightened by the NOPR's proposal to grant generous ROE incentives for projects lacking this crucial feature, thereby discouraging TOs from sharing ownership with TDUs, potentially undermining existing joint ownership arrangements, reducing their hedge value, and competitively disadvantaging TDUs.

Thus, even if the Commission generally departs from the risks and challenges approach, it is irrational not to maintain ROE incentive applicants' obligation to explain what measures they have taken to make it more likely that the project will be built. Consistent with the 2012 Policy Statement (P 24 & n.33), joint ownership should be recognized as such a measure. And failing to take such reasonable measures should have consequences for incentive applicants: those that have not provided a meaningful opportunity for joint ownership on a load-ratio-share basis to TDUs in the footprint that

⁸⁸ For example, MJMEUC, in a recent joint ownership agreement with Ameren, is planning the construction of facilities in Northeast Missouri that will strengthen the MISO transmission system and also provide additional reliability to Hannibal, Missouri. This is a project in which both MJMEUC and Ameren customers realize benefits, and illustrates the benefits that joint ownership can bring to all involved parties. TDU investment in previously planned CapX projects has also continued post-2012. WPPI Energy ("WPPI") has an approximately \$15.3 million investment in the CapX Hampton-Rochester-La Crosse 354 kV line, energized in 2015. WPPI also has an approximately \$7.1 million investment in the Badger Coulee 345 kV line, energized in 2018, which connects the Hampton-Rochester-La Crosse line to the Madison, Wisconsin area. Cedar Falls Utilities, a participant in TAPS member Midwest Municipal Transmission Group and a joint owner with MidAmerican Energy Company ("MEC") in the Webster, IA, substation, was invited to participate in a Midcontinent Independent System Operator, Inc. ("MISO") 2011 Multi-Value Project. Working with MEC, Cedar Falls transferred that interest to another MISO Multi-Value Project, in which it was able to invest \$4 million in a jointly owned line energized in 2015.

Others have been less fortunate. For example, neither TAPS member Midwest Municipal Transmission Group nor its member Central Minnesota Municipal Power Agency ("CMMPA") has been able to secure an opportunity to invest in transmission development since financing on CMMPA's initial investment in CapX2020 closed in 2012, despite pursuing further investment opportunities through CapX2020, as well as with GridLiance, ITC Holdings Corp. ("ITC"), and Transource Energy ("Transource").

will bear the cost of the facility (i.e., “inclusive joint ownership”) should face a rebuttable presumption that they have *not* taken all appropriate steps to minimize their risks. This presumption should be particularly difficult to surmount if an applicant turns down TDU offers to participate. Because granting an ROE incentive to an applicant that failed to take prudent actions to increase the likelihood its project would get built does not accord with Section 219,⁸⁹ incentive requests from such applicants should face heightened scrutiny, if not outright rejection.

If maintenance or strengthening of the 2012 Policy Statement’s encouragement of joint ownership is not included in any final rule, the Commission should find some other way to effectively induce such arrangements in the revised incentive structure. For example, the Commission should:

1. Consider offers of joint ownership as a prerequisite for obtaining the Abandoned Plant Incentive, or at least bar recovery of abandoned plant costs if a project is cancelled due to siting problems, unless the recipient had mitigated siting challenges by providing a meaningful opportunity for inclusive joint ownership. Absent such mitigation efforts, such abandonment would not be “for reasons outside [the applicant’s] control.” NOPR P 84.⁹⁰
2. Consider joint ownership when calculating *ex post* benefit-cost ratios for the economic-benefit incentive. Specifically, the NOPR (P 60) asks whether for purposes of that calculation, the Commission should exclude costs resulting from factors beyond a developer’s control. At most, the Commission should allow exclusion of cost overruns associated with siting only if, before obtaining initial approval of the project, the applicant extended offers providing a meaningful opportunity for inclusive joint ownership.⁹¹
3. Consider meaningful offers of inclusive joint ownership as a positive attribute that can minimize and overcome objections to benefits-based incentives. These include, but are not limited to:

⁸⁹ Inclusion of TDU participants in the project would provide evidence of the meaningfulness of the offered opportunity.

⁹⁰ See Part VIII.

⁹¹ See Part V.D.

- a. Providing a basis for an exception to TAPS' proposed requirement that an incumbent TO waive all applicable ROFRs when seeking an ROE incentive;⁹²
- b. Providing evidence that an economic or reliability project does not discriminate in favor of the TO seeking the incentive (which incentive also may not be paid by the TO's bundled retail load),⁹³ and
- c. Providing evidence that an above-and-beyond reliability project is not gold-plating, but provides benefits to the system as a whole.⁹⁴

IV. THE FINAL RULE SHOULD INCLUDE OTHER ELEMENTS NECESSARY TO SATISFY SECTION 219

In addition to fundamental flaws in the NOPR's approach discussed in Parts II and III, the NOPR fails to include other elements that would be necessary, although not sufficient (without addressing the foundational flaws), for a final rule providing for benefits-based incentives to be consistent with Section 219 and otherwise lawful.

A. The Final Rule Must Adhere to the Voluntariness Requirement

Voluntariness has long been recognized as an essential requirement for incentive rates to be just and reasonable under the FPA;⁹⁵ and it is especially important in the context of benefits-based incentives that are not tailored to overcome the specific risks and challenges that create a barrier to investment in a particular project.⁹⁶ If adopted at

⁹² See Part IV.E below

⁹³ See Parts V.H and VI.B.5 below.

⁹⁴ See Part VI.B.5 below.

⁹⁵ See *City of Charlottesville v. FERC*, 661 F.2d at 953-54 (rejecting award of an incentive treatment where the factual record did not demonstrate that level of investment had changed as a result of the incentive policy); *CPUC 2018* at 974 ("An incentive cannot 'induce' behavior that is already legally mandated."); see also 1992 Policy Statement at 61,594. Order 679-A, P 25 (nexus test "ensure[s] that incentives are not provided in circumstances where they do not materially affect investment decisions").

⁹⁶ While Order 679-A, P 122 did not categorically disqualify mandatory projects from risks and challenges-based incentives if an applicant demonstrates nexus (recognizing the relevance of such mandate to establishing nexus), the Commission made clear that base ROE should generally be sufficient. See Order 679, P 94 (routine investments to comply with reliability standards "have, as a general matter, been adequately addressed through traditional ratemaking because there is an obligation to construct them and high assurance of recovery of the related costs. For these and other reasons, traditional ROE determinations may continue to be appropriate for these investments.").