

**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

**REPLY COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION AND
TRANSMISSION ACCESS POLICY STUDY GROUP
ON SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING**

The initial comments submitted by public utility transmission providers predictably reflect an all-out effort to discredit the reasonable changes that the Federal Energy Regulatory Commission (“Commission” or “FERC”) proposes to its incentive regulations in the supplemental notice of proposed rulemaking in this proceeding.¹ The American Public Power Association (“APPA”) and Transmission Access Policy Study Group (“TAPS”) urge the Commission to dismiss these unfounded objections and adopt the Supplemental NOPR’s proposed changes to its regulations and policies governing incentives for participation in Transmission Organizations² under section 219 of the FPA.³

Notwithstanding the volume and length of the comments submitted by transmission owners and other parties that support allowing utilities to collect a perpetual return on equity adder (“ROE Adder”) merely for remaining in a Transmission Organization, their arguments

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

² The Federal Power Act (“FPA”) defines a “Transmission Organization” as “a Regional Transmission Organization [“RTO”], Independent System Operator [“ISO”], independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.” 16 U.S.C. § 796(29) (2005). Consistent with the Supplemental NOPR, these reply comments generally use the term “Transmission Organization” instead of RTO or ISO. *See* Supplemental NOPR at n.5.

³ 16 U.S.C. § 824s (2005).

largely boil down to variations on a few flawed themes.⁴ The Commission, for example, is offered assorted views as to why the text and legislative history of FPA section 219 support collection of a perpetual ROE Adder. None of these arguments support a conclusion that such a bonus is compelled under section 219. Many of the Supplemental NOPR opponents contend that the alleged benefits of Transmission Organizations justify the cost of the ROE Adder. But this argument unreasonably ascribes all the benefits of Transmission Organizations to the availability of a perpetual adder without showing that the adder itself is needed to ensure long-term Transmission Organization participation. The initial comments also spill a tremendous amount of ink describing the alleged risks and burdens of being a transmission owner in an RTO or ISO. The Commission, however, has not justified the ROE Adder as compensation for the risks and burdens of Transmission Organization participation, which should be reflected in establishing a transmission owner's base ROE.

The Commission has amply justified amending its regulations as proposed in the Supplemental NOPR, and the record in this rulemaking proceeding supports generic action under FPA section 206 to eliminate ROE Adders awarded under the Commission's existing rules. Any reliance that transmission owners placed on the availability of a perpetual ROE Adder was not reasonable, and, in any case, cannot outweigh the substantial cost to consumers from continuing the adder. Making the ROE Adder available for three years to voluntary participants would not discriminate against utilities that are ineligible for the adder, and claims to the contrary misapply the relevant standards under the FPA. Finally, arguments that the ROE Adder (or any incentive) should apply regardless of the voluntariness of a utility's participation are contrary to FPA

⁴ These reply comments respond primarily to arguments that the Commission should not eliminate the ROE Adder after three years or apply a voluntariness requirement to the Transmission Organization Incentive.

section 219, court precedent, and the Commission’s recent decision in *The Dayton Power and Light Company*⁵ addressing this specific question.

The initial comments of APPA, TAPS, and numerous other customer-oriented commenters rebut the objections to the Supplemental NOPR’s proposed approach.⁶ Indeed, these comments show that eliminating the ROE Adder altogether would be justified on empirical, legal, and policy grounds. APPA and TAPS nonetheless support the Supplemental NOPR’s proposal for a 50-basis point ROE Adder, limited to three years and subject to the overall ROE remaining within the zone of reasonableness, as a reasonable implementation of FPA section 219(c) that would provide a measure of rate relief to already-overburdened transmission customers.⁷ APPA and TAPS also urge the Commission to consider the approach to encouraging joint ownership of transmission outlined in TAPS’ initial comments.⁸

⁵ *The Dayton Power and Light Co.*, 176 FERC ¶ 61,025 (2021) (“*Dayton*”).

⁶ *See, e.g.*, American Manufacturers Comments; APPA Comments; California Municipal Utilities Association (“CMUA”) Comments; California Public Utilities Commission and California Department of Water Resources State Water Project (“CPUC/CDWR”) Comments; Certain TDUs Comments; Delaware Municipal Electric Corporation, Inc. Comments; Kansas Corporation Commission Comments; National Association of State Utility Consumer Advocates Comments; New England Consumer-Owned Systems (“NECOS”) Comments; New England States Committee on Electricity Comments; New York Coalition Comments; Northern Virginia Electric Cooperative, Inc. Comments; Ohio Consumers’ Counsel Comments; The Public Utilities Commission of Ohio’s Office of the Federal Energy Advocate (“Ohio FEA”) Comments; Old Dominion Electric Cooperative Comments; Organization of PJM States, Inc. (“OPSI”) Comments; Public Interest Organization Comments; Public Systems Comments; Resale Power Group of Iowa (“RPGI”) Comments; Sacramento Municipal Utility District (“SMUD”) Comments; Six Cities Comments; State Entities Comments; State Water Contractors Comments; TAPS Comments; Transmission Agency of Northern California Comments; Transmission Dependent Utility Systems Comments; Virginia Office of Attorney General, Division of Consumer Counsel Comments.

⁷ *See, e.g.*, APPA Comments at 3 (arguing that transmission rate relief is particularly warranted “given the extraordinary increases in transmission costs for many customers in recent years”); CMUA Comments at 4-5 (describing transmission cost increases in California ISO); NECOS Comments at 11-12 & Exhibit NEC-0001 at ¶ 51 (discussing transmission rate increases in ISO New England); Ohio FEA Comments at 5-6 (discussing transmission investment and increased costs in PJM); RPGI Comments at 16-17 (discussing transmission rate increases incurred by RPGI). APPA and TAPS note that Commission Staff’s recent report on RTO/ISO metrics shows significant transmission cost increases between 2014 and 2018 in each of the RTO/ISO regions. *See Performance Metrics for ISOs, RTOs, and Regions Outside ISOs and RTOs*, Docket No. AD19-16-000, Common Metrics Staff Report at Appendix B (July 2021).

⁸ TAPS Comments at 17-25.

I. REPLY COMMENTS

A. The Supplemental NOPR Proposal is Consistent with FPA Section 219

A number of commenters contend that the text and legislative history of FPA section 219 compel the award of a perpetual incentive for Transmission Organization participation.⁹ Far from unambiguously requiring such largesse, FPA section 219(c) unambiguously limits incentives to encourage the act of *joining* a Transmission Organization – not “participating” or “remaining in” a Transmission Organization.¹⁰ If Congress had wanted to mandate incentives for participating in a Transmission Organization, it could easily have said so.¹¹

Even if section 219(c) can be regarded as ambiguous, APPA, TAPS, and other commenters explained that the Commission can reasonably interpret the section to permit the adoption of a time-limited incentive mechanism aimed at encouraging utilities to join a Transmission Organization, particularly when FPA section 219(c) is read in the context of the just and reasonable rate requirement specified in section 219(d).¹² Arguments to the contrary lack merit.

The mandatory “shall . . . provide for incentives” language in section 219(c) does not require a permanent ROE Adder (in fact, it does not require an *ROE* incentive at all). Nor does

⁹ See, e.g., Duquesne Light Company (“Duquesne”) Comments at 6-7; Edison Electric Institute (“EEI”) Comments at 18-21; Exelon Corporation (“Exelon”) Comments at 3-6; ITC Holdings Corp. Comments at 5-15; Midcontinent Independent System Operator and Southwest Power Pool (“MISO-SPP”) Comments at 14-16; Midcontinent ISO Transmission Owners (“MISO TOs”) Comments at 42-44; New England Transmission Owners (“NETOs”) Comments at 9-16; PJM Interconnection, L.L.C. (“PJM”) Comments at 6-17; PJM Transmission Owners (“PJM TOs”) Comments at 34-37; Southwest Power Pool Transmission Owners (“SPP TOs”) at 14-16; WIRES Comments at 20-24.

¹⁰ See, e.g., APPA Comments at 7-8; TAPS Comments at 7-11.

¹¹ WIRES points out that the House version of the Energy Policy Act of 2005 (“EPAct 2005”) titled the relevant section “Additional incentives for RTO participation.” WIRES Comments at 22 (citing H.R. 6, 109th Cong. § 218(b) (as passed by House, Apr. 21, 2005)). This suggests that the drafters of the provision recognized a distinction between joining and participating in a Transmission Organization and opted to limit the statutory text to encouraging “joining” a Transmission Organization.

¹² See, e.g., APPA Comments at 7-12; RPGI Comments at 5-13; TAPS Comments at 10-11.

the fact that the benefits of Transmission Organizations – or the alleged burden on transmission owners from participating in them – may persist for the duration of a utility’s participation mean that incentives must likewise continue.¹³ Indeed, section 219(d) specifically contemplates that the Commission’s rules under section 219 may be revised from time to time.¹⁴ Limiting the incentive to three years is in no way inconsistent with the purpose of FPA section 219(c) to encourage utilities to *join* Transmission Organizations for the ultimate benefit of consumers. As long as “each transmitting utility or electric utility that joins a Transmission Organization” receives an incentive, the Commission has complied with Congress’ directive.¹⁵ Here, consistent with 219(d)’s overarching requirement that incentives must be just and reasonable (proscribing incentives for actions that are already mandatory) each Transmission Owner that has voluntarily joined, or will voluntarily join, an RTO is eligible to receive an incentive for three years.

The lack of an explicit sunset provision in Section 219(c) does not imply that the incentive must be perpetual, as some commenters contend. By leaving the duration of the incentive undefined, Congress left to the Commission’s judgement how the incentive should be structured, including how long it will last. As APPA explained in its initial comments, the Commission “has wide discretion to determine where to draw administrative lines,”¹⁶ and,

¹³ *See, e.g.*, EEI Comments at 9-10.

¹⁴ 16 U.S.C. § 824s(d) (specifying 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 205 and 206”) (emphasis added); *see also, e.g.*, RPGI Comments at 9-10 (observing that use of “the phrase ‘any revisions,’ . . . plainly demonstrates Congress’s expectation that the rules promulgated by the Commission pursuant to Section 219 would not create immutable entitlements.”).

¹⁵ 16 U.S.C. § 824s(c).

¹⁶ *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002).

particularly given the discretion that Congress left to the Commission in FPA section 219, the three-year ROE Adder period is a reasonable exercise in line-drawing.¹⁷

A number of commenters point to the legislative history of section 219(c) as allegedly supporting the case for a perpetual ROE Adder. The legislative background cited by these parties is at best inconclusive, and, if anything, Congress' decision to use the phrase "that *joins* a Transmission Organization" in section 219(c) as opposed to broader language tends to suggest that Congress intentionally limited the focus to encouraging the act of *joining* a Transmission Organization, while leaving substantial discretion to FERC in implementing the provision.¹⁸ As noted above, the House version of EPAct 2005 referred to incentives for Transmission Organization "participation" – language that was not included in the final bill. In this regard, the Commission should not accord any weight to the affidavit from former Congressman Joe Barton accompanying the initial comments filed by EEI and WIRES. Even where legislative history is a valid interpretive tool, a single legislator's testimony fifteen years after the bill was passed offering his interpretation of section 219(c) deserves no consideration;¹⁹ the Commission must interpret the statute as passed by the House and Senate and signed by the President.²⁰

¹⁷ Ameren Services Company ("Ameren") mistakenly asserts that, in responding to the Notice of Inquiry ("NOI") in Docket No. PL19-3-000, the Joint Commenters group (which included APPA), "recognize[d] that remaining in an RTO requires incentives." Ameren Comments at 22 (footnote omitted). The Joint Commenters, in fact, urged the Commission to eliminate the Transmission Organization adder altogether. Joint Commenters NOI Initial Comments at 72.

¹⁸ See, e.g., RPGI Comments at 11 ("it is fair to conclude that Congress set broad parameters for FERC's development of 'true' transmission incentives that would require transmission utilities to accomplish something greater, or perform something better, than they otherwise would have accomplished or performed in the ordinary course of business.").

¹⁹ See, e.g., *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) (declining to give any probative weight to affidavits submitted by former Senators offering their views on the intent of a provision of the Federal Election Campaign Act of 1971).

²⁰ The Commission should also dismiss as irrelevant commenters' reliance on the written statement of the Commission's General Counsel included in the legislative history of EPAct 2005. See NETOs Comments at 13; WIRES Comments at 23. In the portion of the statement quoted by commenters, Ms. Marlette was discussing section 1232 of EPAct 2005 (addressing federal utility participation in Transmission Organizations), not section 1241, which added section 219 to the FPA.

It also bears emphasis that the Commission itself has characterized *joining* and *remaining in* a Transmission Organization as distinct actions.²¹ Prior to the enactment of EPAAct 2005, the Commission, acting under FPA sections 205 and 206, had awarded ROE adders to utilities for joining Transmission Organizations, while declining to grant such adders to existing Transmission Organization members.²² For example, the Commission declined to award Southern California Edison Company a participation adder on the grounds that the company was already a member of the California ISO.²³ The Commission revised its approach in Order No. 679, but clearly continued to recognize that “joining” and “remaining in” a Transmission Organization were distinct actions.²⁴

B. The Existing ROE Adder Does Not Produce Consumer Benefits

Multiple commenters, including several RTOs, offer descriptions of the benefits that customers allegedly receive from Transmission Organizations and argue that these benefits outweigh the cost of the ROE Adder.²⁵ These discussions are largely irrelevant to the question of whether it is reasonable to authorize collection of an ROE Adder for the duration of a utility’s Transmission Organization membership.²⁶ APPA and TAPS acknowledge that the Commission has recognized the benefits that Transmission Organizations can provide to consumers and that these benefits may justify an incentive for joining a Transmission Organization under FPA

²¹ See APPA Comments at 7 n.25.

²² See, e.g., *PJM Interconnection L.L.C.*, 104 FERC ¶ 61,124, at 61,435 (2003).

²³ *Southern Cal. Edison Co.*, 114 FERC ¶ 61,018, at P 15 (2006).

²⁴ See *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, P 86 n.42 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007) (“Our decision in *Southern California Edison* failed to recognize that incentives are equally important in inducing utilities to join and remain in Transmission Organizations.”).

²⁵ See, e.g., Duquesne Comments at 5; EEI Comments at 10; MISO-SPP Comments at 5-10; MISO TOs Comments at 13-30; PJM Comments at 28; PJM TOs Comments at 24-29; SPP TOs Comments at 3-7; WIRES Comments at 12-13.

²⁶ See, e.g., Public Interest Organizations Comments at 3-5.

section 219(c). The question before the Commission is not whether customers benefit from Transmission Organizations, but whether customers benefit from the perpetual ROE Adder incentive and whether this perpetual incentive is “in fact needed and . . . no more than needed, for the purpose” of encouraging utilities to join and/or remain in Transmission Organizations.²⁷

Transmission owner commenters effectively seek to ascribe all the benefits of Transmission Organizations to the availability of a perpetual ROE Adder rather than showing that the adder assures Transmission Organization participation. Despite the voluminous record in this proceeding, there is no compelling evidence that the ROE Adder for Transmission Organization membership induces transmission owners to remain in Transmission Organizations, let alone that 50 basis points is the amount that is “no more than needed” for the purpose of keeping transmission owners in a Transmission Organization. In fact, the weight of the record evidence demonstrates that transmission owners are likely to remain in a Transmission Organization regardless of whether the Supplemental NOPR proposal is adopted or not.²⁸

C. The Alleged Risks and Burdens of Transmission Organization Participation Do Not Warrant a Perpetual ROE Adder

Many of the comments opposing the Supplemental NOPR argue at length that transmission owners face increased burdens and risks as a result of Transmission Organization membership, and they assert that transmission owners (and their investors) are entitled to compensation for these risks and burdens through the incentive ROE Adder.²⁹ WIRES goes so far as to argue that an ROE that does not include an adder for these burdens and risks would be

²⁷ *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955).

²⁸ See discussion in Part I.D, *infra*.

²⁹ See, e.g., California Utilities Comments at 20-22; EEI Comments at 6-12; MISO-SPP Comments at 10-13; MISO TOs Comments at 30-41; PJM Comments at 25-28; PJM TOs Comments at 7-21; SPP TOs Comments at 6-9; WIRES Comments at 10-11, 14-16.

confiscatory.³⁰ The Commission should dismiss this *post hoc* justification for the ROE Adder as inconsistent with Order No. 679 and the Commission’s policies for establishing risk-adjusted base ROEs.

While opponents of the Supplemental NOPR generally urge the Commission to adhere to Order No. 679 in awarding an ROE incentive merely for remaining in a Transmission Organization, this fidelity to Order No. 679 collapses when transmission owners try to rationalize the ROE Adder as compensation for the risks and burdens of such participation. These arguments are at odds with the Commission’s conclusion in Order No. 679 that the basis for awarding the adder is the benefits that flow from Transmission Organization membership.³¹ The Commission did not cite the alleged risks of Transmission Organization participation as a basis for an ROE Adder in Order No. 679 or Order No. 679-A.³² On the contrary, the Commission specifically indicated that “issues concerning risk . . . are more appropriately addressed in the proceedings that evaluate proxy companies and set a zone of reasonableness.”³³

³⁰ WIRES Comments at 15.

³¹ Order No. 679 at P 331; Order No. 679-A at P 86.

³² Some commenters point to the Commission’s statements in the March 20, 2020 NOPR that “the RTO-Participation Incentive also compensates transmitting utilities for the ongoing duties and responsibilities of RTO/ISO membership,” *Elec. Transmission Incentives Policy Under Sec. 219 of the Fed. Power Act*, 170 FERC ¶ 61,204, at P 93 (2020) (“March 2020 NOPR”), and that “[t]he duties and responsibilities associated with RTO/ISO membership have also increased since Order No. 679.” *Id.* at P 96. These statements were included in the very portion of the March 2020 NOPR that the Commission has now proposed to revise, and, thus, do not serve as support for the proposition that the ROE Adder should compensate transmission owners for the risks and burdens of Transmission Organization participation. *See* Supplemental NOPR at P 13. Contrary to the PJM TOs’ assertion (at pages 6-7), paragraph 26 of Order No. 679 did not suggest that the incentive for RTO/ISO participation was to compensate utilities “for the material and increasing risks and burdens of RTO membership.” In that portion of Order No. 679, the Commission was discussing the risks and challenges associated with constructing new transmission, not the risks associated with RTO/ISO membership.

³³ Order No. 679 at P 326. Notably, transmission owner Ameren correctly acknowledges “that the Commission did not justify the adder based on it being needed to compensate utilities for the added risk of joining an RTO.” Ameren Comments at 34. Ameren agrees (as all transmission owners should) that “the base ROE provides for recovery of the utility’s cost of equity capital, including any increased risk associated with participation in an RTO, and the RTO adder is the incentive required by Congress.” *Id.* This is indeed the framework established by the Commission in Order No. 679, and the Commission is on firm ground in revisiting its earlier policy of allowing longstanding

The Commission recently rejected a similar “risks and burdens” rationale for a Transmission Organization incentive in *Dayton*. There, Dayton Power and Light Company argued that denying its request for a 50-basis point adder for participation in PJM could threaten its “financial integrity, credit ratings, and/or ability to attract investment.”³⁴ Calling this argument “misplaced,”³⁵ the Commission explained:

[I]t is the base ROE, rather than incentives such as RTO Adder, that was intended to ensure a utility’s financial integrity. In contrast, as the Commission stated in Order No. 679, the basis for the RTO Adder is a recognition of the benefits that flow from membership in RTOs/ISOs and to incentivize utilities to join them. Therefore, the Commission’s decision to deny the incentive RTO Adder here is irrelevant to Dayton’s base ROE and financial integrity, credit ratings, and ability to attract investment.³⁶

Accepting for the sake of argument that Transmission Organization membership imposes certain risks and burdens on transmission-owning members that are not offset by the benefits of such membership, the availability of a just and reasonable base ROE should adequately account for these risks, as the Commission indicated in *Dayton*.³⁷ To the extent that a transmission owner in a Transmission Organization believes (contrary to the discussion below) that the burdens and risks of Transmission Organization participation would not be reflected in its allowed ROE, the transmission owner is free to propose appropriate modifications to the proxy group and/or a calibrated risk adjustment in the proceedings setting its base ROE, consistent with

Transmission Organization members to continue to collect an incentive ROE Adder based on its assessment that the incentives required under FPA section 219(c) need not include a perpetual adder.

³⁴ *Dayton*, 176 FERC ¶ 61,025, at P 29.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; see also, e.g., APPA Comments at 14-15; CPUC-CDWR Comments at 25-30; NECOS Comments, Exhibit NEC-0001 at ¶ 47.

the Commission’s instructions in Order No. 679.³⁸ If the duties and responsibilities of Transmission Organization membership impose other prudently-incurred costs on public utility transmission owners, these costs are generally recoverable in cost-based rates, almost universally through formula rates that minimize any risk of under-recovery.

The initial comments do not show that the Commission’s base ROE method fails to account adequately for the alleged risks and burdens of Transmission Organization membership. Although the Commission relies on national proxy groups for setting the base ROE for electric utilities,³⁹ the prevalence of Transmission Organization participation by operating companies of those proxies helps ensure that any risks attendant to such participation will be reflected in the selected proxy groups and appropriately captured in the calculation of the base ROE.⁴⁰ None of the opponents of the Supplemental NOPR present evidence (beyond general assertions) that establishes otherwise.⁴¹ A review of the proxy companies used in Opinion No. 569-A to establish the base ROE for MISO transmission owners, for example, indicates that a majority of the proxy companies have transmission operations in Transmission Organizations.⁴²

³⁸ Order No. 679 at P 326 (“issues concerning risk . . . are more appropriately addressed in the proceedings that evaluate proxy companies and set a zone of reasonableness.”).

³⁹ See *Ass’n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Op. No. 569, 169 FERC ¶ 61,129, at P 412 (2019), *order on reh’g*, Op. No. 569-A, 171 FERC ¶ 61,154, *order addressing reh’g requests*, Op. No. 569-B, 173 FERC ¶ 61,159 (2020).

⁴⁰ See Op. No. 569 at P 412 (rejecting arguments that use of a national proxy group meant “that the high and low ends of the DCF and CAPM zones of reasonableness produced by those proxy groups are unrepresentative of the highest and lowest risk profiles among the MISO TOs.”); see also *MISO Transmission Owners v. FERC*, D.C. Cir. Case Nos. 16-1325, *et al.*, Brief for Respondent Federal Energy Regulatory Commission at 51 (June 8, 2021) (arguing that “[t]he Commission uses screening criteria that limit proxy group companies to those presenting investment risks comparable to [MISO Transmission] Owners.”).

⁴¹ See, e.g., American Electric Power Company (“AEP”) Comments at 23 (stating that the “proxy companies may have no subsidiaries that participate in an RTO”); PJM TOs Comments at 37-39 (arguing that the base ROE “may not” adequately compensate transmission owners); NETOs Comments, Attachment 1 at ¶ 30.

⁴² See Attachment A hereto.

Even if transmission owners had shown that a base ROE established under the Commission’s methodology does not adequately compensate for the risks and burdens of Transmission Organization participation (which they did not), they make no effort to show that a generic 50-basis point adder is appropriately calibrated to address any such risks.⁴³ As Mr. Montalvo explained in his declaration accompanying APPA’s initial comments, transmission owners in Transmission Organizations have a range of ROEs,⁴⁴ and the notion that a generic 50-basis point adder would be the appropriate level of compensation for Transmission Organization risks for all transmission owners is unsupported.⁴⁵ This proves the wisdom of the Commission’s suggestion in Order No. 679 that any adjustment of a transmission owner’s allowed ROE to compensate for the risks and burdens of joining a Transmission Organization should be addressed in setting the base ROE.

D. The Supplemental NOPR Adequately Supports the Proposal to Revise the Commission’s Approach to FPA Section 219(c) Implementation

The Commission should dismiss arguments that the Supplemental NOPR does not satisfy the legal process requirements under the Administrative Procedure Act (“APA”) or the FPA for modifying the Commission’s existing regulations and policies for transmission incentives.⁴⁶

As APPA, TAPS, and others explained in their initial comments, the Commission may change its existing rules provided that it acknowledges its change in position, accounts for any

⁴³ See *Farmers Union Cent. Exch. Inc. v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir. 1984) (the Commission must “calibrate the relationship between increased rates and the attraction of new capital” to the investments it seeks to promote).

⁴⁴ APPA Comments, Montalvo Declaration at ¶¶ 20-21.

⁴⁵ See also, e.g., NECOS Comments, Exhibit NEC-0001 at ¶¶ 37-42.

⁴⁶ See, e.g., EEI Comments at 12-16; MISO-SPP Comments at 16-18; MISO TOs Comments at 13-41, 44-48; NETOs Comments at 21-24; PJM Comments at 16-17; SPP TOs Comments at 13-20; WIRES Comments at 8-17.

serious reliance interests, and offers a reasoned explanation for its changed interpretation.⁴⁷ The Commission’s rationales, and the record developed in this proceeding (including the initial comments) support the Commission’s proposed change in approach to awarding an ROE Adder for Transmission Organization participation.

The Supplemental NOPR posited that “providing the Transmission Organization incentive indefinitely may not be necessary to incentivize a transmitting utility to join a Transmission Organization and, given the large impact that such an incentive has on ratepayers, may not appropriately balance utility and ratepayer interests, particularly given the substantial benefits of Transmission Organization membership to participating utilities.”⁴⁸ Substantial evidence supports these observations. While some commenters quibble with the \$400 million annual rate impact estimate developed by TAPS and cited in the Supplemental NOPR, there is no serious dispute that the ROE Adder imposes significant costs on consumers.⁴⁹ Opponents of the Supplemental NOPR mainly argue instead that these consumer costs are outweighed by the benefits of Transmission Organizations. The costs of the incentive, however, must be compared to the benefits of the incentive, which as discussed above, are not the same as the benefits of Transmission Organizations.

⁴⁷ See APPA Comments at 8 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980-981 (2005)); SMUD Comments at 2-4; TAPS Comments at 8. APPA and TAPS address arguments that the Commission failed to address transmission owners’ reliance interests in section I.E, *infra*.

⁴⁸ Supplemental NOPR at P 8 (footnote omitted); *see also id.* at P 14.

⁴⁹ Commission Staff estimated the annual cost of the incentive adder at \$350 million. Transcript of April 15, 2021 Commission Open Meeting at 54; *see also, e.g.*, CPUC-CDWR Comments at 2 (calculating that the cost of the ROE Adder in California has exceeded \$600 million over the past 15 years).

A number of commenters also challenge the Commission’s suggestion that transmitting utilities obtain substantial benefits from participation in Transmission Organizations.⁵⁰ Here again, the record supports a finding that transmission owners – and their shareholders – obtain benefits from Transmission Organization participation, particularly through centralized transmission planning and increased access to renewable resources to meet their corporate goals.⁵¹ The Commission, however, need not rest its change in approach on the existence of transmitting utility benefits. The key question remains whether the Commission’s policy conforms to the requirement that the incentive is “in fact needed and . . . no more than needed, for the purpose” of encouraging utilities to join and/or remain in Transmission Organizations.⁵²

Contrary to arguments that a three-year, 50-basis point ROE Adder is not lucrative enough to encourage utilities to join Transmission Organizations, the record supports the Commission’s observation that a perpetual ROE Adder is not necessary to encourage utilities to join Transmission Organizations. Mr. Montalvo – a former ISO New England employee – reasoned that a three-year adder was sufficient to encourage a utility to join a Transmission Organization “and can be seen as compensating shareholders for any erosion of earnings that might occur during this finite period.”⁵³ While limiting the ROE Adder to the first three years of participation may be less remunerative than an (unjustified) adder that persists for the duration of

⁵⁰ See, e.g., MISO-SPP Comments at 5-10; MISO TOs Comments at 22-30 & Attachment 1; PJM Comments at 28-29; PJM TOs Comments at 25-28; WIRES Comments at 11-12.

⁵¹ See APPA Comments at 9; Certain TDUs Comments at 9-10 (discussing benefits to transmission owners); CPUC-CDWR Comments at 17-19 (discussing benefits); TAPS Comments at 5 (providing examples of utilities that have established corporate renewable goals that benefit investors).

⁵² *City of Detroit v. FPC*, 230 F.2d at 817.

⁵³ APPA Comments, Montalvo Declaration at ¶ 37. Mr. Montalvo worked at ISO New England for ten years, where he held the positions of Director of Market Development, Director of Internal Market Monitoring, and Director of Enterprise Risk Management. See *id.* at ¶ 2.

Transmission Organization membership, it would still provide a meaningful benefit to transmitting utilities.⁵⁴

Certainly the record does not support a finding that continuation of the adder for longer than three years is needed to prevent transmission owner *withdrawal* from Transmission Organizations. While opponents of the Supplemental NOPR offer qualified suggestions that adopting the Commission’s proposal could prompt some utilities to “reevaluate” or “reconsider” Transmission Organization participation, these assertions are conspicuously devoid of any evidence that withdrawal is actually likely to occur.⁵⁵ The initial comments, in fact, tend to confirm that the decision to withdraw from a Transmission Organization is influenced by numerous considerations – not all of them in the utility’s control – beyond the collection of an ROE Adder.⁵⁶ Indeed, eliminating the perpetual ROE Adder might make Transmission Organization participation more attractive to state and local policymakers, as it would reduce costs and increase the value proposition to consumers. Adoption of the Supplemental NOPR based on the record in this proceeding would comfortably satisfy the APA’s standards for reasoned decision-making.

⁵⁴ The SPP TOs calculate that the revised ROE Adder would still provide nearly 20% of the benefit of a 30-year ROE Adder on a net present value basis. *See* SPP TOs Comments at 8 n.29.

⁵⁵ *See, e.g.*, AEP Comments at 11 (elimination of the ROE Adder “would be a significant factor that AEP must consider in evaluating continued RTO participation”); California Utilities Comments at 6 (adopting the Supplemental NOPR could “potentially caus[e] utilities to leave” Transmission Organizations); Exelon Comments at 27 (“the Commission’s proposed policy will give Transmission Owners a reason to reconsider whether to continue their RTO membership and may prompt some to pursue alternative arrangements”); MISO TOs Comments, Attach. 1, p. 51 (“It is not inconceivable that in the long run, the elimination of the adder may have unintended consequences as TOs assess their options”); NETOs Comments at 7 (acknowledging that “the issue here is not necessarily whether transmission owners will withdraw from RTOs if the RTO Participation Incentive is eliminated”); PJM TOs Comments at 7 (eliminating the ROE Adder would “cause many utilities to reevaluate their RTO membership decisions”); WIRES Comments at 27 (“the Supplemental NOPR creates a risk that existing members will leave RTOs”).

⁵⁶ *See, e.g.*, WIRES Comments at 16 (arguing that “[t]he process of exiting an RTO is time consuming and costly. Invariably, as Commission experience has shown, departures from RTOs can trigger litigation over cost allocation responsibilities. The utility will need the approval of the RTO, state regulators, and the Commission.”).

Some commenters contend that the Supplemental NOPR does not comply with FPA section 206. WIRES, for one, argues that the Commission must find that its existing *regulations* are unjust and unreasonable before proceeding with the changes proposed in the Supplemental NOPR.⁵⁷ WIRES cites no precedent for this proposition beyond the text of FPA section 206 itself, which references “rule[s]” and “regulation[s].”⁵⁸ In the context of FPA sections 205 and 206, it is evident that the statute is referring to rules and regulations of *public utilities* that may affect rates, not the Commission’s regulations.⁵⁹ To be sure, the Commission must ensure that its rules will not *result* in unjust, unreasonable, or unduly discriminatory public utility rates and charges,⁶⁰ but the Commission need not find that a regulation itself is unjust and unreasonable before modifying it.⁶¹

Other commenters contend that the Commission must find that the rates of individual transmission owners currently collecting an ROE Adder are unjust and unreasonable before the Commission can require these transmission owners to eliminate the adder.⁶² The Supplemental NOPR is clear that it proposes to act under FPA section 206 in requiring transmitting utilities that have been Transmission Organization members for more than three years to eliminate the

⁵⁷ WIRES Comments at 8.

⁵⁸ *See id.* WIRES also cites *Emera Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017), but nothing in that decision addresses the alleged need for the Commission to find an existing rule or regulation unjust and unreasonable before amending it.

⁵⁹ For example, FPA section 205(d) requires public utilities to file changes in any “rate, charge, classification, or service, or in any *rule, regulation*, or contract relating thereto . . .” 16 U.S.C. § 824d(d) (emphasis added). This must refer to the utility’s rules and regulations, not FERC regulations, as it would make no sense to require a public utility to file changes to the Commission’s regulations.

⁶⁰ *See* 16 U.S.C. § 824s(d).

⁶¹ *Cf.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 514 (finding that the APA “makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.”).

⁶² *See, e.g.*, NETOs Comments at 24-25; Indicated New York Transmission Owners (“NYTOs”) Comments at 24; PPL Electric Utilities Corp. Comments at 12-13; SPP TOs Comments at 17.

adder.⁶³ The rationales cited in the Supplemental NOPR for limiting the ROE Adder to three years are more than sufficient to justify a finding that the rates of transmission owners that have collected the adder for more than three years have become unjust and unreasonable, and the Commission should so find.

Such a generic finding of unjust and unreasonable rates would be sufficient under FPA section 206 to require transmission owners to modify their tariffs to eliminate ROE Adders granted under the Commission's existing FPA section 219 regulations. The Commission has previously explained that it "is not required to make individual findings concerning the rates of individual public utility transmission providers when proceeding under FPA section 206 by means of a generic rule."⁶⁴ Rather, "[w]hen the Commission proceeds by rule it can conclude that any tariff violating the rule would have such adverse effects as to render it unjust and unreasonable within the meaning of section 206 of the FPA."⁶⁵ In this rulemaking proceeding, the Commission can make an unjust and unreasonable finding under FPA section 206 on a generic basis and require the filing of revised rates by public utility transmission providers in individual FPA section 206 proceedings.⁶⁶

Finally, there is no merit to arguments that implementing the Supplemental NOPR's proposals would constitute an improper retroactive rule change by the Commission.⁶⁷ These comments are simply attempts to repackage unconvincing "reliance" arguments as retroactive

⁶³ Supplemental NOPR at P 11.

⁶⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000-A, 139 FERC ¶ 61,132, at P 56 (citing *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987)).

⁶⁵ *Id.* (quoting *Associated Gas Distribs.*, 824 F.2d at 1008) (internal quotes and alterations omitted).

⁶⁶ Contrary to the arguments of a number of commenters, the Commission can find that an allowed ROE within the "zone of reasonableness" derived under the Commission's ROE-setting methodology is unjust and unreasonable under FPA section 206. *Emera Maine v. FERC*, 854 F.3d at 22-23 (rejecting the argument that the Commission must accept as just and reasonable all ROEs within the zone of reasonableness).

⁶⁷ See NETOs Comments at 41-42; NYTOs Comments at 26.

ratemaking objections. As discussed above, the Supplemental NOPR would obligate public utility transmission owners to make filings pursuant to FPA section 206 to limit the ROE Adder to three years. The rule would have a solely prospective effect; existing Transmission Organization members that are past the three-year membership threshold would not be required to refund any amounts collected under the adder as a result of the new rule, and members that turned over operational control fewer than three years ago would continue to be eligible to collect the adder prospectively until the three-period expires.

E. Any Reliance Interest in the Commission’s Existing Policy is Outweighed by the Cost to Consumers

Some transmission owners assert that the Commission must take into account the “serious reliance interests” engendered by the Commission’s longstanding policies.⁶⁸ While these commenters are correct that the Commission is required to consider any serious reliance interests in repealing an existing rule,⁶⁹ the Commission has “considerable flexibility” in addressing any such interests,⁷⁰ and the existence of reliance interests is “not necessarily dispositive.”⁷¹ Even if transmission owners that have collected the incentive ROE Adder for years could demonstrate a reliance interest (which, as discussed below, they cannot), the Commission is only required to acknowledge that interest and consciously weigh it against other factors.⁷² The Supplemental NOPR has specifically performed this analysis and reasonably

⁶⁸ See, e.g., EEI Comments at 12-16; Exelon Comments at 24-25; NETOs Comments at 17-18; PJM TOs Comments at 36-37 WIRES Comments at 13.

⁶⁹ See, e.g., *Dept. of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1915 (2020) (“*DHS v. Regents*”).

⁷⁰ *Id.* at 1914.

⁷¹ *Id.*

⁷² *Id.* at 1913-1915.

concludes that the adder no longer serves the purpose of inducing continued membership and that the cost to consumers far outweighs any theoretical reliance interest.

Transmission owners, in any event, had no reasonable reliance interest in the amount and duration of the incentive remaining unchanged. As noted above, FPA section 219(d) itself specifically contemplates that the Commission's rules under FPA section 219 may be revised, which undermines suggestions that the Commission's ROE Adder policies are somehow inviolable. Moreover, Order No. 679 explicitly refused to establish a fixed amount or duration for the incentive.⁷³ Potential changes in the Commission's policy on the ROE Adder are consistent with the fact that allowed equity returns are always subject to change, and transmission owners were on notice that the Commission could change its policies in a way that could impact ROE. To the extent transmission owners are claiming that they made investments in transmission projects in reliance on the 50-basis point ROE Adder, they fail to identify any specific investments made in reliance on the adder (generalized and vague claims of reliance should be discounted). And any such reliance would not be reasonable because the Commission made clear in Order No. 679 that the purpose of the Transmission Organization incentive adder is to induce transmission owners to remain in an RTO/ISO, not to build specific projects.⁷⁴

⁷³ See Supplemental NOPR at P 2; Order No. 679 at PP 326-27; APPA Comments at 8 n.27.

⁷⁴ See Order No. 679-A at P 87 (explaining that "Section 219(c), applicable to the Transmission Organization incentive, is separate from the construction incentives in subsection (b), and therefore was not intended to directly encourage construction.") (footnote omitted); Order No. 679-B at P 21 (explaining that the Transmission Organization incentive "is separate from incentives related to a utility's transmission construction program. Therefore, we clarify that Transmission Organization ROE incentive is not tied to the construction of new transmission facilities.") (footnote omitted); *see also* MISO TOs Comments at 12 n.33 (acknowledging that "the purpose of the RTO incentive is not directly to promote investment in transmission infrastructure (but rather is to promote RTO membership)").

F. The Supplemental NOPR Proposal is Not Unduly Discriminatory

Adopting a 50-basis point adder for voluntary Transmission Organization participation, limited to three years, would not be unduly discriminatory or preferential, as some opponents of the Supplemental NOPR contend.⁷⁵ Those commenters generally cite the Commission's conclusion in Order 679 that denying the incentive to utilities that had already joined an RTO would be unduly discriminatory.⁷⁶

As a threshold matter, the argument that a Commission rule that treats certain utilities differently amounts to undue discrimination misconstrues sections 205 and 206 of the FPA, which bar *public utilities* from engaging in “unduly discriminatory or preferential” treatment among their customers.⁷⁷ A utility that is not receiving an adder is not discriminating between customers.⁷⁸ While the Commission must provide a reasoned basis for treating similar situations differently, that is a requirement of the APA, not the FPA's prohibition on undue discrimination.⁷⁹

Even if the FPA's prohibition on undue discrimination applied in this context, limiting the ROE Adder to three years and/or to voluntary participation would not discriminate against utilities. It is axiomatic that the Commission's prohibition on undue discrimination only forbids

⁷⁵ See, e.g., AEP Comments at 34-35, 41; EEI Comments at 24; Exelon Comments at 26; NETOs Comments at 39-41; WIRES Comments at 16-17.

⁷⁶ Order No. 679 at P 331; Order No. 679-A at P 86.

⁷⁷ 16 U.S.C. §§ 824d and 824e.

⁷⁸ If anything, it would be unduly discriminatory to allow all customers in a Transmission Organization to be charged the same ROE Adder as an inducement for RTO/ISO participation when the transmission owners are not similarly situated as to the need for such inducement. Cf. *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 27-28 (D.C. Cir. 1982) (explaining that “charging the same price to two purchasers where the seller's costs with respect to each differ must . . . be considered discrimination”) (internal quotes and citations omitted).

⁷⁹ See, e.g., *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) (explaining that “It is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently.” (internal quotes, alterations and citations omitted)).

treating similarly situated parties differently (or treating differently situated parties similarly).⁸⁰

The Supplemental NOPR’s proposal would grant all transmission owners that join a Transmission Organization the same incentive – three years of a 50-basis point ROE Adder. It therefore treats all similarly situated entities in a similar manner. Nor would the rule discriminate against utilities whose participation is not voluntary. Such a utility is not “similarly situated” to a utility that is considering voluntarily joining a Transmission Organization.⁸¹

Order 679’s finding of undue discrimination – cited by a number of commenters – occurred in a very different context; the Commission was concerned that denying any incentive to some utilities because they had already joined but granting it to utilities that had yet to join would have treated similarly situated utilities differently.⁸² That is not the case with the Supplemental NOPR proposal.

G. Ignoring the Voluntariness of Joining a Transmission Organization Would Violate the FPA

The Supplemental NOPR requested comment on whether any Transmission Organization incentive should be limited to utilities that voluntarily join a Transmission Organization.⁸³ The initial comments of APPA, TAPS, and others explained that FPA section 219 requires the Commission to grant incentives only for voluntary participation.⁸⁴ Some commenters nonetheless maintain that the Commission should – or even must – award transmission

⁸⁰ See, e.g., *Cities of Riverside and Colton, Cal. v. FERC*, 765 F. 2d 1434, 1439-40 (9th Cir. 1985).

⁸¹ See *Maine Pub. Utils. Comm’n v. FERC*, 454 F.3d 278, 289 (D.C. Cir. 2006); *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 978 (9th Cir. 2018) (“*CPUC v. FERC*”).

⁸² See Order No. 679 at P 331.

⁸³ Supplemental NOPR at P 19.

⁸⁴ See, e.g., APPA Comments at 16-19; CPUC-CDWR Comments at 46-50; NECOS Comments at 12-14 & Exhibit NEC-0001 at ¶ 46; SMUD Comments at 4-7; TAPS Comments at 11-12.

incentives for involuntary participation in Transmission Organizations.⁸⁵ None of the arguments offered by these commenters is persuasive.

A number of parties argue that making involuntary RTO/ISO participants ineligible for an adder would improperly read a “voluntariness” requirement into section 219.⁸⁶ This misinterpretation of section 219 ignores Congress’ use of the word “incentive,” as well as the express admonition in section 219(d) that any such incentives must be just and reasonable.⁸⁷ An “incentive” necessarily includes the concept of voluntariness; the Commission can’t reasonably provide a utility an “incentive” to join a Transmission Organization when the utility is already *required* to join. Congress’ choice, moreover, to expressly reference the section 205 just and reasonable standard in section 219(d) incorporates the then-longstanding policy that a just and reasonable incentive must induce prospective, voluntary actions.⁸⁸

Consistent with this understanding of FPA section 219, the Commission’s ruling in *Dayton* correctly rejected arguments that the lack of an explicit reference to “voluntariness” in section 219 precludes the Commission from restricting the ROE Adder to voluntary participants.⁸⁹ The Commission indicated that Order No. 679 did not reject a voluntariness requirement, noting that allowing an adder for ongoing membership under Order No. 679 was based in part on the fact that such membership is “generally voluntary.”⁹⁰ The Commission also

⁸⁵ See, e.g., California Utilities Comments at 24-28; EEI Comments at 23-25; PJM Comments at 8-9, 20-22; PJM TOs Comments at 44-46.

⁸⁶ See, e.g., PJM Comments at 8-9; PJM TOs Comments at 44-46.

⁸⁷ See, e.g., RPGI Comments at 9 (observing that “[b]y including Section 219(d), Congress emphatically linked 21st Century rate treatments to a rich, century-old heritage of regulation to prevent the abuse of monopoly power and to achieve an informed balancing of ratepayer and investor interests so that utilities are compensated fairly for their cost of providing service and consumers do not overpay.”).

⁸⁸ See, e.g., APPA Comments at 16-19; TAPS Comments at 11-12.

⁸⁹ *Dayton*, 176 FERC ¶ 61,025, at PP 26-28.

⁹⁰ *Id.* at P 26 (quoting Order No. 679 at P 331).

explained that the Ninth Circuit “made clear” in *CPUC v. FERC* “that the voluntariness of a utility’s membership in an RTO is a necessary consideration in granting the RTO Adder.”⁹¹ Importantly, although the court’s decision in *CPUC v. FERC* primarily focused on whether the Commission had properly applied the requirements of Order No. 679, the Commission correctly acknowledged in *Dayton* that the Ninth Circuit recognized the need for a voluntariness requirement to comply with longstanding Commission policy under the just and reasonable standard that “an incentive cannot induce behavior that already is legally mandated.”⁹²

EEI argues that distinguishing between voluntary and involuntary participation in awarding an ROE Adder would distort the playing field in the competition for investment capital, directing investment away from states that mandate RTO participation.⁹³ *First*, as the Commission explained in *Dayton*, capital attraction requirements are addressed through a utility’s base ROE, and the denial of an incentive for involuntary Transmission Organization participation “is irrelevant to [the utility’s] base ROE and financial integrity, credit ratings, and *ability to attract investment*.”⁹⁴ *Second*, there is no compelling evidence that such uneven allocation of capital is likely to occur. As Mr. Montalvo explained in his declaration accompanying APPA’s initial comments, a 50-basis point difference in ROE is unlikely to have a discernable impact on transmission investment.⁹⁵ Transmission Owners around the country already have different ROEs,⁹⁶ and there is no requirement in the FPA that all transmission

⁹¹ *Id.* at P 28 (discussing *CPUC v. FERC*, 879 F.3d at 977-78).

⁹² *Id.* (citing *CPUC v. FERC*, 879 F.3d at 977-78).

⁹³ *See, e.g.*, EEI Comments at 24. Arguments that the voluntariness requirement is unduly discriminatory are addressed in section I.F, *supra*.

⁹⁴ *Dayton*, 176 FERC ¶ 61,025, at P 29 (emphasis added).

⁹⁵ APPA Comments at 16 & Montalvo Declaration at ¶ 21.

⁹⁶ *See id.*, Montalvo Declaration at ¶ 20; *see also* SPP TOs Comments at 19 (observing that “the base ROEs for transmission owners in RTOs vary by far more than the size of the 50-basis point RTO Participation Adder”).

owners be awarded the same ROE Adder in order to maintain a level playing field, irrespective of any factors that might bear on the ROE's determination.

Opponents of a voluntary participation requirement also contend that such a prerequisite will prompt litigation and uncertainty.⁹⁷ APPA and TAPS argued in their respective initial comments that the Commission should conduct a case-by-case assessment of the voluntariness requirement. While this may lead to case-specific hearings in instances where a utility's request for an ROE Adder raises disputed issues of fact concerning the voluntariness of its Transmission Organization participation, Order No. 679 appropriately adopted precisely that approach, and avoidance of litigation on such fact-specific questions would not be a reasoned basis for failing to comply with the statutorily and court-required voluntariness requirement.⁹⁸

Finally, considering state requirements on Transmission Organization participation in awarding incentives would not allow states to make determinations under FPA section 219 or otherwise tread on the Commission's jurisdiction.⁹⁹ The Commission retains full authority to determine eligibility for Transmission Organization participation incentives, but, in exercising that authority, it must take into consideration the relevant circumstances of the applicant, including whether state law – or some other legal requirement – compels the utility to participate in a Transmission Organization, thereby obviating the justification for awarding the adder as an inducement to RTO/ISO participation. Moreover, a state law requirement for Transmission Organization participation would advance, not conflict with, the purpose of FPA section 219(c) and the Commission's efforts to promote membership in Transmission Organizations.

⁹⁷ See, e.g., AEP Comments at 43; California Utilities Comments at 26; EEI Comments at 24; PJM Comments at 21; PJM TOs Comments at 46.

⁹⁸ See, e.g., *General Motors Corp. v. FERC*, 656 F.2d 791 (D.C. Cir. 1981) (remanding to the Commission for failure to justify its refusal to hold an evidentiary hearing).

⁹⁹ See, e.g., California Utilities Comments at 27-28; PJM TOs Comments at 45-46.

H. The Need for Transmission Investment Does Not Justify Costly and Unnecessary Incentives

Opponents of the Supplemental NOPR speculate about a parade of horrors that could arise if the Commission adopts the proposed rule, alleging that it will interfere with transmission investment, hinder the Biden administration's climate goals, and undermine faith in the Commission's use of incentives generally. As discussed in the initial comments of APPA and others, arguments that cessation of a perpetual ROE Adder will interfere with transmission investment are unsupported.¹⁰⁰ The comments filed by RPGI for example, show that, in the Midcontinent ISO, the ROE Adder "makes no difference whatsoever in reported gross plant additions."¹⁰¹ Similar data presented by Mr. Montalvo indicates that transmission investment may occur across a range of allowed ROEs.¹⁰² Further, to the extent that a 50-basis point adder does influence investment decisions, that influence may be harmful to consumers. As NECOS witness Dr. Jonathan Lesser explains, for example, an unnecessary above-cost incentive can exacerbate the Averch-Johnson effect and lead to inefficient transmission investment – hardly an outcome the Commission should seek to promote.¹⁰³

An ROE Adder limited to three years may provide a meaningful incentive to join Transmission Organizations without prompting withdrawal by existing Transmission Organization members. Speculation about how the Commission's change in incentive policy may be perceived by investors is not a valid basis to retain a perpetual ROE Adder that the

¹⁰⁰ See APPA Comments at 15-16; Certain TDUs Comments at 13-15; NECOS Comments at 11-14; RPGI Comments at 13-14.

¹⁰¹ RPGI Comments at 13-14 (comparing pre- and post-incentive gross plant additions).

¹⁰² See APPA Comments at 15-16 & Montalvo Declaration at ¶¶ 20-21.

¹⁰³ NECOS Comments at 9-10 & Exhibit NEC-0001 at ¶¶ 50-53; *see also, e.g.*, CPUC-CDWR Comments at 38 (noting that an unjustified ROE Adder can make transmission expansion more challenging); OPSI Comments at 6-7 (expressing concern that the ROE Adder has contributed to the proliferation of Supplemental Projects in PJM).

Commission has correctly suggested is currently imposing unjustified costs on transmission customers.

I. The Commission Should Allow for Targeted Incentives to Promote Joint Ownership of Transmission Facilities by Non-Public Utilities

In its initial comments, TAPS offered a proposal to encourage public utilities to extend joint ownership opportunities to transmission-dependent non-public utilities (“TDUs”). While urging the Commission to take steps to prevent circumvention of the proposed three-year duration limitation, TAPS urged 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.¹⁰⁴ APPA and TAPS reiterate the potential benefits of such a mechanism as part of an overall transmission incentive framework, especially given the pending March 2020 NOPR, which proposes to shift from a risks and challenges approach to benefits-based incentives, threatening the continued applicability of the 2012 Incentive Policy Statement’s¹⁰⁵ current joint ownership inducement as part of the risks and challenges approach.¹⁰⁶

II. CONCLUSION

APPA and TAPS endorse the Commission’s proposal to adopt a standard 50-basis point ROE incentive adder, limited to three years and the zone of reasonableness, as an incentive for

¹⁰⁴ 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. *See* TAPS Comments at 3, 22-25.

¹⁰⁵ *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129, at P 24 & n.33 (2012).

¹⁰⁶ *See* TAPS Comments at 17-22.

Transmission Organization participation, provided the incentive is only available for voluntary participation. The comments of public utility transmission owners and other parties that support a perpetual ROE Adder do not provide any persuasive basis to refrain from adopting the well-supported proposal included in the Supplemental NOPR.

Respectfully submitted,

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ATTACHMENT A

Proxy Companies Used in DCF and/or CAPM to Set Base ROE in Op. 569-A

Company	DCF/CAPM	Transmission in RTO/ISO?
Consolidated Edison, Inc.	DCF and CAPM	Yes
Public Service Enterprise Grp.	DCF and CAPM	Yes
PPL Corp.	DCF and CAPM	Yes
CenterPoint Energy, Inc.	DCF and CAPM	No
IDACORP Energy	DCF and CAPM	No
OGE Energy Corp	DCF and CAPM	Yes
Westar Energy Inc.	DCF and CAPM	Yes
Portland General Electric	DCF and CAPM	No
DTE Energy Co.	DCF and CAPM	No
PG&E Corp.	DCF and CAPM	Yes
The Southern Co.	DCF and CAPM	No
SCANA Corp.	DCF and CAPM	No
Xcel Energy Inc.	DCF and CAPM	Yes
Northwestern Corp.	DCF and CAPM	No
Duke Energy Corp.	DCF and CAPM	Yes
American Elec. Power Co. Inc.	DCF and CAPM	Yes
Vectren Corp.	DCF and CAPM	Yes
Alliant Energy Corp.	DCF and CAPM	No
Avista Corp.	DCF and CAPM	No
NextEra Energy	DCF and CAPM	No
Pinnacle West Capital Corp.	DCF and CAPM	No
Empire District Elec. Co.	DCF and CAPM	Yes
Dominion Resources, Inc.	DCF and CAPM	Yes
Eversource Energy	DCF and CAPM	Yes
Ameren Corp.	DCF and CAPM	Yes
El Paso Elec. Co.	DCF and CAPM	No
ALLETE Inc.	DCF and CAPM	Yes
CMS Energy Corp.	DCF and CAPM	No
Great Plains Energy, Inc.	DCF and CAPM	Yes
Otter Tail Corp.	DCF and CAPM	Yes
Black Hills Corp.	DCF and CAPM	No
Sempra Energy	DCF and CAPM	Yes
Exelon	DCF and CAPM	Yes
PNM Resources	DCF and CAPM	No
UIL Holdings	DCF and CAPM	Yes
TECO Energy	DCF and CAPM	No
ITC Holdings Corp.	DCF and CAPM	Yes
Edison International	CAPM	Yes
Entergy	CAPM	Yes
FirstEnergy Corp.	CAPM	Yes

Source: Op. No. 569-A, Appendix II; Trial Staff Initial Brief in Docket No. EL14-12 at Attachment A to App. 2, p. 6 (cited in Op. No. 569-A, Appendix III).