UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act	))	Docket No. RM20-10-000

COMMENTS OF THE STATE ENTITIES

Pursuant to the Federal Energy Regulatory Commission's April 15, 2021 Supplemental Notice of Proposed Rulemaking[1] in the above-referenced proceeding, Connecticut Attorney General William Tong, California Attorney General Rob Bonta, Illinois Attorney General Kwame Raoul, Maryland Attorney General Brian Frosh, Massachusetts Attorney General Maura Healey, Michigan Attorney General Dana Nessel, New Jersey Attorney General Gurbir Grewal, Pennsylvania Attorney General Josh Shapiro, Rhode Island Attorney General Peter F. Neronha, Thomas J. Donovan, Jr. Attorney General of Vermont, Karl A. Racine, Attorney General for the District of Columbia, Katherine S. Dykes, Commissioner of the Connecticut Department of Energy and Environmental Protection, the Connecticut Office of Consumer Counsel, the Maine Office of the Public Advocate, Rhode Island Division of Public Utilities and Carriers, Maryland Office of People's Counsel, and Office of the People's Counsel for the District of Columbia (together, "State Entities") provide the following comments.

As detailed below, the State Entities oppose overgenerous incentives for participation by transmission utilities in Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"), particularly if such participation is mandatory. State Entities support reforms

[1] *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 175 FERC ¶ 61,035 (Apr. 15, 2021) (Supplemental Transmission Incentives NOPR).

designed to limit any such incentives to the minimum amount necessary to encourage the desired goal at least cost to ratepayers.

INTRODUCTION AND BACKGROUND

On April 15, 2021, the Federal Energy Regulatory Commission (the "Commission") issued a Supplemental Notice of Proposed Rulemaking in Docket No. RM20-10-000 on transmission rate incentives ("Supplemental Transmission Incentives NOPR").[2] In the Supplemental Transmission Incentives NOPR the Commission proposes to modify the incentive proposed earlier in this rulemaking proceeding for transmission and electric utilities[3] that join a Regional Transmission Organization or Independent System Operator (collectively, "Transmission Organization").[4] The Supplemental NOPR proposes, pursuant to FPA Section 206, to limit the incentive to 50 basis points and to require each utility that has already received an incentive for joining and remaining in a transmission organization for three or more years to submit a compliance filing revising its tariff to remove the incentive from its transmission tariff.[5] The Supplemental Transmission Incentive NOPR makes no changes to other proposals in the March 20, 2020 Transmission Incentives NOPR.

[2] *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 175 FERC ¶ 61,035 (Apr. 15, 2021), *available at* https://www.ferc.gov/sites/default/files/2021-04/RM20-10-000-041521.pdf.

[3] A transmitting utility is defined as "an entity … that owns, operates, or controls facilities used for the transmission of electric energy." 16 U.S.C. § 796(23). An electric utility is defined as 'a person or Federal or State agency … that sells electric energy." *Id.* § 796(22).

[4] A Transmission Organization is defined as a "Regional Transmission Organization [RTO], Independent System Operator [ISO], independent transmission provider, or other organization finally approved by the Commission for the operation of transmission facilities." 16 U.S.C. § 796(29). For consistency with Federal Power Act ("FPA") section 219, in this final rule, we use "Transmission Organization," rather than "RTO/ISO," as the Commission did in *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Proposed Rulemaking, 85 FR 18784, 170 FERC ¶ 61,204, *errata notice*,171 FERC ¶ 61,072 (2020)("March 2020 NOPR").

[5] Supplemental Transmission Incentives NOPR at P 5.

The State Entities

The Connecticut Attorney General ("CTAG") is an elected Constitutional official and the chief legal officer of the State of Connecticut. CTAG's responsibilities include intervening in various judicial and administrative proceedings to protect the interests of the citizens and natural resources of the State of Connecticut and in ensuring the enforcement of a variety of laws of the State of Connecticut, including Connecticut's Unfair Trade Practices Act and Antitrust Act, so as to promote the benefits of competition and to assure the protection of Connecticut's consumers from anti-competitive abuses. CTAG's request for leave to intervene in these proceedings is in furtherance of these overall responsibilities.[6]

The California Attorney General is the chief law officer of the State of California.[7] With exceptions not relevant here, the California Attorney General has charge, as attorney, of all legal matters in which the State is interested.[8] More specifically, the California Legislature has authorized the California Attorney General to intervene in any administrative proceeding upon a showing that the proceeding involves conduct, programs, or products which may have the effect of impairing, polluting, or destroying the natural resources of California.[9] Such natural resources include land, water, or any other natural resources that may contribute to the health, safety,

[6] The CTAG has previously initiated or intervened in a number of recent Commission proceedings addressing important policy issues affecting the electric industry and electric ratepayers in Connecticut and New England. These proceedings include Commission Docket Nos: AD18-7, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*; RM18-1, *Grid Reliability and Resiliency Pricing*; RP16-301, *Iroquois Gas Transmission System, LP*; ER16-1023, *ISO New England, Inc., et al;* EL16-19, *ISO New England, Inc.;* CP16-21, *Tennessee Gas Pipeline Company, L.L.C.*; ER-13-185, *ISO New England, Inc.;* EL-13-033; *Environment Northeast, et al. v. Bangor Hydro-Electric Company, et al.*; ER12-1455, *ISO New England, Inc.;* ER12-953, *ISO New England, Inc.;* EL11-66, *Martha Coakley, Massachusetts Attorney General, et al.* v. *Bangor Hydro-Electric Company, et al.*; IN12-007, *Constellation Energy Commodities Group, Inc.*; ER11-1943, *ISO New England, Inc.*

[7] Cal. Constitution, Art. V, § 13.

[8] Cal. Gov't Code § 12511.

[9] Cal. Gov't Code § 12612.

welfare, or enjoyment of a substantial number of persons.[10] Therefore, the California Attorney General has the "unique authority to protect the environment of the State of California."[11]

The Office of the Illinois Attorney General represents the People of the State of Illinois on public utility issues in proceedings before state and federal regulatory agencies and in state and federal courts. The Illinois Attorney General is directed by statute "to protect the rights and interests of the public in the provision of all elements of electric . . . service both during and after the transition to a competitive market, and . . . to ensure that the benefits of competition in the provision of electric . . . services to all consumers are attained."[12] Further, the Illinois Attorney General is vested "with responsibility to initiate, enforce and defend all legal proceedings on matters relating to the provision, marketing, and sale of electric . . . service whenever the Attorney General determines that such action is necessary to promote or protect the rights and interests of all Illinois citizens, classes of customers, and users of electric . . . services."[13]

The Massachusetts Attorney General is the chief legal officer of the Commonwealth of Massachusetts and is authorized by both state common law and by statute to institute proceedings before state and federal courts, tribunals and commissions as she may deem to be in the public interest. The Massachusetts Attorney General is further authorized expressly by statute to intervene on behalf of public utility ratepayers in proceedings before the Commission and has appeared frequently before the Commission.[14]

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[10] Cal. Gov't Code § 12605.

[11] *City of Long Beach v. City of Los Angeles*, 19 Cal.App.5th 465, 476 (2018).

[12] 15 ILCS 205/6.5(b).

[13] 15 ILCS 205/6.5(c).

[14] Mass. Gen. Laws ch. 12, § 11E.

The Attorney General of Maryland is the State's chief legal officer with general charge, supervision, and direction of the State's legal business. The Attorney General has the authority to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. The Attorney General has previously commented on proposed rules and intervened in actions before the Commission.[15]

Dana Nessel is the duly elected and qualified Attorney General of the State of Michigan and holds such office by virtue of and pursuant to the provisions of the Const 1963, art 5, § 21, and mandate of the qualified electorate of the State of Michigan, and she is head of the Department of Attorney General created by the Executive Organizations Act, 1965 PA 380, ch 3, MCL 16.150 *et seq*. The Michigan Attorney General has the right, by both statutory and common law, to intervene and appear on behalf of the People of the State of Michigan in any court or tribunal, in any cause or matter, civil or criminal, in which the People of the State of Michigan may be a party or interested.[16]

The Rhode Island Attorney General is a public officer charged by common law and by statute with representing the State of Rhode Island, the public interest, and the people of the State. This includes representation with respect to electric or gas industry matters that affect electric or gas consumers in Rhode Island. In Rhode Island, "the Attorney General is entitled to act with a significant degree of autonomy, particularly since the Attorney General is a constitutional officer and is an independent official elected by the people of Rhode Island."[17]

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[15] Md. Const. art. V, § 3(a)(2); Md. Code Ann., State Gov't § 6-106.1.

[16] MCL 14.28; *People v O'Hara,* 278 Mich 281; 270 NW2d 298 (1936); *Gremore v Peoples Community Hospital Authority,* 8 Mich App 56; 153 NW2d 377 (1967); *Attorney General v Liquor Control Comm'n,* 65 Mich App 88; 237 NW2d 196 (1975); *In re Certified Question,* 465 Mich 537, 543-545; 638 NW2d 409 (2002).

[17] *State v. Lead Indus., Ass'n, Inc.,* 951 A.2d 428, 474 (R.I. 2008).

Under the common law, he is the representative of the public, obligated to protect the public interest and empowered to bring actions to redress grievances suffered by the public as a whole.[18] Here, the Attorney General, through his designated Environmental Advocate, and pursuant to the Environmental Rights Act, R.I. Gen. Laws § 10-20-1, *et seq*., has a separate statutory right and obligation to "take all possible action" to protect the right of each Rhode Islander to "the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state." *See* R.I. Gen. Laws § 10-20-1 and § 10-20-3(d)(5). Accordingly, the Rhode Island Attorney General has the unique authority to protect the environment of the State of Rhode Island.

The Vermont Attorney General is authorized to represent the state of Vermont in civil proceedings involving the state's interests, when, in his judgment, the interests of the state so require. Vt. Stat. Ann. tit. 3 ch. 7.

The Attorney General for the District of Columbia is an elected official who is the chief legal officer for the District of Columbia. The Attorney General is statutorily charged with conducting all of the law business of the government of the District of Columbia and is afforded all common law powers traditionally conferred upon state Attorneys General, including upholding the public interest. D.C. Code § 1-301.81(a)(1). In particular, the Attorney General has "the power to intervene in legal proceedings on behalf of this public interest." *Id.*

The Connecticut Department of Energy and Environmental Protection has statutory authority over the state's energy and environmental policies and is obligated to ensure that the state has adequate and reliable energy resources.[19] The Department is further tasked with

[18] The Rhode Island Attorney General "'has a common law duty to protect the public interest.'" Id. at 471 (*quoting Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005).

[19] Conn. Gen. Stat. §§ 22a-2d; 16a-3a.

interacting with the regional transmission operator in response to state and regional energy needs and policies. The Department also is responsible to ensure that the state's decarbonization goals are met.[20]

The Connecticut Office of Consumer Counsel is the statutorily designated ratepayer advocate in all utility matters concerning the provision of electric, natural gas, water, and telecommunications services. The Office of Consumer Counsel is authorized by statute to intervene and appear in any federal or state judicial and administrative proceedings where the interests of utility ratepayers are implicated.

The Maine Office of the Public Advocate is charged by Maine statue to represent the interests of consumers of utility services[21] and is authorized to intervene in federal proceedings "in which the subject matter of the action affects the consumers of any utility doing business in this State."[22]

The Maryland Office of People's Counsel is an independent state agency that represents the interests of residential consumers in utility cases. Pursuant to Maryland Public Utilities Code Annotated, §2-205(b)(2019), the People's Counsel "may appear before any federal or state agency as necessary to protect the interests of residential…users [of gas, electricity or other regulated services]."

The Rhode Island Division of Public Utilities and Carriers is the statutorily designated ratepayer advocate in all utility matters concerning the provision of electric, natural gas, water, and telecommunications services. *See* R.I. Gen. Laws §§ 39-1-1(c) & 39-1-19(b). Moreover,

[20] Conn. Gen. Stat. § 22a-200.

[21] 35-A M.R.S.§ 1701 *et. seq.*

[22] 35-A M.R.S.§ 1702(5).

pursuant to R.I. Gen. Laws § 39-1-29, the Division of Public Utilities and Carriers is mandated to represent state interests in any federal administrative proceedings affecting public utility services in the state.

The Office of the People's Counsel for the District of Columbia ("DC OPC") is an independent agency of the District of Columbia ("District") and the statutory advocate of District consumers and ratepayers. Pursuant to D.C. Code §34804(d), DC OPC may "represent and appeal for the people of the District of Columbia" in proceedings before FERC when those proceedings "involve the interests of users of the products of or services furnished by" the District's public utilities.

Section 219 of the FPA

Prior to 2005, the Commission considered requests for transmission incentives pursuant to section 205 of the FPA.[23] In 2005, Congress amended the FPA to address incentives policy.[24] In 2006, the Commission implemented section 219 by issuing Order No. 679, which established the Commission's basic approach to transmission incentives and enumerated a series of potential incentives that the Commission would consider.[25] The Commission subsequently refined its approach to transmission incentives in a 2012 incentives policy statement, which provided guidance on the Commission's interpretation of Order No. 679 and its approach toward granting transmission incentives, but did not alter the Commission's regulations or Order No. 679's basic approach to granting transmission incentives.[26]

[23] 16 U.S.C. § 824d; *see also Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006).

[24] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241.

[25] Order No. 679, *Promoting Transmission Investment through Pricing Reform*, 116 FERC ¶ 61,057 (2006).

[26] *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,149 (2012).

Overall, Section 219 of the FPA recognized the need for capital investment in transmission and required the Commission to "establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[27] Congress included among its goals promoting "capital investment in the enlargement, improvement, maintenance and operation of all facilities for the transmission of electric energy in interstate commerce." A central tenet of Section 219 is that incentives are to ensure the reliability of the transmission system and reduce the cost of delivered power by reducing transmission congestion.[28]

Contents of the Supplemental NOPR

The Supplemental Transmission Incentives NOPR makes three principal changes from the March 2020 NOPR. The Supplemental Transmission Incentives NOPR would limit the incentive to joining a Transmission Organization to 50 basis points, would limit the incentive to only three years, and invites comment on whether the incentive should apply at all to utilities that are obligated to join a Transmission Organization.[29]

Specifically, the Commission states "that it is reasonable to read FPA section 219(c) to direct the Commission to provide an incentive for 'join[ing]' a Transmission Organization and not for remaining in a Transmission Organization in perpetuity."[30] The Supplemental Transmission Incentives NOPR notes that providing "the incentive indefinitely may not be necessary to incentivize a transmitting utility to join a Transmission Organization and, given the large impact

[27] 16 U.S.C. § 824s.

[28] 16 U.S.C. § 824s.

[29] Supplemental Transmission Incentives NOPR at P 5.

[30] *Id.* at P 6.

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."[31]

Accordingly, the Supplemental Transmission Incentives NOPR proposes to limit the return on equity ("ROE") adder to a period of three years after a transmitting utility joins a Transmission Organization.[32] This incentive would not be available if the transmitting utility has previously been a member of a Transmission Organization.[33]

The second significant change in the Supplemental Transmission Incentives NOPR is the Commission's proposed finding that limiting the Transmission Organization Incentive to 50 basis points "provides a material incentive to join a Transmission Organization without unduly burdening ratepayers."[34] This is a material change from the Transmission Incentives NOPR, which suggested a 100-basis-point adder.[35]

Finally, the Supplemental Transmission Incentives NOPR seeks comment regarding whether the Transmission Organization Incentive should be available only to transmitting utilities that join a Transmission Organization voluntarily.[36] This, of course, is at variance with the March 2020 NOPR, which provided the incentive even if a utility was obligated to join a Transmission Organization.[37]

[31] *Id.* at P 8.

[32] *Id.* at P 9.

[33] *Id.* at P 10.

[34] *Id.* at P 12.

[35] *Id.* at P 13.

[36] *Id.* at P 19.

[37] *Id.*

ARGUMENT

The State Entities have long advocated for a more reliable and efficient transmission system, at least cost to ratepayers, that also respects and accommodates state policies. In the context of incentives, the record in this matter contains no evidence that any financial incentive is needed to encourage participation in a Transmission Organization. The State Entities strongly agree that any such incentive should be limited and reduced to the maximum extent possible. The State Entities, consistent with their statutory duties to protect consumers, urge the Commission to scrutinize any proposed incentive consistent with its obligation under the FPA to ensure that consumers are not charged excessive costs. *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016).

I. An Incentive Should Incent Conduct and Transmission Owners Already Receive Substantial Benefits from Participating in a Transmission Organization.

The State Entities agree with the fundamental principle expressed in Chair Glick's dissent in the March 2020 NOPR:

> [I]ncentives must actually incentivize something. A payment that does not incentivize anything is a handout, not an incentive. Handing out customers' money to transmission owners without a strong belief that that money will induce beneficial conduct is unjust and unreasonable and inconsistent with Congress' intent behind section 219.[38]

This is not a new principle. Courts have long recognized that incentives must be granted to "facilitate investment," not to "reward investments that would happen in any event." *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 130 (D.C. Cir. 2019); *see also Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 970 (9th Cir. 2018) (granting petition for review and remanding

[38] March 2020 NOPR, Partial Dissent at P 4.

for a determination on whether the purportedly incentivized conduct was mandated or voluntary). In fact, the Commission may only award transmission incentives if they materially affect investment decisions. *See San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 138 (9th Cir. 2019) (quoting Order No. 679-A, 117 FERC ¶ 61,345 at P 25 (2006)). This, of course, is consistent with the fundamental and long established position that the Commission must closely scrutinize the proposed incentives consistent with its duty under the FPA to ensure that consumers are not charged excessive costs. *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016); *see also Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1207 (D.C. Cir. 1987) (Starr, J., concurring ("The Commission stands as the watchdog providing 'a complete, permanent and effective bond of protection from excessive rates and charges.'" (quoting *Atl. Ref. Co. v. Pub. Service Comm'n*, 360 U.S. 378, 388 (1959))).

As the Commission has noted, there are "substantial benefits of Transmission Organization membership to participating utilities."[39] These benefits "include optimization of the transmission system, and regional transmission planning as well as access to numerous types of markets."[40] The financial rewards for joining a Transmission Organization can be substantial as well. For example, the Midcontinent Independent System Operator ("MISO") estimates that it provides "$3.5 billion in total benefits annually to its members."[41] Transmission owners are clearly receiving billions of dollars in benefits from their respective Transmission Organizations,[42] and the State Entities are aware of no evidence that transmission companies would fail to join or remain in a Transmission Organizations and pass up these benefits in the

[39] Supplemental Transmission Incentives NOPR at P 8; *see also* March 2020 NOPR at P 94.

[40] *Id*. at P 14.

[41] *Id*. at P 14, fn 29. See MISO, 2020 Value Proposition, at 5 (Feb. 5, 2021), https://cdn.misoenergy.org/2020%20MISO%20Value%20Proposition%20Calculation%20Details521882.pdf.

[42] Supplemental Transmission Incentives NOPR at P 14, fn 29, 30.

absence of an incentive. Overall, the record in the underlying proceeding is devoid of any convincing evidence that a financial incentive to join a Transmission Organization is actually needed, effectively rendering the incentive a windfall or a hand out to transmission utilities for actions they would take in any event. For this reason, any Transmission Organization Incentive should be set at a de minimus amount.

II. Should the Commission Determine An Incentive Is Necessary, Any Incentive Should Be Limited.

For the reasons outlined above, the State Entities find no compelling evidence that an incentive is necessary. If the Commission determines, however, that an incentive is needed or is required by the language of section 219 of the FPA, the State Entities agree with the NOPR proposal to limit any Transmission Organization Incentive to ensure that : 1) it does not extend beyond three years; 2) it is no more than 50 basis points; and 3) it does not apply where participation in a Transmission Organization is mandatory.

A. The Incentive Should Be Limited to Three Years

Any incentive should be limited to three years because the point of the incentive is to encourage a transmission provider to *join* a Transmission Organization and, once that has been accomplished, the "incentive" will incent nothing further. There is nothing in section 219(c) of the FPA to suggest that an ongoing or continuing gratuity is somehow just and reasonable. In fact, as noted in the Supplemental Transmission Incentive NOPR, "the statute only directs an incentive for entities that 'join' a Transmission Organization."[43] Thus, the Supplemental Transmission Incentive NOPR concludes that: "we believe that it is reasonable to read FPA

[43] *Id*. at 8.

section 219(c) to direct the Commission to provide an incentive for 'join[ing]' a Transmission Organization and not for remaining in a Transmission Organization in perpetuity."[44]

Furthermore, limiting the incentive to three years rather than allowing it in perpetuity comports with the Commission's obligation, noted above, to ensure that consumers are not charged excessive costs.[45] As the record in this docket makes clear, Transmission Organizations provide billions in dollars in services to participating transmission utilities who, therefore, have every reason to join and stay in a Transmission Organization. [46] And the costs to ratepayers of providing the incentive are substantial.

In fact, ratepayers in New England have been paying a 50-basis-point incentive for participation in a Transmission Organization for more than 17 years. *ISO New England, Inc.*, 106 FERC ¶ 62,280 (2004) at PP 245-50. This incentive was awarded even though all of the transmission owners were already participating in markets overseen by NEPOOL and ISO New England. *Id*. There is no evidence that paying this higher ROE has provided any benefit to electric customers and serves only to transfer more of their money to the transmission owners.

Commenters in the underlying docket estimated that ratepayers are currently paying about $400 million per year to support this ongoing incentive.[47] Therefore, the State Entities concur that limiting the incentive to joining, as opposed to remaining, in a Transmission Organization focuses the incentive on the transmission utility's decision to participate in such an organization while ensuring that ratepayers are not continually burdened long after such a decision is made. The State Entities also support a requirement that transmission utilities that

[44] Supplemental Transmission Incentives NOPR at P 6. *See also*, Alliant, Comments, Docket No. PL19-3-000, at 41 (June 26, 2019).

[45] *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016).

[46] Supplemental Transmission Incentives NOPR at P 14, fn 29.

[47] TAPS Comments, Docket No. PL19-3-000, at 97 (June 26, 2019).

have been members of a Transmission Organization for longer than three years remove any incentive it received for joining the Transmission Organization from its rates at the first opportunity.

B. The Incentive Should Not be Greater the 50 Basis Points

Similarly, the State Entities agree that the Transmission Organization Incentive should be limited to fifty basis points as suggested in the Supplemental Transmission Incentive NOPR, or even less. The State Entities urge the Commission to consider a 25-basis point incentive. As noted above, this is essentially free money above and beyond the transmission owners are already earning. Commenters have indicated that this incentive currently costs ratepayers about $400 million a year at the 50-basis point level.[48] A 25-basis point incentive would provide transmission companies $200 million a year to join or remain in a Transmission Organization that provides them with substantial benefits. This is a very generous incentive that is being paid for by ratepayers.

If the Commission chooses not to reduce incentive to 25-basis points, the State Entities strongly urge the Commission to reject the 100-basis point incentive advanced in the March 2020 NOPR. The State Entities note that the current and very generous 50-basis-point incentive has successfully encouraged transmission owners to join RTOs and ISOs and, across the country, there is robust participation in such organizations. In short, the 50-basis-point incentive has worked and increasing the incentive by an *additional* 50 basis points, as suggested in the March 2020 NOPR, without evidentiary support that there is a need for such an increase, would be

[48] Supplemental Transmission Incentives NOPR at P 8, fn 21 citing TAPS Comments, Docket No. PL19-3-000, at 97 (June 26, 2019).

arbitrary and capricious and do nothing but burden ratepayers, resulting in unjust and unreasonable rates.[49]

The record is clear that an additional fifty basis points is unwarranted and unneeded. There has been significant investment in transmission infrastructure by investor-owned electric companies and other transmission companies. Investment has grown from $8.6 billion in 2006 to $23.4 billion in 2019 and as much as $27.1 billion is projected for 2021.[50] This increased investment underscores an important fact, specifically, that the value of the 50 basis point incentive, and its impact on ratepayers, *has increased substantially*, without having the incentive itself raised to 100 basis points. This is because the incentive is an adder to the transmission companies' ROE and therefore, as the rate base has grown, the ROE has grown correspondingly. Turning to MISO again, the transmission owners in MISO North, for example, had their gross transmission allocated rate base grow from $11.2 billion to $38 billion between 2006 and 2020. As a result, because the rate base tripled over those years, the incentive revenues tripled automatically, as well.[51] It cannot be maintained that doubling down on incentive revenues that have already tripled is just and reasonable under the FPA.

C. There Should Not Be an Incentive For Joining a Transmission Organization if Participation Is Mandatory

Finally, the Supplemental Transmission Incentives NOPR seeks comment on the issue of voluntariness, specifically whether any incentive should be given to a utility for joining a Transmission Organization when such utility is already obligated to join. FPA section 219(c) authorizes the Commission to provide an incentive to a transmission utility to join a

[49] 16 U.S.C. § 824d

[50] *Id*. at P 14, fn 31. *See* EEI Business Analytics Group, Historical and Projected Transmission Investment, at 1 (Nov. 2020),

[51] *Id*. at P 14, fn 30.

Transmission Organization. However, section 219(c) does not address the issue of whether such an incentive should be given if a utility is under a separate legal requirement to join. This ambiguity has resulted in litigation.[52]

The State Entities oppose granting an incentive for actions that have already occurred or that are independently obligated. The reason why is ably articulated in the dissent in the March 2020 NOPR: "Handing out customers' money to transmission owners without a strong belief that that money will induce beneficial conduct is unjust and unreasonable and inconsistent with Congress' intent behind section 219."[53]

Courts have long recognized that incentives must "facilitate investment," not "reward investments that would happen in any event." *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 130 (D.C. Cir. 2019). As another federal court has ruled: "[a]n incentive cannot 'induce' behavior that is already legally mandated."[54] Consequently, the State Entities believe that granting an ROE incentive adder to encourage required conduct improperly commandeers benefits that consumers otherwise would enjoy through lower rates, transferring wealth to the transmission owner without reason.

Finally, the Supplemental Transmission Incentives NOPR proposes to revise section 35.35(f) of the Commission's regulations to provide that incentives to join a Transmission Organization are available only if a utility has not previously been a member of a Transmission Organization "as the intention is for the Transmission Organization Incentive to encourage

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[52] *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 980 (9th Cir. 2018) (remand to the Commission as to whether PG&E was eligible for a 50-basis-point incentive for participation in CAISO in light of the fact that participation is mandated by California state law); *see also*, N.Y. State Dept. of Pub. Serv., Protest, Docket No. ER20-715-000, at 5 (filed Jan. 21, 2020).

[53] March 2020 NOPR, Partial Dissent at P 4.

[54] *Cal. Pub. Util. Comm'n v FERC*, 879 F.3d at 974.

transmitting and electric utilities to join Transmission Organizations, not to incent such utilities to change membership between Transmission Organizations or to alter their ownership structures."[55] To the extent the Commission concludes that he State Entities fully support this revision.

CONCLUSION

The State Entities oppose incentives for ISO and RTO participation if such participation is mandatory. If the Commission concludes that a financial incentive is needed or required to achieve the goals of Section 219(c), any incentive should be limited in amount and duration and designed to encourage the desired behavior at least cost to ratepayers. Therefore, the State Entities support the Supplemental Transmission Incentives NOPR revisions that limit the incentive to three years and 50 basis points at most.

Respectfully Submitted,

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[55] *Id.* at P 20.

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Dated: June 25, 2021

CERTIFICATE OF SERVICE

I, Robert Snook, hereby certify that on this day I caused the foregoing to be served upon all parties identified on this agency's service list for this proceeding.

Robert Snook
Robert Snook

Dated: June 25, 2021