

**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 AND REQUEST FOR CLARIFICATION
OF THE ORGANIZATION OF MISO STATES, INC. AND THE ORGANIZATION OF
PJM STATES, INC.**

On April 15th, 2021, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a Supplemental Notice of Proposed Rulemaking (“Supplemental NOPR”) regarding its Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act (“FPA”).¹ The Organization of MISO States, Inc. (“OMS”) and the Organization of PJM States (“OPSI”) (collectively, the “Joint Committees”) appreciate the opportunity to share their views on the issues raised in the Supplemental NOPR.² The Joint Committees support the Commission’s proposal to leave the RTO-participation adder at 50 basis points while limiting its duration to three years after a utility hands over operational control of its transmission facilities.

The OMS is a non-profit, self-governing organization comprised of representatives from the seventeen regulatory bodies with jurisdiction over entities participating in the Midcontinent Independent System Operator (“MISO”) and serves as the regional state committee for the MISO region. The purpose of the OMS is to coordinate regulatory oversight among its members, to make recommendations to MISO, the MISO Board of Directors, the Commission, and other relevant government entities and state commissions as appropriate, and to intervene in proceedings before the Commission to express the positions of the OMS member agencies.

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

² The Minnesota Department of Commerce, an associate member of the OMS, joins these comments.

OPSI is a non-profit, self-governing organization comprised of representatives from the regulatory bodies with jurisdiction over entities participating in the P.J.M. Interconnection, L.L.C (“PJM”) and serves as the regional state committee. The purpose of OPSI is to coordinate regulatory oversight among its members, to make recommendations to PJM, the PJM Board of Directors, the Commission, and other relevant government entities and state commissions as appropriate, and to intervene in proceedings before the Commission to express the positions of the PJM member agencies.

Service of pleadings, documents, and communications in this proceeding should be made on the following:

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I. INTRODUCTION

State and local regulators have a mandate to ensure that retail customers pay just and reasonable rates, and the FPA was created to protect consumers from excessive costs.³ The OMS has been active and consistent in its position regarding ROE incentive adders for many years,

³ See *Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388-389, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-612, 64 S.Ct. 281, 88 L.Ed. 333 (1944); *Mun. Light Boards of Reading & Wakefield, Mass. v. Fed. Power Comm'n*, 450 F.2d 1341, 1348 (D.C. Cir. 1971) (“Its primary aim is the protection of consumers from excessive rates and charges.”)

arguing that this adder should not be granted in perpetuity,⁴ and its position on the role of incentives mirrors the Commission’s position.⁵ Similarly, OPSI has consistently opposed the existing nature of the RTO-participation adder due to concerns it unjustifiably and unreasonably increases costs imposed upon customers, contrary to FPA requirements.⁶ While incentives can be an effective means of mitigating risk that may be hampering beneficial transmission development, incentives must only be approved in accordance with the consumer protection considerations that are embedded in the FPA. Therefore, the Joint Committees support the Commission’s proposal as a step in the right direction towards an incentive program that balances the interests of utilities and consumers. Further, the Commission should only grant this incentive for the minimum

⁴ See *Promoting Transmission Investment Through Pricing Reform*, Comments of the Organization of MISO States, Docket No. RM11-26-000 (Sept. 12, 2011) (“granting a standard ROE adder to all companies that join an RTO is not the most effective way to encourage RTO participation”); *Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, Comments of the Organization of MISO States, Docket No. PL19-3-000 (June 26, 2019) (“The increasing maturity and broadening roles of RTOs, the increased ability to effectively hedge both operating and financial risks through RTO-sponsored activities, and the reduction in reliability risks attributable to RTO membership together make the permanent RTO-membership ROE adder redundant”); *Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, Reply Comments of the Organization of MISO States, Docket No. PL19-3-000 (Aug. 26, 2019) (“Joining and remaining in an RTO is a complex analysis that involves balancing many interests and receiving the RTO-participation adder is but one factor in an analysis to join or remain in an RTO. The OMS believes that today utilities receive sufficient benefits from membership in an RTO and that the RTO-participation adder is no longer needed to encourage Transmission Owners that have joined an RTO to remain in an RTO.”); *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Comments of The Organization of MISO States, Inc., The Southwest Power Pool Regional State Committee, Inc., and The Organization of PJM States, Inc., Docket No. RM20-10-000 (July 1, 2020) (Comments of the Joint State Committees) (“The Joint Committees ask the Commission to clarify why it is necessary to double the Regional Transmission Organization (“RTO”) participation adder and grant it in perpetuity, especially in light of well-documented benefits of RTO participation.”).

⁵ *California Pub. Utilities Comm’n v. Fed. Energy Regul. Comm’n*, 879 F.3d 966, 977 (9th Cir. 2018) citing *New England Power Pool*, 97 FERC ¶ 61,093 at 61,477 (2001), *order on reh’g*, 98 FERC ¶ 61,249 (2002) (“FERC has a longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced. This policy is incorporated in Order 679. The policy prohibits FERC from rewarding utilities for past conduct or for conduct which they are otherwise obligated to undertake.”)

⁶ See *Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, Comments of the Organization of PJM States, Inc. Docket No. PL19-3-000 (June 26, 2019) (suggesting an alternative framework for granting the RTO-participation adder using metrics based upon the specific requirements of FPA section 219(c); stating the “incentive granted under Subsection 219(c) that is ongoing in nature, such as an adder to the utility’s base ROE, should be discontinued on a showing that the ongoing cost of the incentive to consumers exceeds the ongoing benefit they receive.”); *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Comments of the Organization of PJM States, Inc., Docket No. RM20-10-000 (July 1, 2020) (stating that the RTO Participation Incentive “through its perpetuity encourages utilities to both join and remain in an RTO/ISO” and “goes beyond what is required by FPA Section 219(c)”) (emphasis in original) (citation omitted”).

amount of time necessary to incent the desired behavior, which could be less than three years. Granting any incentive beyond the timeframe needed to incent the desired behavior is unjust and unreasonable. The Joint Committees agree that the proposed 50 basis points adder is consistent with Commission practice and precedent. However, the Commission need not be bound by its precedent if it articulates a reasonable explanation for departure. The numerous benefits of belonging to a Regional Transmission Organization (“RTO”) should be incentive enough for joining.

Lastly, should the Commission implement this Supplemental NOPR as proposed, the OMS seeks clarification on whether the incentive would apply to new transmission projects owned by utilities that have already been a member of a Transmission Organization for more than three years.

II. THE COMMISSION’S PROPOSAL

In the Supplemental NOPR, the Commission is seeking comment on its proposal to codify a 50 basis points incentive adder for utilities that join a Transmission Organization and to make it available for the first three years after the utility hands over operational control of its transmission assets.⁷

The Commission proposes to require utilities that have received this incentive for three or more years to revise their tariffs to remove this incentive,⁸ and the Commission seeks comment on the appropriateness of the three-year duration for this incentive.⁹ This is different from the

⁷ Supplemental NOPR at P 2, 5.

⁸ *Id.* at P 3

⁹ *Id.* at P 9

March 2020 NOPR (“March NOPR”) which proposed to raise this incentive to 100 basis points and grant it in perpetuity.¹⁰

This Supplemental NOPR also seeks comment on whether this incentive should be available to transmitting utilities that are required to join an RTO. If so, the Commission asks for comment on how it should make this determination and whether there should be exceptions.¹¹

The Commission does not address or seek comment on the other aspects of the March NOPR.¹²

III. REQUEST FOR CLARIFICATION

The OMS requests the Commission clarify whether it intends to grant this incentive to new projects built by utilities that are members of a Transmission Organization, i.e., whether this incentive applies to new assets in addition to new entities. If so, the OMS asks for modification of the proposal to apply only to new entities and not new assets.

The Joint Committees also requests clarification regarding whether a subsidiary of a utility which has already turned over control of its transmission assets to a Transmission Provider can receive this adder.

IV. COMMENTS

A. The Federal Power Act Exists for the Benefit of Consumers

As the OMS has emphasized in its previous comments in this docket, the FPA is a consumer-protection statute.¹³ The OMS Board in its December 2018 letter to FERC was

¹⁰ *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Proposed Rulemaking, 85 FR 18784, 170 FERC ¶ 61,204 at P 99, errata notice, 171 FERC ¶ 61,072 (2020) (March NOPR).

¹¹ Supplemental NOPR at PP 5-6, 19.

¹² *Id.* at P 3

¹³ Comments of the Joint State Committees at 5. *See, e.g.*, Pa. Water & Power Co. v. FPC, 343 U.S. 414, 418 (1952); New England Power Generators Ass’n v. ISO New England Inc., 146 FERC ¶ 61,038 at P 26 & n.33 (2014); *See Atlantic Refining Co. v. Public Service Comm’n*, 360 U.S. 378, 388-389, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-612, 64 S.Ct. 281, 88 L.Ed. 333 (1944); *Mun. Light*

(continued)

interested in making sure that consumers “pay no more than is necessary to develop and maintain a reliable and efficient transmission grid.”¹⁴ It stated that incentives exist to ensure that the grid is both reliable and efficient and that any return utilities receive above a level needed to maintain this standard is not just and reasonable.¹⁵

On December 21, 2018, the OPSI Board of Directors also sent a letter to the Commission stating that transmission incentives, “should reflect specific goals and risks to be truly merited. OPSI has concerns that at least some incentive adders have become overly generous and do not change or incent the intended behavior... resulting in excessive costs to customers.”¹⁶

While the FPA requires that the Commission “provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization,”¹⁷ an analysis that stops at this language and does not consider whether the resulting rate treatment is just and reasonable is an incomplete analysis.¹⁸ A complete analysis must not only ask whether the utility meets the requirements of Section 219(c) but also whether the resulting rate is just and reasonable.¹⁹

Boards of Reading & Wakefield, Mass. v. Fed. Power Comm'n, 450 F.2d 1341, 1348 (D.C. Cir. 1971) (“Its primary aim is the protection of consumers from excessive rates and charges.”)

¹⁴ Organization of MISO States, Letter at 2 (Dec 19, 2018) (“OMS December Letter”) available at: https://www.misostates.org/images/stories/Filings/FERC/2018/ROE_Incentive_Letter_to_FERC_12-18-18_final_with_signature.pdf (last accessed on June 25, 2021).

¹⁵ *Id.*

¹⁶ Organization of PJM States, Letter at 1, (December 21, 2018) (“OPSI December Letter”) available at: <https://opsi.us/wp-content/uploads/2019/03/FERC-Letter-Transmission-ROE-Incentive-Policy-Leter-12.21.18.pdf> (last accessed on June 25, 2021).

¹⁷ 16 U.S.C. 824s(c).

¹⁸ Supplemental NOPR, Commissioner Danly Dissent at P 2; Supplemental NOPR, Commissioner Chatterjee Dissent at P 2 (Commissioner Danly’s self-described stilted Latinate expression “the utility joins; the Commission provides” shares the same logical flaws as Commissioner Chatterjee’s analysis that because the statute does not include the words *voluntarily* or *newly joined* that the Commission is not legally allowed to limit the duration of this incentive. Both are flawed because these frameworks allow for unjust and unreasonable results that run afoul of the FPA because they would allow the Commission to grant incentives that do not change a utility’s behavior.)

¹⁹ 16 U.S.C. 824s(d) (“All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”)

Commissioner Christie gets it right in his concurrence when he writes, “ROE adders needlessly burden customers without showing they actually incentivize their desired conduct.”²⁰ He writes that utility regulation exists to protect consumers from the exercise of market power which would unjustly transfer wealth from consumer to a monopoly utility.²¹

The Joint Committees urge the Commission to not only take consumer protection into account in this proceeding but to put it at the forefront of any ROE analysis as the FPA requires. Doing so requires the Commission to grant ROE incentive adders in only those instances where it can be shown that these incentives directly influenced a utility’s decision to join an RTO. It is safe to say that those entities that have not joined an RTO at this point in time would likely be influenced by this type of adder and given that one third of US customers are not served by utilities in an RTO, it could easily be considered a targeted incentive.

B. Only Incentives that Actually Incentivize Something Benefit Consumers

In its 2018 letter to the Commission, the OMS questioned the value of the RTO-participation adder and called on the Commission to cease granting this incentive in perpetuity due to the reduced risk utilities now face with respect to RTO participation.²² OPSI likewise wrote, “A prime example of a questionable adder, and one of most concern, is the ROE adder

²⁰ Supplemental NOPR, Commissioner Christie Concurrence at P 2.

²¹ *Id.* at P 2-3.

²² OMS December letter at 1-2. (“The RTO adder is of particular concern and warrants scrutiny by FERC. And the most concerning element is that this adder will last in perpetuity. However, the landscape has changed drastically since 2006 when these adders were first initiated. After more than 15 years of experience with RTOs, the resulting benefits to utility members are now better understood. RTOs are no longer a new policy experiment. Moreover, transmission owners may no longer need an additional incentive adder to simply join an RTO. FERC should assess whether it is just and reasonable to allow the collection of an additional 50 basis points on all existing and incremental rate base indefinitely for every transmission owner in every RTO.

“Additionally, over the years, FERC has provided regulatory mechanisms such as formula rates, projected revenue requirements that are trued up to capture any under-recovery, abandoned plant and construction work in progress, all of which reduce transmission owners’ risk and should be carefully examined in the context of this and other ROE incentives.”)

incentive for RTO participation. Currently, transmission owners receive an additional 50 ROE basis points for doing nothing other than being a member of an RTO.”²³

The OMS was, and remains, concerned that granting incentives that are not targeted will reduce the Commission’s ability to incentivize more beneficial conduct.²⁴ For example, the Commission is currently considering ways to incent Grid Enhancing Technologies,²⁵ and the Joint Committees look forward to working with the Commission to incent desired actions that would not otherwise have occurred, including the deployment of advanced technologies. Granting this incentive for longer than it is needed to incent the desired conduct will limit the Commission’s ability to incent the use of these technologies and other beneficial actions.

While a uniform incentive that does not inquire into what risk it reduces is a handout that does not protect consumers, a targeted and time-limited incentive in line with the proposed incentive could help utilities overcome transitional challenges such as the steep learning curve and staffing challenges associated with RTO participation. If utilities are still reluctant to join a Transmission Organization, it is not because they will lose money by joining because transmission owners can recover all prudently incurred costs associated with joining a Transmission Organization. The Commission should consider what other barriers exist to RTO participation and holistically review how the requirements the Commission places on RTOs could serve as a barrier to new membership. The Commission should do this as part of a larger detailed exploration of what incentives generally may be more appropriate than an ROE adder.

²³ OPSI December Letter at 1.

²⁴ OMS December letter at 1.

²⁵ *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Workshop, Docket Nos. RM20-10-000 and AD19-19-000 (April 15, 2021).

C. The Commission Should Remain Flexible in Approving this Incentive When Utilities are Legally Required to Join a Transmission Organization

The Commission asks if this incentive should only be available for utilities that join a Transmission Organization voluntarily.²⁶ Ideally, the Commission should not grant an incentive when the action it seeks to incentivize is legally required. That said, it is impossible to know whether the fact that a utility will receive this adder was the single deciding factor that ultimately led a group of regulators to require a utility to join an RTO. Nonetheless, this should not prevent regulators from being able to take into account the fact that a utility will receive this adder when requiring a utility to join an RTO. The Commission should allow state and local decisionmakers the flexibility to rely on this incentive in making determinations on whether to require a utility to join a Transmission Organization. Doing so will allow the Commission the room to properly analyze whether it is appropriate to grant this incentive adder to utilities that are legally required to join a Transmission Organization.

D. The Commission Should Prioritize the Use of Non-ROE Adder Incentives and Comprehensively Evaluate Disincentives to RTO Participation

The Commission asks for comment on whether there are other non-ROE incentives that would be more appropriate to incent transmission owners to join a Transmission Organization.²⁷ The Joint Committees encourage the Commission to prioritize the use of non-ROE incentives and only grant an ROE adder when non-ROE adders cannot incent the desired behavior. In its December 2018 letter, OPSI wrote, “over the years, FERC has provided regulatory mechanisms such as formula rates, abandoned plant recovery and construction work in progress recovery, all of which reduce transmission owners’ risk and the need for this incentive adder.”²⁸ The Joint

²⁶ Supplemental NOPR at P 17

²⁷ *Id.* at P 14

²⁸ OPSI December Letter at 2.

Committees encourage the Commission to consider whether RTO participation could be more appropriately incentivized with a non-ROE adder to mitigate the staffing and governance concerns that utilities may have when joining an RTO.

The Commission should also evaluate the barriers that exist for those entities that have not joined an RTO, and the reasons for those who currently express their intent to join an RTO in the future, to understand how to target and incent their participation. The need for flexibility, or a novel role for regulators, including more meaningful methods of participation and involvement than they have in existing RTO processes, may be sufficient to alleviate some jurisdictional concerns, but the Joint Committees encourage the Commission to think broadly when granting non-ROE incentives to encourage utilities to join an RTO. The Commission should balance the incentives it grants with the disincentives to join and the obligations of RTO membership that utilities take on when they join an RTO. These disincentives placed on utilities could discourage future RTO participation.

E. The Commission Should not Revisit the March 2020 NOPR Except to Eliminate the Transco Adder

Finally, while this Supplemental NOPR only addresses a single proposal from the March 2020 NOPR, the Joint Committees encourage the Commission not to revisit other aspects of the March NOPR except for the proposal to eliminate the Transco adder.²⁹ Because this incentive does not incentivize beneficial conduct, it should be eliminated.

Further, the Joint Committees do not believe that a benefits-based approach would be preferable to the Commission's current "risks and challenges" based approach, and the Joint

²⁹ March NOPR at P 7, 91.

Committees took issue with that NOPR's lack of a framework to ensure that incentives actually benefit consumers.³⁰

Among other things, the Joint Committees did not see how granting an ROE incentive adder to projects that are already economically beneficial would benefit consumers, nor what reliability benefits beyond what the NERC standards already required would be provided by this incentive.

The Joint Committees also took issue with the Commission's proposal to cap incentives at 250 basis points which would no longer be bound by the zone of reasonableness because this limits the Commission's ability to ensure just and reasonable rates.

V. CONCLUSION

Wherefore, the Joint Committees support the Commission's decision to cap this incentive at 50 basis points and to limit the duration of this incentive and ask the Commission to clarify its proposal. The Joint Committees submit these Comments because a majority of each committees' members have agreed to generally support them. Individual members reserve the right to file separate comments regarding the issues discussed in these comments. The following members generally support this filing:

OMS

Arkansas Public Service Commission
Illinois Commerce Commission
Indiana Utility Regulatory Commission
Iowa Utilities Board
Kentucky Public Service Commission
Louisiana Public Service Commission
Michigan Public Service Commission
Minnesota Public Utilities Commission
Mississippi Public Service Commission
Missouri Public Service Commission
Montana Public Service Commission
The Council of the City of New Orleans

North Dakota Public Service Commission
South Dakota Public Utilities Commission
Public Utility Commission of Texas
Public Service Commission of Wisconsin

The Manitoba Public Utilities Board did not participate in the vote on these comments.

³⁰ Comments of the Joint State Committees at 7.

OPSI

Public Service Commission of the District of
Columbia

Illinois Commerce Commission
Indiana Utility Regulatory Commission
Kentucky Public Service Commission
Maryland Public Service Commission
Michigan Public Service Commission
Tennessee Public Utility Commission

Public Utilities Commission of Ohio

The Delaware Public Service Commission,
New Jersey Board of Public Utilities,
North Carolina Utilities Commission,
Pennsylvania Public Utility Commission,
Virginia State Corporation Commission,
and Public Service Commission of West
Virginia abstained.

Respectfully submitted,

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Dated June 25th, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list prepared by the Secretary for the above-captioned docket in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.2010.

DATED at Madison, Wisconsin this the 25th of June 2021.

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