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 AMERICAN PUBLIC POWER ASSOCIATION

July 1, 2020

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In its March 20, 2020 notice of proposed rulemaking,[1] the Federal Energy Regulatory Commission ("Commission" or "FERC") proposes substantial changes to its regulations and policies governing the award of transmission incentives under section 219 of the Federal Power Act ("FPA").[2] The American Public Power Association ("APPA") urges the Commission to reconsider many of these proposed changes that, if adopted, are likely to increase transmission costs without any assurance of commensurate benefits for consumers.[3]

I. INTRODUCTION

APPA supports prudent investment in our nation's transmission infrastructure for the benefit of consumers. Prudently planned and constructed transmission facilities can increase supply options, reduce congestion-related costs, integrate renewable resources, and promote grid reliability. APPA supports reasonable Commission policies that promote such beneficial transmission investment. With the exception of the proposal to eliminate the incentive adder for stand-alone transmission companies ("Transcos"), however, the changes to the Commission's

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[1] *Elec. Transmission Incentives Policy Under Sec. 219 of the Federal Power Act*, 170 FERC ¶ 61,204 (2020) ("NOPR").

[2] 16 U.S.C. § 824s.

[3] The NOPR comes on the heels of the Commission's Notice of Inquiry ("NOI") in Docket No. PL19-3-000 to consider the scope and implementation of its electric transmission incentives regulations and policy pursuant to section 219. *Inquiry Regarding the Commission's Elec. Transmission Incentives Policy*, 166 FERC ¶ 61,208 (2019). APPA submitted extensive comments and reply comments in response to the NOI as part of the Joint Commenters coalition. The NOPR includes only limited references to the NOI comments, even though many of the commenters squarely identified the problematic aspects of proposals that have now found their way in to the NOPR.

transmission incentive policies proposed in the NOPR will likely result in unjust and unreasonable outcomes, raising transmission costs without ensuring that consumers receive increased benefits.

The Commission's existing approach to awarding project-specific incentives is generally sound, and the NOPR identifies no compelling reason to change it. The current incentive framework was established in Order No. 679 and subsequent orders.[4] The Commission refined its approach to awarding incentives in a 2012 policy statement that principally revised the Commission's "nexus test," particularly for applicants seeking return on equity ("ROE") adder incentives.[5] The 2012 Policy Statement emphasized the need for applicants to mitigate project risks, including requesting risk-reducing incentives, prior to seeking an incentive ROE adder based on project risks and challenges that are not reflected in the base ROE and cannot be adequately mitigated. Applicants must demonstrate "how the total package of incentives requested is tailored to address demonstrable risks and challenges" of the project.[6] This emphasis on risk-reducing incentives that address specific obstacles to beneficial development (*i.e.*, risks and challenges) has been particularly important to striking an appropriate balance between consumer and investor interests in awarding incentives.

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[4] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) ("Order No. 679"). Under the current incentives policy, in order to receive a project-specific transmission incentive, an applicant must satisfy both: (1) the "statutory test," which requires that the transmission project ensures reliability and/or reduces the cost of delivered power by reducing transmission congestion; and (2) the "nexus test," which ensures that there is a nexus between the incentive sought and the risks and challenges of the investment being made. An applicant is presumed to meet the statutory test if the project is approved either through a fair and open regional planning process that evaluates projects for reliability and/or congestion, or by a state commission or state siting authority. A project in a national interest electric transmission corridor that has received a FERC permit also satisfies the statutory test. 18 CFR § 35.35 (i) & (j) (2020); Order No. 679 at P 58; Order No. 679-A at P 50; NOPR at P 15.

[5] *See Promoting Transmission Investment Through Pricing Reform,* 141 FERC ¶ 61,129 (2012) ("2012 Policy Statement").

[6] *Id.* at P 10.

In the years since the Commission issued Order 679, and particularly since the 2012 Policy Statement was released, transmission investment has grown significantly, and the NOPR provides no evidence that investment is being withheld for lack of incentives under FERC's current policies. It is imperative to recognize, moreover, that the increase in transmission investment in recent years has resulted in substantial increases in transmission rates in some regions, and this trend is expected to continue.[7] The Energy Information Administration's 2020 Annual Energy Outlook projects that rising transmission and distribution costs will offset much of the projected decrease in generation costs through 2050.[8] These transmission cost increases impose a significant burden on public power utilities and the customers they serve. In considering proposed changes to transmission incentives, the likelihood of an increased cost burden on transmission customers should be a principal consideration, consistent with FPA section 219. Unfortunately, most, if not all, of the new incentives proposed in the NOPR fail to adequately ensure that the additional costs that would be imposed on consumers would be justified by commensurate consumer benefits.

The policies that the NOPR offers in replacement for the current incentive framework suffer from a number of significant flaws that should prompt the Commission to reconsider most of the proposed policy changes. As a threshold matter, the NOPR does not justify the *need* for significant reforms to its incentive policies. The Commission specifically acknowledges that transmission development has been "generally robust" in recent years.[9] There is no empirical evidence cited in the NOPR demonstrating that the current incentive framework is ineffective in

[7] *See, e.g.*, *Inquiry Regarding the Commission's Elec. Transmission Incentives Policy*, Docket No. PL19-3-000, Initial Comments of the Joint Commenters at 14-15 (June 26, 2019) ("Joint Commenters NOI Comments").

[8] EIA, *Annual Energy Outlook 2020* at 74.

[9] NOPR at P 26.

promoting transmission investment in accordance with the dictates of FPA section 219, and, in fact, the Commission acknowledges that it is has insufficient information to gauge the effectiveness of its current policies.[10] And while the Commission argues that the types of transmission projects and the incentives needed to promote them must evolve in response to industry changes, the NOPR never draws a rational connection between the proposed incentives and the new types of projects the Commission claims are needed. Even if the Commission is correct that new "types" of transmission are required, the proposed incentives are largely aimed at "low-hanging fruit"[11] projects that are – or should be – identified in the regional planning processes already.

The Commission's proposal to eliminate the nexus requirement and shift to a "benefits-based" system also runs afoul of the requirements of FPA section 219. Awarding incentives solely for the benefits that a project provides, or for conduct that isn't voluntary, is inconsistent with the plain language of section 219, which refers to "incentives." By definition, an incentive is an *inducement* to take some action. Further, FPA section 219 requires incentive rates to be "just and reasonable and not unduly discriminatory or preferential."[12] An approach to incentives that focuses solely on outcomes (benefits) and does not include any required nexus between the incentive and the project investment decision may simply be a "bonus for good behavior,"[13] and would contravene the requirement for just and reasonable incentive rates that the incentive "is in fact needed, and is no more than is needed, for the purpose."[14]

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[10] *See id.* at P 115.

[11] NOPR, Comm'r Glick Dissent at P 7.

[12] 16 U.S.C. § 824s(d).

[13] Order No. 679 at P 26 (internal quote omitted).

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

Also highly problematic is the NOPR's proposal to double the incentive adder for participation in Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") ("RTO Adder"), and to make the incentive available regardless of the voluntariness of RTO/ISO participation. Not only is the removal of the voluntariness requirement a departure from the bedrock principle for granting incentives (*i.e.*, of inducing action that is not otherwise required), the NOPR offers no reasonable basis for simply doubling the current standard RTO participation adder. Fatally, the NOPR does not show that the substantial increase in costs that an increased RTO Adder would impose will be justified by any increased customer benefits. The NOPR cites no evidence that an increase to the adder is necessary to encourage new, let alone continued, RTO/ISO participation, nor does the NOPR provide any rationale for why 100 basis points is an appropriate figure, even assuming that an RTO Adder at some level could be justified. Increasing the RTO Adder in recognition of the alleged duties and responsibilities of RTO/ISO membership, moreover, would double-compensate utilities for risks already accounted for in the base ROE.

Of particular concern to APPA and its public power utility members, the NOPR makes no reference to promoting joint ownership of transmission facilities by non-public utilities, even though the issue was squarely raised in the NOI and addressed by a number of commenters. The Commission has consistently recognized the benefits of joint ownership of transmission facilities, and, in particular, has encouraged the participation of non-public utilities in jointly owned projects, including through the 2012 Policy Statement. .

The NOPR generally fails to reconcile the proposed project-specific incentive reforms with the regional planning processes the Commission has sought to promote in Order No. 890[15]

[15] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299

and Order No. 1000.[16] Although the Commission suggests that information from the RTO/ISO planning processes can be "leverage[d]" to seek project-specific incentives,[17] the Commission does not address why incentives are necessary to promote projects that the regional planning processes are – or should be – identifying as needed, beneficial transmission solutions. Nor does the NOPR appear to consider potential conflicts with the planning process that may arise when sponsors pursue incentives based on project benefit claims that have not been fully evaluated (if at all) in the regional planning process, or when disputes arise over transmission planning benefit assessments, as utilities vie for incentives based on those studies.

The new project-specific ROE incentives outlined in the NOPR all suffer from serious defects. As noted, these incentives would simply provide a windfall to projects that a properly functioning planning process should already be identifying. The ex-ante economic benefit adder, while at least applying a benefit-to-cost ratio eligibility threshold, would unreasonably grant incentives based on analysis of congestion cost savings that might never materialize, and the ex-post economic benefit adder rewards projects that have already been built. Both the ex-ante and ex-post economic benefit incentives would unreasonably award long-lived incentive adders based on a snapshot analysis of congestion cost savings that may not be durable over a significant period of time, applying benefit-to-cost thresholds that are not adequately justified and could lead to arbitrary and discriminatory results. The proposed adder for "above and beyond" reliability projects does not incorporate any benefit-to-cost requirements and it is

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(2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) ("Order No. 890").

[16] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("Order No. 1000").

[17] NOPR at P 30.

essentially devoid of standards or metrics to identify or quantify the alleged benefits from such projects that might conceivably justify the costs of an incentive adder. And although APPA is supportive of policies to promote the deployment of transmission technologies, the incentives proposed in the NOPR are unlikely to be effective or reasonable.

The proposal to adopt a 250 basis point incentives cap that may exceed the top of the range of reasonableness could allow utilities to collect unjust and unreasonable returns. The top of the zone of reasonableness provides an upper limit on a just and reasonable incentive return, and the Commission fails to provide any basis for exceeding that limit. The use of a fixed basis point cap on total ROE adders nonetheless would be a useful tool for ensuring reasonable incentives, and, if the Commission proceeds with the proposed reforms in the NOPR, the Commission should adopt a policy that total ROE adders are limited to the *lower of* a reasonable basis point cap or the top end of the zone of reasonableness.

Based on the problems identified above, as discussed more fully in the sections that follow, APPA urges the Commission to reconsider its proposals to substantially revise its current incentive policies. If, however, the Commission chooses to proceed with the incentive proposals in the NOPR, APPA makes a number of recommendations, including the following:

- Transmission incentives should be restricted to projects evaluated and approved in a full Commission-approved regional transmission planning process under Order No. 1000.
- An entity seeking a project-specific transmission incentive should be required to demonstrate that there is at least a rational relationship between each incentive sought and the decision to invest in the transmission project.
- The Commission should require a clear demonstration through a cost-benefit analysis that the quantifiable benefits to consumers from a project materially exceed the incremental costs of the requested incentives.
- Parties to proceedings in which project-specific incentives are proposed must have full access to all information and analyses on which the claims of benefit are based, including analyses conducted by RTOs and ISOs, and an opportunity to evaluate and challenge

benefit claims. The risk of being unable to substantiate a claimed benefit-cost outcome must be on the applicant.

- Project-specific ROE adders should sunset after no more than 15 years. A shorter time frame could be applied in particular circumstances if, prior to the sunset date, the Commission makes a determination that the adder is no longer needed or effective.
- Project-specific ROE adders should be limited to the cost of the project used in the application to demonstrate project benefits, and cost overruns must be considered.
- For project-specific incentives granted on an ex-ante basis, the Commission should adopt rules to ensure that projects provide the anticipated benefits on an actual cost basis.
- For the economic benefit incentive, the benefit-to-cost ratio threshold calculations should include the costs of ROE incentives.
- The reliability incentive should be limited to the portion of the overall project investment that the applicant demonstrates is necessary to produce reliability benefits above and beyond the requirements of the North American Electric Reliability Corporation ("NERC") reliability standards.
- To the extent that a project is required to meet existing baseline reliability planning requirements, the project should be ineligible for the reliability incentive.
- The Commission should not award the reliability benefit incentive based on qualitative reliability benefit claims alone.
- Applicants should not be eligible for both the reliability adder and economic adder for the same project.
- Any basis point cap on ROE adders should be set at no more than 150 basis points, and total ROE adders should be limited to the lower of this basis point cap or the top end of the zone of reasonableness.
- The Commission should not allow applicants to seek removal of basis point caps on previously-granted incentives.
- The Commission should adopt its proposal to eliminate the ROE incentive for Transcos and it should also remove previously awarded Transco ROE incentive adders.
- The Commission should limit any RTO Adder to no more than 50 basis points, and this adder should be phased out after six years of RTO/ISO membership. The adder should not be available to RTO/ISO members whose participation is not voluntary.
- The RTO Adder should not apply to projects that are not evaluated and approved in the full RTO/ISO regional planning process.
- The Commission should clarify the NOPR's overly-broad proposed definition of what constitutes an eligible transmission technology.

- The Commission should adopt the proposed requirement that public utilities seeking incentives disclose all reasonably anticipated incentives to transmission planning regions as part of the public utility's transmission project proposal.

II. INTEREST OF APPA

APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities throughout the United States. More than 2,000 public power utilities provide over 15 percent of all kWh sales to ultimate customers and to businesses in every state except Hawaii. Collectively, public power systems serve over 49 million people. APPA utility members' primary goal is providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Many APPA electric utility members are transmission dependent, taking transmission service from public utilities, including RTOs and ISOs. Changes to the Commission's transmission incentives policy could affect significantly the rates paid by these members and the consumers they serve.

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III. COMMENTS

A. The NOPR Does Not Support the Need for Reform

The incentive rate provisions of FPA section 219 were enacted in 2005 in response to a "long decline in transmission investment."[18] This decline in investment has been reversed in the nearly fifteen years since the Energy Policy Act of 2005 went into effect. The Commission readily acknowledges in the NOPR that "transmission infrastructure development has remained generally robust at an aggregate level"[19] – an assertion that is fully supported by industry data.[20] At the same time, the increase in transmission spending has significantly increased transmission costs for many customers over the last several years,[21] making it imperative that any revisions to

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[18] Order No. 679-A at P 3.

[19] NOPR at P 26.

[20] For example, the Edison Electric Institute's ("EEI") most recent public data on actual and projected transmission investment show that investor-owned utilities and stand-alone transmission companies planned to invest $23.7 billion in transmission assets in 2018 – a figure that is more than 50 percent higher than the level of investment EEI reported for 2012 ($15.6 billion). *See* "Historical and Projected Transmission Investment," *available at* http://www.eei.org/issuesandpolicy/transmission/Documents/bar_Transmission_Investment.pdf. EEI projects annual transmission investment to continue in excess of $20 billion per year through at least 2021. *Id.* A 2018 report by The Brattle Group confirmed an increased level of transmission investment in recent years, showing that annual transmission investments rose from $10.8 billion in 2010 and have hovered in the $19-$21 billion range since 2013. The Brattle Group, *Cost Savings Offered by Competition in Electric Transmission Experience to Date and the Potential for Additional Customer Value* at 16 (April 2019) ("Brattle Report"), *available at*: https://brattlefiles.blob.core.windows.net/files/15987_brattle_competitive_transmission_report_final_with_data_tables_04-09-2019.pdf. *See also* U.S. Energy Info. Admin., *Today in Energy* (Feb. 9, 2018), https://www.eia.gov/todayinenergy/detail.php?id=34892 (cited at paragraph 27 of the NOPR).

[21] *See* Joint Commenters NOI Comments at 14-15.

the Commission's current transmission incentive policies ensure that the cost of incentives to transmission customers is justified by commensurate benefits. The proposals contained in the NOPR, however, neither justify the need for reform, nor ensure that incentives established pursuant to the proposed policies would be just and reasonable.

1. The NOPR Does Not Justify the Proposal to Reform Transmission Incentives in Response to Industry Changes

Notwithstanding the robust level of investment under the Commission's current ratemaking and incentive policies, the Commission contends that its transmission incentive policy requires reform, arguing that "the types of transmission projects that are needed, and the use of rate treatments to incent them, must evolve to reflect the changes in market fundamentals."[22] APPA agrees that the electric industry is undergoing a period of marked change. Here, however, the NOPR never connects the dots between the identified industry changes, the new "types" of transmission projects that may be needed to respond to them, and the transmission incentives proposed in the NOPR. The Commission never adequately explains why ongoing industry changes render its existing incentives policies inadequate or how the proposed policies – particularly the shift to a benefits-based approach – will remedy any deficiencies that might exist. Indeed, the Commission acknowledges in the NOPR that it is has insufficient information to gauge the effectiveness of its current incentive policies,[23] an admission that undercuts its assertions that the current policy is inadequate to promote the beneficial transmission the Commission suggests the industry needs.

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[22] NOPR at P 26.

[23] *Id.* at P 115 (observing that "[e]xperience to date suggests that current information collection related to FPA section 219 incentives is insufficient to determine the effectiveness of individual incentive grants, or to evaluate the Commission's overall incentives program.").

When the Commission displaces an existing rule as it proposes to do here, and the "new policy rests upon factual findings that contradict those which underlay its prior policy," the Commission must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[24] And like all Commission rulemakings, any final rule that significantly modifies the Commission's transmission incentive policies must reflect a process of reasoned decision-making that demonstrates a "rational connection between the facts found and the choice made."[25] The proposals included in the NOPR would fall short of these standards.

The NOPR asserts that the evolving electric industry requires new "types" of transmission projects, yet the Commission does not clearly identify these new "types" of projects. The NOPR's proposals for project-specific incentives focus on facilities that reduce congestion, projects that provide a greater level of reliability than required by mandatory reliability standards, and transmission technologies that enhance reliability, efficiency, capacity, and improve the operation of new or existing transmission facilities. These types of projects potentially could fall within the scope of FPA section 219, but the NOPR fails to explain how the kinds of projects it has targeted for incentives in the NOPR will respond to the needs created by "changes in market fundamentals."[26] Transmission projects that reduce congestion or enhance reliability do not necessarily address industry changes such as the greater diversity of resources participating in electricity markets,[27] or changes in load patterns that may require new types of

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[24] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

[25] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[26] NOPR at P 26.

[27] *Id.* at PP 27-28.

transmission investment.[28] The industry changes cited in the NOPR may indeed point to a need for new, well-planned transmission infrastructure. But simply identifying a list of reasons that the country might need new or different types of transmission is not the same thing as providing a reasoned basis for reforming the Commission's *incentive policy*, let alone support for the particular incentives the Commission proposes.

Even if the types of projects that would be eligible for new incentives will be responsive to industry changes, there is no reason to think that transmission owners and developers would refrain from investing in these projects in the absence of lucrative ROE adders. Section 219(b)(2) of the FPA specifies that the Commission's incentive rules must "provide a return on equity that attracts new investment in transmission facilities," and the current environment of robust transmission investment indicates that the Commission's current ratemaking and incentive policies are already in accord with this requirement. Transmission owners and developers have invested heavily in recent years without the promise of project-specific incentive returns, and where transmission projects have been subject to competitive selection in regional planning processes, there has been significant vying for the opportunity to construct new transmission infrastructure (and earn FERC-authorized returns on the investment).[29]

The Commission contends that the incentives needed to promote new types of transmission must "evolve,"[30] yet the Commission's project-specific incentives largely consist of blunt-tool ROE adders applied to "low-hanging fruit" projects that the transmission planning

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[28] *Id.* at PP 27-29.

[29] *See, e.g.*, *Pub. Serv. Elec. & Gas Co. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,229 (2015); *American Transmission Company, LLC v. Midwest Independent System Operator, Inc.*, 142 FERC ¶ 61,090 (2013); *ITC Midwest, LLC v. American Transmission Company, LLC*, 142 FERC ¶ 61,096 (2013); *Xcel Energy Services, Inc. v. American Transmission Company, LLC*, 140 FERC ¶ 61,058 (2012).

[30] NOPR at P 26.

processes under Order Nos. 890 and 1000 are (or should be) already considering.[31] The NOPR includes no explanation or analysis as to why additional ROE basis points – while potentially costly to consumers – are likely to influence investment decisions for the types of projects included in the NOPR, or how these incentives will translate to increased benefits for consumers as they raise costs. Indeed, as NOI commenters pointed out, incentives that increase project costs may make it *less* likely that beneficial transmission projects will be built by making cost allocation and siting challenges even more difficult.[32]

APPA agrees that it is reasonable to question whether the most beneficial and cost-effective transmission is actually being planned and built. But to the extent that objectively beneficial projects are *not* being identified and approved in the regional planning process, there is no compelling evidence that lack of incentives is the problem. As many NOI commenters observed, there are other key obstacles to building beneficial grid infrastructure, such as siting challenges and disputes over cost allocation, and these obstacles are unlikely to be solved by changing the Commission's incentive framework to focus exclusively on benefits.[33] Concerns about lack of beneficial transmission may also arise from shortcomings in the planning process itself, such as a failure to adequately account for project benefits. The Commission does not explain how revised incentives – as opposed to improvements to the planning process or other policy changes within its authority – will be efficacious in promoting the new "types" of projects

[31] NOPR, Comm'r Glick Dissent at P 7.

[32] *See, e.g.*, Joint Commenters NOI Comments at 39; Transmission Access Policy Study Group NOI Comments at 31-32.

[33] *See, e.g.*, Americans for a Clean Energy Grid NOI Comments at 10-12; American Wind Energy Association NOI Comments at 2-5; Joint Commenters NOI Comments at 13-14; NRECA NOI Comments at 15-16; Public Interest Organizations NOI Comments at 1-2.

FERC suggests are needed in today's evolving industry. It is unreasonable for customers to take on an even greater transmission cost burden to address deficiencies in the planning process.

The Commission also overlooks other industry changes that tend to reduce the need for lucrative transmission incentives, particularly the increased prevalence of transmission formula rates since FPA section 219 was enacted in 2005. The practical effect of the "near-industry-wide transition from stated to formula rates"[34] should be an across-the-board reduction in the need for transmission incentives since formula rates themselves can "incent needed transmission investment."[35] Reforming the Commission's incentive policies without acknowledging the prevalence and risk-reducing nature of transmission formula rates would be arbitrary and capricious.[36]

2. The Evolution of the Transmission Planning Process Is Not a Basis for Modifying the Commission's Incentive Policy

The Commission also points to the evolution of the transmission planning process as a basis for reforming its transmission incentive policy, arguing that FERC can "leverage" the RTO/ISO process "to better target incentives" toward cost-effective projects.[37] There should be no need to "leverage" the transmission planning process to target incentives to particular projects; the planning process itself should identify the most beneficial projects. The entire point of the regional planning process is to identify beneficial projects that address reliability,

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[34] *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, 165 FERC ¶ 61,117, at P 16 (2018).

[35] *Niagara Mohawk Power Corp.*, 124 FERC ¶ 61,106, at P 33 (2008), *order on reh'g*, 126 FERC ¶ 61,173 (2009).

[36] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an agency rule may be arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem").

[37] *See* NOPR at P 30 ("There is now an opportunity for the Commission to leverage the RTOs/ISOs' efforts to better target incentives at transmission projects that demonstrate sufficient economic benefits, as measured by the degree to which such benefits exceed related transmission project costs.").

economic, or other needs, and this planning process should keep pace with evolving transmission requirements. Indeed, in adopting the reforms in Order No. 1000, the Commission specifically cited the need to plan for "additional, and potentially significant, investment in new transmission facilities [that] will be required in the future to meet reliability needs and integrate new sources of generation."[38] It is not a rational policy choice to arbitrarily reward a subset of the "best" of the planned projects with revenue-enhancing incentives based solely on the grounds that the projects are beneficial.[39]

Offering ROE incentives for certain projects could also create conflicts with the regional planning process. A benefits-based approach could result in transmission owners and developers seeking Commission findings on benefit claims that are not supported by, or may even conflict with, regional planning processes. Further, "leveraging" the planning process to identify projects that may be entitled to incentives could make the planning process itself more contentious. For example, a public utility may be more apt to challenge RTO/ISO production cost analyses when it could mean the difference between a project meeting the economic incentive benefit-to-cost ratio benchmark and missing out on an incentive. Project benefit analyses conducted by RTOs and ISOs would also likely be placed at issue in litigation at the Commission over incentive applications. The Commission acknowledges that RTOs and ISOs raised concerns about such potential controversy,[40] yet the NOPR proposes a policy that would practically ensure that these concerns will be realized.

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[38] Order No. 1000 at P 46.

[39] *See* California ISO NOI Comments at 10 (arguing that "granting an ROE incentive based on project-specific benefits or the type of need a project meets essentially constitutes an incentive for planning the system, not an incentive based on what is necessary to attract capital for a specific project or incent a developer to construct it.").

[40] *See* NOPR at P 44 (acknowledging RTO/ISO concerns "that the Commission not impose a benefits-based incentives approach that would duplicate or interfere with their transmission planning efforts, cause inefficient use of RTO/ISO staff time, or engender contention and potential litigation.").

Finally, favoring proposals pushed by public utilities in pursuit of incentives could also undermine the Commission's obligations under FPA section 217(b)(4), which the Commission's transmission planning requirements were intended to address.[41]

B. The Commission's Reinterpretation of FPA Section 219 and Its Proposal to Eliminate the Nexus Requirement Are Inconsistent With the Statute

The Commission contends that the proposed focus on benefits in awarding project-specific incentives will "more closely align with the statutory language and purpose of FPA section 219,"[42] citing the language in section 219(a) requiring the Commission to adopt "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."[43] Based largely on this revised interpretation of section 219, the Commission proposes to eliminate the "nexus" requirement, under which applicants currently must "demonstrate a connection between the total package of incentives sought and the proposed investment, in light of the risks and challenges facing a transmission project seeking incentives."[44]

The Commission's revised interpretation of section 219 is unreasonable. In the first place, removing the nexus requirement would effectively read the word "incentive" out of the statute. By definition, an incentive is an *inducement* to take some action, yet the NOPR proposes to award project-specific rewards based solely on project outcomes (*i.e.*, benefits) regardless of the need for any inducement. If Congress wanted to authorize ROE adders or other rewards for project benefits or mandatory conduct, it could have chosen a different word than incentive.

[41] *See* Order No. 890 at PP 425, 436.

[42] NOPR at P 32.

[43] *Id.* (quoting 16 U.S.C. § 824s(a)).

[44] *Id.* at P 35.

The Commission's interpretation of section 219 is also flawed insofar as it fails to give effect to the entire provision.[45] FPA section 219 specifically directs that all incentive rates awarded pursuant to that provision must be just and reasonable and not unduly discriminatory or preferential.[46] Merely establishing that a project will benefit consumers is not a sufficient basis to award an incentive under FPA section 219. To comply with the requirements for just and reasonable incentive rates, there must also be a nexus between the incentive and the project investment decision, or, as Commissioner Glick put it in his partial dissent, the "incentives must actually incentivize something."[47]

The Commission's "nexus" requirement for project-specific incentives is intended to ensure that "incentives are not provided in circumstances where they do not materially affect investment decisions."[48] This nexus between incentives and investment is required so that the Commission's rules "continue to meet the just and reasonable standard by achieving the proper balance between consumer and investor interests on the facts of a particular case . . . ."[49] As the Commission put it succinctly in Order No. 679, incentives granted under FPA section 219 are not simply a "bonus for good behavior."[50] The Commission's incentive rules are to "benefit consumers by providing real incentives to encourage new infrastructure, not simply increasing

[45] *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (explaining that "[i]t is our duty to give effect, if possible, to every clause and word of a statute." (internal quotes and citations omitted)).

[46] 16 U.S.C. § 824s(d).

[47] NOPR, Comm'r Glick Dissent at P 4.

[48] Order No. 679-A at P 25; *see also* Order No. 679 at P 26.

[49] Order No. 679 at P 26; *see also San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 133 (D.C. Cir. 2019) (observing that "[t]he requirement of a demonstrated, case-specific nexus tethers each authorized incentive rate increase to a determination that granting that incentive in a given case actually serves Congress's objective of benefiting consumers.").

[50] Order No. 679 at P 26 (internal quote omitted).

rates in a manner that has no correlation to encouraging new investment."[51] The "risks and challenges" component of the current incentives framework implements the Commission's nexus requirement for project-specific incentives,[52] helping to ensure compliance with precedent addressing the Commission's incentive rate authority, including the fundamental requirement to show that an incentive rate increase "is in fact needed, and is no more than is needed, for the purpose."[53] Even accepting the NOPR's assertion that FPA section 219 does not expressly reference the nexus test or impose a "but-for" requirement for incentives,[54] the Commission may not simply abandon the risks and challenges framework – or some form of requirement of a nexus between the incentive and investment decision – and remain in compliance with the just and reasonable rate requirement under section 219(d).[55]

The NOPR also runs afoul of just and reasonable rate requirements by proposing to discard the Commission's existing policy of evaluating whether a requested ROE adder is justified in light of risk-reducing incentives.[56] The Commission proposes to retain the current risk-reducing incentives for all transmission projects that meet the Commission's rebuttable presumption of project benefits.[57] The Commission says it believes a benefits-based incentive

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[51] *Id.*; *see also* Order No. 679-A at P 16 (explaining that the Commission "will require applicants to show some nexus between the incentives being requested and the investment being made, *i.e.*, to demonstrate that the incentives are rationally related to the investments being proposed.").

[52] *See generally* 2012 Policy Statement at PP 6-7.

[53] *City of Detroit v. FPC*, 230 F.2d at 817; *see also Farmers Union Cent. Exch. Inc. v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir. 1984); *City of Charlottesville v. FERC*, 661 F.2d 945, 953-54 (D.C. Cir. 1981).

[54] NOPR at P 35 & n.39.

[55] *See, e.g.*, NOPR, Comm'r Glick Dissent at P 5 (arguing that the Commission need not apply a "but-for" test, but "the Commission must conclude that any incentive we create will lead transmission owners to take actions that benefit customers.").

[56] *See* NOPR at P 39 (proposing to eliminate the current requirement that applicants "demonstrate that base ROE or non-ROE incentives are insufficient to adequately address the needs of these transmission projects before seeking an ROE incentive.").

[57] *See id.* at P 38.

ROE "supplement[s]" these incentives,[58] but supplementing these risk-reducing incentives with an incentive ROE without considering the need for the total package of incentives threatens to overcompensate transmission owners by simultaneously reducing risks and rewarding benefits, resulting in unjust and unreasonable incentive rates.[59] While the Commission has previously observed that it "may be difficult to meaningfully distinguish between an ROE that appropriately reflects a public utility's risk and an incentive ROE to attract new investment,"[60] this does not mean that the Commission can rationally find an ROE incentive just and reasonable without considering the impact of risk-reducing incentives.[61]

Finally, moving from a risks and challenges framework to a benefits-based approach also raises concerns that utilities will be awarded incentives for projects that they are already required to undertake, either as a result of an existing legal obligation or good utility practice, in contravention of requirements for just and reasonable incentive rates.[62] For example, where there are known and accepted measures that utilities employ to save costs, there should be no bonus for doing so. In fact, a company could be penalized for imprudence, not only when it incurs unnecessary or excessive expenses, but where it chooses to forgo known cost-saving measures. It would be unreasonable to award an "incentive" payment for taking action that it would be imprudent *not* to undertake.[63] So, for example, deploying technology that improves

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[58] *Id.*

[59] *See, e.g.*, Order No. 679-A at P 27 (recognizing that if the nexus test is applied separately to each incentive as opposed to the package of incentives as a whole, such an approach would "fail[] to protect consumers where an applicant seeks incentives that both reduce the risk of a project and offer an enhanced ROE for increased risk.").

[60] NOPR at P 78 (citing Order No. 679-A at P 15).

[61] *See* section III.F.1, *infra* (discussing the requirement that incentive ROEs conform to the capital attraction requirements of just and reasonable rates).

[62] *See Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 975 (9th Cir. 2018) ("*CPUC v. FERC*") ("An incentive cannot 'induce' behavior that is already legally mandated. Thus, the voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder.").

[63] *See, e.g.*, *Pub. Serv. Co. of N.H.*, 6 FERC ¶ 61,299 (1979).

performance over existing levels should not entitle the utility to an "incentive" payment if the technology, albeit innovative, was well established and widely used. If the remedy for imprudence would be a rate reduction, it would be illogical to grant an incentive for what is simply prudent utility behavior.

C. The NOPR's Proposed Departure from the Current Risks and Challenges Framework Undermines the Encouragement of Joint Ownership

APPA is particularly concerned by the NOPR's omission of any discussion of promoting joint ownership of transmission facilities, including joint ownership by non-public utilities. The NOI specifically sought comment on promoting joint ownership by non-public utilities, and Joint Commenters, Transmission Access Policy Study Group ("TAPS"), and other commenters expressed support for policies promoting joint ownership.[64] The NOPR is silent on the issue, yet its proposal to eliminate the current risks and challenges framework leaves no clear avenue for promoting joint ownership under the Commission's transmission incentive policy.

Encouraging joint ownership by non-public utilities has been a feature of the Commission's FPA section 219 transmission incentive policies since Order No. 679.[65] In Order No. 679-A, the Commission stated that it "encourages public power participation," explaining that it would "look favorably on an incentive request that includes public power joint ownership."[66] In updating its incentives policy in 2012, the Commission observed that joint ownership arrangements can "mitigate risks associated with siting and environmental impacts."[67] Under the 2012 Policy Statement, "[t]he Commission encourages incentives applicants to

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[64] *See* GridLiance NOI Comments at 2-20; Joint Commenters NOI Comments at 54-57; National Rural Electric Cooperative Association NOI Comments at 9-11, 30-33; TAPS NOI Comments at 6-14, 85-87.

[65] *See* Order No. 679 at PP 354, 357.

[66] Order No. 679-A at P 102.

[67] 2012 Policy Statement at P 24.

participate in joint ownership arrangements and agrees . . . that such arrangements can be beneficial by diversifying financial risk across multiple owners and minimizing siting risks."[68] The Commission's encouragement for joint ownership by non-public utilities comports with the admonition in FPA section 219(b)(1) that the Commission's rules should promote beneficial transmission investment "regardless of the ownership of the facilities."[69]

The Commission has consistently recognized the benefits of joint ownership of transmission facilities, and, in particular, has encouraged the participation of non-public utilities in jointly owned projects.[70] The Commission stated in Order No. 890, that it "believes there are benefits to joint ownership of transmission facilities, particularly large backbone facilities, both in terms of increasing opportunities for investment in the transmission grid, as well as ensuring nondiscriminatory access to the transmission grid by transmission customers."[71] The Commission reiterated these points in Order No. 1000.[72] In a period of rising transmission costs, moreover, joint ownership of transmission facilities can effectively provide a hedge against these costs. The Commission's belief in the benefits of joint ownership is well justified, as successful joint ownership initiatives such as CapX2020 in the Upper Midwest illustrate.[73]

[68] *Id.*

[69] 16 U.S.C. § 824s(b)(1).

[70] An overview of the benefits associated with joint ownership can be found in the 2012 policy paper on the subject issued by TAPS, *available at*: https://tapsgroup.org/wp-content/uploads/2013/01/TAPS-Joint-Ownership-White-Paper.pdf.

[71] Order No. 890 at P 593.

[72] Order No. 1000 at P 776; *see also* Order No. 1000-A at P 81 (stating that "the Commission supports investment in transmission by transmission dependent utilities . . . .").

[73] CapX2020 is a joint initiative of eleven utilities, including non-public utilities, that was formed to upgrade and expand the electric transmission grid in the Upper Midwest. *See generally Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,171, at P 3 (2014). CapX2020 has been characterized as "a great example of how joint ownership in the upper Midwest can harness the collaboration of eleven utilities, their regulators and the public to expand the transmission grid to meet increased demand and support renewable energy development." *WPPI Energy*, 141 FERC ¶ 61,004, at p. 61,014 (2012) (Comm'r Norris, concurring). Additional information regarding the CapX2020 initiative is available at: http://www.capx2020.com.

If the Commission proceeds with the proposal in the NOPR to abandon the current risks and challenges framework, including the encouragement for joint ownership, the Commission should still make room in its incentive policy to promote joint ownership by non-public utilities. APPA recommends that the Commission require each applicant for project-specific transmission incentives to explain whether opportunities for joint ownership in the project were offered to non-public utilities within the project sponsor's service footprint that will bear a portion of the project cost, and, if not, why not. Each applicant should be required to explain why joint ownership either was infeasible or would not increase the benefits associated with the development of a project. Any project for which joint ownership arrangements may have been feasible but were not pursued should face heightened scrutiny in seeking incentives, particularly ROE adders.

D. Any Use of a Benefits-Based Approach for Project-Specific Incentives Should Be Accompanied By a Number of Conditions

For the reasons discussed above, APPA opposes the NOPR's proposal to shift from the current risks and challenges framework to a benefits-based approach for awarding project-specific incentives. Further, as discussed below, the particular incentive ROE adder proposals included in the NOPR – including the economic benefit incentive and the reliability benefit incentive – have significant deficiencies that should prompt the Commission to reconsider the proposals. If, however, the Commission moves to a benefits-based approach for project-specific incentives notwithstanding the concerns identified by APPA, the Commission should adopt a number of general requirements that would mitigate some of the most potentially problematic aspects of this policy.

First, transmission incentives should be restricted to transmission projects approved in the full regional transmission planning process under Order No. 1000. If the Commission proposes to fundamentally alter its existing approach to evaluating transmission incentives by focusing solely on benefits, it should revisit its decision in Order No. 679 not to condition incentives on project approval in a Commission-approved regional transmission plan.[74] Such a condition would reinforce participation in regional planning, help ensure that all projects seeking incentives in a particular region were analyzed using consistent criteria and standards, and provide greater assurance that projects receiving incentives will actually deliver consumer benefits.

In the years since Order No. 679, the Commission has made coordinated regional planning a priority, including through the reforms carried out in Order No. 890 and Order No. 1000. The 2012 Policy Statement emphasized the expectation that applicants for return-enhancing incentives would show that "alternatives to the project have been, or will be, considered in either a relevant transmission planning process or another appropriate forum."[75] To promote the Commission's policies favoring coordinated regional planning to ensure just, reasonable and non-discriminatory service, and to provide greater assurance that projects awarded incentives will likely provide consumer benefits that might justify the incentives, particularly in light of potential alternatives, the Commission should require approval of a project in a Commission-approved regional transmission planning process as a prerequisite for receiving incentive rates.

Projects that are not subject to the full regional planning process should be ineligible for transmission incentives, including projects that are planned in RTOs/ISOs as part of a transmission provider's "local" transmission planning process subject only to Order No. 890

[74] Order No. 679 at P 58.

[75] 2012 Policy Statement at P 25.

planning requirements (such as Supplemental Projects in PJM).[76] Such projects, which have grown to be a significant proportion of transmission investment in some regions,[77] are unlikely to be able to provide adequate assurance that any benefits they might provide are justified in light of potential alternatives and overall regional needs.[78] Under no circumstances should transmission investments in RTO/ISO regions that are not, at a minimum, deemed subject to Order No. 890 planning requirements (such as asset management projects in the California ISO) be eligible for incentives under an expected benefits framework.[79]

Second, an entity seeking a project-specific transmission incentive should be required to demonstrate at least a rational relationship between each incentive sought and the decision to invest in the transmission project. While the Commission has not adopted a "but-for" test in granting transmission incentives under FPA section 219,[80] some demonstration of a nexus between the incentive and the project investment decision is necessary to comply with FPA section 219 and principles of reasoned decision-making. A requirement that applicants for transmission incentives demonstrate a rational relationship between the project investment decision and the incentive would at least provide some assurance that the incentive will "actually

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[76] *See, e.g.*, *Monongahela Power Co.*, 162 FERC ¶ 61,219, *reh'g denied,* 164 FERC ¶ 61,217 (2018) (addressing planning process for Supplemental Projects in PJM).

[77] For example, a May 12, 2020 presentation to the PJM Transmission Expansion Advisory Committee shows that Supplemental Project costs in 2019 were $3.4 billion, compared to $1.5 billion in baseline projects. In 2018, Supplemental Project costs were $6.7 billion, compared to baseline project costs of $2.1 billion. The presentation is available at: https://www.pjm.com/-/media/committees-groups/committees/teac/2020/20200512/20200512-item-10-2019-project-statistics.ashx.

[78] *See* 2012 Policy Statement at PP 25-26.

[79] *See Cal. Pub. Utils. Comm'n v. Pac. Gas & Elec. Co.*, 164 FERC ¶ 61,161 at P 46 (2018), *reh'g denied* 168 FERC ¶ 61,171 at P 7 & n.19 (2019), *So. Cal. Edison Co.*, 164 FERC ¶ 61,160 at P 14 (2018), *reh'g denied*, 168 FERC ¶ 61,170 at P 7 & n.15 (2019), *appeal filed* 9th Cir. Case Nos. 19-71886, 19-72925 (addressing "asset management" projects in California ISO).

[80] NOPR at P 35.

incentivize something,"[81] in accordance with longstanding incentive rate requirements and principles of reasoned decision-making.

Thus, for example, if a public utility requested an economic benefit incentive for a project identified in a regional transmission plan for reliability purposes that the utility was under an obligation to construct, there likely would be no rational relationship between the economic benefit incentive and the project investment decision. The Commission could consider arguments as to whether an applicant has demonstrated the requisite connection between the incentive and the investment decision on a case-by-case basis, with the applicant bearing the burden of proof.

Third, the Commission should require a clear demonstration through a cost-benefit analysis that the quantifiable benefits to consumers from a project materially exceed the incremental costs of the requested incentives. The Commission has not previously required specific benefit-to-cost demonstrations in granting incentives under FPA section 219, but, as the NOPR recognizes, a shift to a benefits-based framework warrants revisiting this approach.[82] If the Commission is going to grant project-specific incentives based on the benefits that the project provides, there should be a clear showing, at a minimum, that *quantifiable* benefits of a project significantly exceed the cost of the incentives, particularly any ROE adders. This requirement should not be limited to projects seeking incentives based on economic benefits, but should also be applied to projects seeking incentives for reliability or technological benefits.

[81] NOPR, Comm'r Glick Dissent at P 4; *see also* Order No. 679-A at P 16 (explaining that the Commission "will require applicants to show some nexus between the incentives being requested and the investment being made, *i.e.*, to demonstrate that the incentives are rationally related to the investments being proposed.").

[82] NOPR at P 46 (observing that "shifting from a risks and challenges based paradigm to a benefits-based paradigm, where incentives reward the most beneficial rather than most challenging transmission projects, supports using benefit-to-cost ratios to award economic incentives.").

Fourth, parties to proceedings in which project-specific incentives are proposed must have full access to all information and analyses on which the claims of benefit are based, including analyses conducted by RTOs and ISOs, and a full opportunity to evaluate and challenge benefit claims. The Commission proposes that applicants may seek to demonstrate project benefits based on analyses conducted by RTOs/ISOs or their own studies.[83] Despite the fact that assessing benefit claims is likely to be more labor, data, and time intensive than a typical risks and challenges analysis, the Commission does not propose any change in procedures for evaluating incentive requests.[84] The Commission should make clear that participants in proceedings evaluating benefits-based incentive applications will have an opportunity to evaluate the basis for the claimed benefits, including access to RTO/ISO analyses. For example, the Commission proposes "to provide a rebuttable presumption that economic benefits measured in benefit-to-cost ratios derived by RTOs/ISOs for transmission projects within their footprints should be included in the determination of an applicant's transmission project's benefits."[85] In order for such a presumption to be truly rebuttable, however, parties seeking to evaluate or challenge a proposed incentive must have access to the RTO/ISO analysis. The risk of being unable to substantiate a claimed benefit-cost outcome must be on the applicant.

Fifth, project-specific ROE adders should sunset after no more than 15 years. This period would be consistent with, for example, the 15-year horizon incorporated in PJM's regional transmission expansion plan process.[86] A shorter time frame could be applied in particular

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[83] *See id.* at PP 50, 54, 74.

[84] *Id.* at P 40 ("we propose no changes to the procedural flexibility offered to applicants seeking incentives, including applicants' ability to seek expedited declaratory orders on incentive proposals before submitting a filing for approval under FPA section 205 for inclusion of the incentives in rates.").

[85] *Id.* at P 50.

[86] PJM RTEP Development, *available at:* https://www.pjm.com/planning/rtep-development.aspx.

circumstances if, prior to the sunset date, the Commission makes a determination that the adder is no longer needed or effective. It is appropriate to remove project-specific adders after a fixed period of time because the identifiable benefits from the underlying project investment will become attenuated over time and will no longer serve as a basis to justify the continuation of a benefits-based incentive.

Sixth, application of project-specific ROE adders should be limited to the cost of the project used in the application to demonstrate project benefits. Under the Commission's existing incentive policies, "the Commission expects applicants for an incentive ROE . . . to commit to limiting the application of the incentive ROE based on a project's risks and challenges to a cost estimate."[87] A shift to a benefits-based framework would make it even more important to restrict a project-specific ROE incentive to the original cost estimate used in justifying the adder, as project cost overruns could diminish or even eliminate the consumer benefits on which the incentive was based. Limiting any ROE adder to the project investment cost used to justify the incentive will promote cost discipline and help ensure that consumers may actually receive the benefits that allegedly justified the incentive in the first place.

Seventh, for project-specific incentives granted on an ex-ante basis, the Commission should adopt rules to ensure that the projects actually provide the projected benefits. As noted, the NOPR does not propose to change the process for applicants to seek incentives; entities may still file a petition for declaratory order prior to making a FPA section 205 filing to include the incentive in rates, or the utility may simply make a section 205 filing.[88] The ability of entities to seek advance approval of incentives based on projected benefits makes it all the more important

[87] 2012 Policy Statement at P 28.

[88] *See* NOPR at P 40.

to ensure that there are mechanisms in place to verify that benefit projections are actually realized. Where the basis for incentives is the benefits the project will provide, the entire rationale for the incentive is eliminated if the project benefits identified in the application do not materialize. Even under the Commission's existing incentive policy, a preliminary finding that a project is entitled to incentives may be revisited if there are changed circumstances that indicate that the project may not provide the benefits described in the application.[89] This policy should be strengthened if the Commission shifts to a benefits-based approach for project-specific incentives.

Whether incentives are conditionally granted in a declaratory order proceeding or in an FPA section 205 proceeding, the Commission should condition any award of project-specific incentives on a project developer demonstrating, based on the actual costs of the project, that the project will still provide the same level of benefits (*e.g.*, benefit-to-cost ratio) that was used in obtaining the conditional award of incentives.

Further, incentives awarded based on projected benefits should be conditioned on the applicant filing a notice of any material change in the status of a transmission project following a Commission determination to grant incentives, akin to the reporting requirement for sellers with market-based rate authority.[90] Such notification should describe in detail the material changes in the project and the anticipated consequences of those changes for the project's effects on reliability and/or cost of delivered power. Material changes could include changes in costs, benefit-cost ratios, project milestones and timeline, projected benefits, and ownership changes.

[89] *See, e.g.*, Order No. 679 at P 78 (explaining that "[i]f an applicant obtains a declaratory order and the proposal changes from the facts on which the declaratory order was issued, the applicant may seek another declaratory order or wait to seek approval of the changes in the subsequent section 205 filing. In that event, interested parties may challenge the changes in the section 205 proceeding.").

[90] *See* 18 CFR § 35.42 (2020).

Based on the notification of changes to the project and the comments submitted by interested parties, the Commission should reevaluate the appropriateness of incentives in light of the reported changes. If the incentives were granted in a declaratory order proceeding, the incentives may be revisited in any FPA section 205 proceeding, consistent with the Commission's current practice.[91] If incentives have already been approved pursuant to FPA section 205, the Commission could issue a show cause order to an incentive recipient directing the recipient to demonstrate why a particular incentive should not be eliminated.

E. The Commission Should Not Adopt the Proposed ROE Incentive Reforms

1. The Proposed Economic Benefit Incentive is Not Just and Reasonable

The NOPR proposes a complex framework for awarding incentive ROE adders to transmission projects that provide economic benefits relative to project costs. There would be two components to the economic benefit incentive adder: (1) 50 basis points based on projected ("ex-ante") cost savings; and (2) 50 basis points for cost savings measured at the end of construction ("ex-post" savings).[92] To be awarded an economic benefit ROE incentive, the Commission proposes that an applicant would need to show that the project has a benefit-to-cost ratio at or above a certain percentile threshold based on transmission projects examined over a sample period.[93] For an incentive based on ex-ante benefit calculations, the Commission proposes that a project's benefit-to-cost ratio would need to be in the top 75th percentile, and for an ex-post incentive, the ratio must be in the top 90th percentile.[94] The Commission proposes to

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[91] Order No. 679 at P 78.

[92] APPA's understanding is that only projects that qualify for the ex-ante incentive would be eligible for the ex-post incentive; in other words, the ex-post incentive is not available to all projects that meet the benefit-to-cost threshold, but only those that requested the ex-ante proposal.

[93] NOPR at P 44.

[94] *Id.* at PP 57-59.

establish different benefit-to-cost thresholds for small (under $25 million) and large projects.[95] The NOPR would "implement procedures that will provide for inputting and calculation of new national benefit and cost data and the resulting benefit-to-cost threshold between small system modifications and significant transmission facility additions at five-year intervals."[96]

APPA urges the Commission not to adopt the proposed economic benefit incentive proposal. While the proposal at least incorporates the concept of a benefit-to-cost test for awarding incentives – something APPA has long supported – the proposal is neither just and reasonable, nor consistent with principles of reasoned decision-making. The principal flaw with the economic benefit incentive is that the NOPR fails to offer a reasoned explanation of what the incentive is intended to accomplish, particularly for the ex-ante incentive, as the incentive would needlessly add costs to projects that are (or should be) identified in the planning process.

a. The Economic Incentive Adder is Not Justified

The Commission states that it is proposing "an approach to economic benefits-based incentives that we believe is relatively simple, transparent, and yet is efficient in relying upon RTOs/ISOs' analyses of the economic benefits of transmission projects."[97] This statement highlights the main problem with the economic benefit incentive; namely, that it proposes to provide incentives for objectively beneficial projects that the regional planning processes – particularly those in RTOs/ISOs – are (or should be) identifying as the most efficient or cost-effective investments under the regional transmission planning processes. The NOPR indicates that the very studies that RTOs and ISOs use to assess economic benefits could serve as the basis

[95] Based on existing data, the NOPR notes that the 75th percentile benefit-to-cost ratio for large projects is 3.98, and 33.91 for small projects. *See id.* at PP 57-58. The 90th percentile benefit-to-cost ratio for large projects is 5.17, and 77.4 for small projects. *See id.* at P 59.

[96] *Id.* at P 56.

[97] *Id.* at P 44.

for incentive requests.[98] While the Commission at least notes that the ex-post incentive could encourage an applicant to complete a project on budget,[99] this does not salvage the ex-post proposal. If the ex-ante and ex-post economic benefit incentive adders would apply to projects that would be identified in the regional planning process for either economic or reliability purposes, then the incentive serves no purpose and is simply an unjust and unreasonable "bonus for good behavior."

Nor does the NOPR provide a rationale for simply picking a subset of economically-beneficial projects based on arbitrarily-drawn thresholds (*i.e.*, the top 25 percent or top 10 percent most beneficial projects). Indeed, it is *exactly* these projects that should be readily identified by the planning process – these should be the proverbial "no brainers" in the planning process. To the extent these types of projects are not being planned and built, the problem is unlikely to be a lack of ROE adder incentives, as discussed above.

b. The Design of the Economic Benefit Incentive is Unreasonable

Aside from the threshold conceptual problems with the economic benefit incentive, the design of the proposed incentive is unreasonable.

A project's eligibility for the ex-post and ex-ante incentives will be based on an analysis of congestion cost savings from the project at a particular point in time. Evaluating "adjusted production costs or similar measures of congestion reduction or certain other quantifiable benefits that are verifiable and not duplicative" may be a logical approach to estimating economic project benefits generally,[100] but such a snapshot analysis does not provide an adequate

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[98] *Id.* at PP 48-49.

[99] *Id.* at P 60 ("We believe that providing an opportunity for an additional, ex-post incentive for an applicant would benefit customers by further incentivizing transmission project developers to meet a transmission project's projected benefit-to-cost estimates by completing their transmission projects at or below projected costs.").

[100] *Id.* at P 48.

basis to grant a potentially long-term increase in the allowed return on the equity capital devoted to a transmission project given shifting transmission system topology and the difficulty of isolating the congestion cost savings attributable to any particular facility over time. If the Commission is going to rest the award of incentives on benefits alone, there must be clear evidence that those benefits will be achieved and that they will be commensurate with the additional costs that consumers will be required to bear. A snapshot analysis of congestion cost savings is inadequate evidence of durable benefits to justify a long-term ROE incentive adder.

While it would be unreasonable to rely on a snapshot analysis of congestion savings for a long-term ROE adder, it is particularly problematic to grant an incentive adder based solely on an ex-ante analysis of congestion cost savings from a proposed project. Congestion cost savings projections are a useful tool in identifying potentially beneficial projects in the transmission planning process,[101] but the NOPR would use these estimates of hypothetical congestion cost savings as grounds for awarding lucrative ROE adders that consumers would pay even if the savings never materialize.

The issue of relying on projections of congestion cost savings to award incentives was recently addressed in a somewhat different context at the Commission's workshop on grid-enhancing technologies ("GETs") in Docket No. AD19-19-000. Responding to a "shared savings" incentive proposal that would award project sponsors a share of projected congestion cost savings,[102] RTO/ISO market monitors Dr. Joseph Bowring and Dr. David Patton both contended that paying utilities a share of hypothetical congestion savings to encourage GETs

[101] *See* NOPR, Comm'r Glick Dissent at P 11.

[102] *See* NOPR at P 23.

deployment was a particularly unsound concept,[103] with Dr. Bowring calling it a "terrible idea"[104] based on benefit estimates that "are ultimately made up and the result of a variety of subjective assumptions."[105] Other workshop panelists also expressed concern with relying on ex-ante congestion cost savings calculations as the basis for payments to entities deploying GETs.[106] Similar concerns would apply to an approach that awards lucrative ROE adders based on ex-ante analyses of hypothetical congestion cost savings that may never materialize for new transmission projects.

Further, the NOPR does not ensure that projects would be ineligible for the ex-ante and ex-post economic benefit incentives if cost overruns or other project changes erase the claimed benefits. If the premise of the new incentive policy is to reward projects that provide the most benefits, it does not make sense to allow incentive returns on projects for which cost overruns have reduced or even eliminated the expected benefits. For the ex-ante incentive, relying strictly on projected cost estimates to grant incentives could encourage project sponsors to lowball estimates and then permit lax cost discipline that will inflate the rate base on which the adder will be applied. An approach that fails to account for cost overruns, apart from being unreasonable and illogical, would be inconsistent with FPA section 219 insofar as the Commission would be granting incentives for projects without any assurance that they meet the statutory requirement of benefiting consumers.[107] Thus, any final rule adopting the ex-ante economic benefit adder would need to reconsider the NOPR's problematic suggestion that

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[103] *See* Docket No. AD19-19-000, Workshop Transcript ("GETs Tr.") at 306-309 (Bowring); GETs Tr. at 311-12 (Patton).

[104] GETs Tr. at 307.

[105] GETs Tr. at 308; *see also* GETs Tr. at 320-22 (Bowring and Patton).

[106] *See* GETs Tr. at 317 (Harrison); GETs Tr. at 317-18 (Millar); GETs Tr. at 318-19 (Lin).

[107] 16 U.S.C. § 824s(a).

entities would remain eligible for the incentive regardless of cost overruns.[108] Similarly, the Commission should not "exclude costs resulting from factors beyond a developer's control from the ex-post analysis for an ex-post economic benefits ROE incentive."[109]

The NOPR's economic benefit incentive proposals are also unreasonable because they propose to grant adders based on national benefit-to-cost ratios derived from a relatively small sample of projects in only three RTOs without accounting for regional differences.[110] Even if the Commission were to use a larger and more diverse sample size in future updates, there would be no assurance that the national benefit-to-cost ratio provides a reasonable benchmark for determining the "most" beneficial projects in any particular region, and, as Commissioner Glick notes, use of a single benefit-to-cost ratio could have uneven and discriminatory results across regions.[111] At best, meeting the benchmark benefit-to-cost ratio would show that a project may be beneficial (as measured by a ratio), not that the project "offer[s] substantially more economic net benefits than the average transmission project"[112] in any particular region.

Reliance on the proposed *percentile* approach to award incentives could also lead to a situation where the benchmark benefit-to-cost ratio becomes smaller over time for the top projects. In other words, the proposed rules would grant incentives to the top 25 percent "ex-ante" projects and the top 10 percent "ex-post" projects, regardless of whether the actual benefit-to-cost ratios that establish those percentiles decline over time. If the Commission proceeds with the economic benefit incentive, therefore, it should at least adopt a rule that the benefit-to-cost

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[108] *Id.* at P 60.

[109] *Id.* APPA also notes that allowing an applicant to exclude cost overruns claimed to be beyond its control would likely lead to fact-intensive litigation about which costs fall into that category.

[110] *See id.* at P 57 & Appendix A.

[111] *See* NOPR, Comm'r Glick Dissent at P 11.

[112] NOPR at P 56.

ratios used to judge eligibility for the economic benefit incentives will be the higher of the existing ratio or the new ratio calculated at five-year intervals based on updated information.

The economic benefit incentive also presents significant implementation problems, and the Commission's suggestion that the proposal "is transparent and relatively straightforward for applicants to prepare and for the Commission to analyze"[113] does not withstand scrutiny. In describing how economic benefits may be measured, the Commission focuses primarily on analyses performed by RTOs/ISOs. As the questions included in the NOPR suggest, however, the ability of stakeholders to access, review, and analyze the information underlying economic benefit analyses generated by RTOs/ISOs is uncertain at best, and the NOPR is even less clear concerning non-RTO/ISO regions.[114] Even in RTO/ISO regions, the NOPR apparently would allow projects that do not go through a full regional planning process to be considered for the economic benefit incentive, even though these projects may not reflect any independent economic benefit assessments.[115] To further complicate matters, the NOPR proposes to consider awarding incentives based on analyses performed by individual public utilities and their consultants.[116] The NOPR does not explain how, if a final rule permits these different kinds of analyses to be used in seeking incentives, it would be possible to make an "apples-to-apples" comparison of economic benefits for purpose of determining whether a project meets the benefit-to-cost ratio thresholds established periodically based on updated project analyses. At a minimum, these problems with the NOPR's proposals would generate administrative litigation

[113] *Id.* at P 50.

[114] *Id.* at P 53.

[115] *Id.* at P 43.

[116] *See id.* at P 54.

and attendant uncertainty, contrary to the Commission's professed purposes in proposing to change its incentives policies.

Given the problems with the economic benefit incentive outlined above, the Commission should abandon this proposal. If the Commission decides to adopt the economic benefit incentive in some form, however, it should at least incorporate the general conditions described in section III.D above.

Finally, if the Commission moves ahead with the economic benefit incentive, the benefit-to-cost ratio threshold calculations must include the costs of ROE incentives.[117] Any other approach would be illogical and unjust and unreasonable; the ROE adder will increase the cost to consumers and must be included in the project cost-benefit analysis.

2. The Commission Should Not Adopt the Proposed Reliability Incentive

The NOPR proposes to offer up to 50 basis points for "for certain transmission projects that produce significant and demonstrable reliability benefits above and beyond the requirements of the NERC reliability standards."[118] The Commission states that it will also consider this incentive for projects that improve resilience.[119] The Commission cites a list of reliability benefits that might warrant the incentive,[120] although the list is not exclusive and the NOPR indicates that applications would be judged on a case-by-case basis,[121] with quantitative and/or qualitative evidence of reliability benefits considered.[122] For the reasons discussed below, the Commission should not adopt the reliability incentive adder.

[117] *Id.* at P 57.

[118] *Id.* at P 64.

[119] *Id.* at P 73.

[120] *Id.* at PP 67-72.

[121] *Id.* at PP 66-67.

[122] *Id.* at P 74.

a. The Proposed Reliability Incentive is at Odds With Regional Planning Requirements

Like the economic benefit incentive, the NOPR's proposed incentive for transmission projects that provide reliability benefits "above and beyond" mandatory NERC reliability standards raises the threshold question of why it is not the role of the Commission-mandated planning process to identify such nominally beneficial projects. Even assuming that the reliability planning criteria in most regions are oriented primarily toward satisfying NERC requirements, a robust planning process should allow for identification and consideration of "above and beyond" projects that will be truly beneficial to consumers (although, as discussed below, the NOPR is fatally unclear about how to identify such projects for purposes of awarding incentives). If the reliability incentive adder would apply to projects that are identified in the regional planning process for either economic or reliability purposes, then the incentive is unnecessary and unreasonable. If the adder would apply to projects that the planning process should be identifying but isn't, it would unreasonable to foist costs on transmission customers to make up for deficiencies in the planning process. And if obstacles other than the planning process itself are the reason that objectively beneficial projects are not planned and built, incentives are unlikely to be an effective solution.

b. The Reliability Benefit Incentive Lacks Meaningful Standards

While the NOPR correctly finds that projects needed to provide an adequate level of reliability should be ineligible for the reliability benefit incentive,[123] it fails to justify its proposal to reward transmission projects that provide reliability benefits "above and beyond" NERC requirements. In the first place, the NOPR never explains why the Commission should generally

[123] *Id.* at P 64.

promote transmission investment to achieve a level of reliability significantly "above and beyond" what the NERC standards dictate. There certainly may be cost-effective projects that would provide valuable reliability benefits to consumers beyond the NERC standards baseline, and the regional planning process should seek to identify such projects. But projects that simply provide more than an adequate level of reliability are not *necessarily* beneficial or cost-effective for consumers, and, as discussed above, the Commission does not draw any meaningful link between ongoing industry changes and the need to change its regulations to promote such "above and beyond" reliability projects. The NOPR's open invitation for such "above and beyond" projects to seek incentives presents risks that utilities will pursue projects that may not be in the best interest of consumers, and which may interfere with the regional planning process.

Unlike the economic project incentive, the reliability incentive proposal does not incorporate any benefit-to-cost standards that might at least provide some assurance that project reliability benefits may be commensurate with project costs. The NOPR proposes to provide bonus ROE adders to projects that provide "significant and demonstrable reliability benefits above and beyond the requirements of the NERC reliability standards," yet the proposed rule is essentially devoid of standards or metrics to identify or quantify the alleged benefits from such projects that might justify the additional costs to consumers. The lack of any such metrics, or even any standards by which to judge what constitutes an appropriate "above and beyond" reliability project, creates a risk that customers could be asked to pay for projects that provide an excessive level or reliability and/or reflect utility gold plating. The proposal would, by its terms, require case-by-case litigation, which would be burdensome for the Commission and customers alike, and would hardly be a recipe for certainty.[124]

[124] *Id.* at P 66.

Even in circumstances where it might be reasonable to invest in transmission facilities to promote a level of reliability beyond what is required by the NERC reliability standards, ordinary cost recovery mechanisms should be adequate to facilitate such investment without the need for incentives. This point was made clear, for instance, at the March 2019 joint technical conference with the Department of Energy on infrastructure security investment.[125] Given this lack of cost-recovery risk – which the Commission cites as a factor in whether incentives should be considered[126] – it would be inappropriate to provide incentives for transmission investment beyond what is required to comply with applicable reliability and planning standards, even in situations where such investments might be warranted.

As discussed above, offering an incentive for projects that provide reliability benefits beyond what is required to meet the NERC standards could also prompt conflicts with the regional planning process itself, as sponsors seek to promote projects that might not be the most efficient or cost-effective solution to regional planning needs, including by offering their own analyses of quantitative and qualitative reliability benefits. This concern is exacerbated by the fact that the NOPR does not propose to limit eligibility for the incentive to regionally planned projects, offering instead to make it available for "all types of transmission projects within the Commission's jurisdiction."[127]

Finally, the NOPR's reliability incentive proposal raises the prospect that customers could pay an ROE adder on the entire project investment when only a portion of the project cost

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[125] *See Security Investments for Energy Infrastructure Tech. Conf.*, Docket No. AD19-12-000, Technical Conference Transcript (March 28, 2019) ("Tr.") at 48, 78 (Akins); Tr. at 64 (Santa); Tr. at 121, 151 (Crane); Tr. at 130-31, 151-52, 161-62 (Emler); Tr. at 137-38, 152 (Kjellander); Tr. at 152, 160-61 (Chivukula); *see also Security Investments for Energy Infrastructure Tech. Conf.*, Docket No. AD19-12-000, Written Statement of Kevin G. Wailes at 6-7 (March 26, 2019).

[126] *See* NOPR at P 64.

[127] *Id.* at P 65.

contributes to reliability benefits above and beyond an adequate level of reliability. Any prudent transmission project is likely to contribute to system reliability. Simply improving or expanding an ordinary transmission project to provide enhanced reliability benefits should not entitle the sponsor to an incentive ROE on the entire project investment, particularly if the component that provides benefits beyond an adequate level of reliability is a technology component that is a relatively small proportion of project investment. If the Commission proceeds with the reliability adder proposal, it should limit the application of the adder to the *portion* of the overall project investment that the applicant demonstrates is necessary "to produce significant and demonstrable reliability benefits above and beyond the requirements of the NERC reliability standards."[128]

c. The Commission Should Not Grant the Reliability Adder Based on Resilience Benefits

The Commission should not adopt its proposal to consider transmission projects that improve resilience in granting reliability incentives.[129] As the still-pending proceeding in Docket No. AD18-17-000 indicates, there are a wide variety of views on what "resilience" means in different contexts, the best ways to promote it, the extent to which the concept should be – or already is – incorporated into planning requirements, and what, if anything, the Commission can and should do to help ensure a resilient grid. Given the unsettled nature of many of these issues at the Commission, it would be, at best, premature to adopt any policy to encourage resilience through incentives.

Moreover, the reliability incentive is directed at projects that provide more than an adequate level of reliability under the NERC standards, but the NERC standards already

[128] *Id.* at P 64.

[129] *Id.* at P 73.

incorporate some aspects of resilience, complicating any effort to judge whether a "resilience" project provides benefits above and beyond the requirements of the NERC reliability standards. NERC's definition of an adequate level of reliability, for example, necessarily reflects the concept of resilience insofar as it incorporates performance objectives that account for pre-defined disturbances and the management of adverse reliability impacts associated with severe and high-impact, low-frequency events.[130] Existing NERC reliability standards also promote resilience, such as TPL-001-4, which requires covered entities to establish transmission system planning performance requirements that will allow the Bulk Electric System to operate reliably over a broad spectrum of conditions and following a wide range of probable contingencies, including extreme events. Separating out "resilience" from "reliability" and determining when a "resilience" project provides more than an adequate level of reliability are not simple tasks.

To the extent that the Commission views "resilience" as *distinct* from "reliability," then incentives to promote resilience are not encompassed within FPA section 219, which is limited to awarding incentives that "benefit[] consumers by ensuring *reliability* and reducing the cost of delivered power by reducing transmission congestion."[131]

d. If the Commission Adopts the Reliability Incentive Adder, the Commission Should Revise and Clarify the Proposed Rule

If the Commission proceeds with the reliability incentive adder, it should revise the proposal to reflect the revisions described in section III.D above. Importantly, the Commission should also clarify that, to the extent that a project is required to meet existing baseline reliability planning requirements (whether of an RTO/ISO or individual transmission owner), the project

[130] *See* Docket No. RR06-1-020, Informational Filing on the Definition of "Adequate Level of Reliability" (May 10, 2013).

[131] 16 U.S.C. § 824s(a) (emphasis added).

should be ineligible for an "above and beyond" reliability incentive. Absent this clarification, applicants might request incentives for projects dictated by existing planning requirements in situations where the requirements are not strictly tied to complying with NERC standards and maintaining an adequate level of reliability. It would be unreasonable to allow utilities to seek incentives for projects that they are effectively already required to construct pursuant to existing planning requirements.

The NOPR proposes that an applicant for the reliability benefit "should support their requests by providing a quantitative analysis of a transmission project's potential reliability benefits, where possible,"[132] but also suggests that the Commission will consider "qualitative demonstrations" where "an applicant is not able to provide a quantitative analysis."[133] To the extent the Commission adopts the reliability incentive adder, the Commission should require a *quantitative* showing of benefits and should not award the reliability benefit incentive based on qualitative reliability benefit claims alone. Further, the Commission should not grant the incentive unless the applicant can show that such *quantifiable* benefits significantly exceed the cost of the ROE adder, as discussed in section III.D above. As with the economic benefit incentive, any award of the reliability incentive adder should also be conditioned on the project meeting the quantitative benefits criteria on an actual cost basis.

The Commission appropriately recognizes that there should be no double counting of benefits in considering the different incentives, and asks "how measurement of economic benefits can be distinguished from measurement of other types of benefits considered for purposes of other incentives."[134] APPA believes it could often be difficult to distinguish

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[132] NOPR at P 74.

[133] *Id.*

[134] *Id.* at P 55.

between the quantifiable reliability benefits of projects applying for the reliability incentive adder and the economic benefits provided by projects that are seeking the economic benefit incentive. Among the potential quantifiable reliability benefits cited in the NOPR, for example, are reductions in reliability unit commitments and increases in import or export capability.[135] These kinds of quantifiable benefits could overlap considerably with production cost savings and other congestion reduction benefits that are the focus of the economic incentive. To avoid such double counting concerns, applicants should not be eligible for both the reliability adder and economic adder for the same project.

F. The Commission Should Revise its Proposal to Apply a 250 Basis Point Limit on ROE Incentive Adders

To comply with the statutory mandate to ensure just and reasonable rates, the Commission proposes a flat 250 basis point limit on ROE incentive adders, and proposes that this cap could exceed the top of the zone of reasonableness.[136] APPA believes that the concept of adopting a fixed basis point cap on incentive adders has merit. The NOPR, however, neither justifies a policy of allowing the ROE to exceed the zone of reasonableness, nor shows that 250 basis points is an appropriate level at which to cap total incentives. APPA recommends that the Commission limit total ROE, inclusive of incentives, to the *lower* of (1) a basis point cap of 150 basis points; or (2) the top end of the range of reasonableness.

1. The NOPR Does Not Justify Allowing Incentive ROEs to Exceed the Zone of Reasonableness

The Commission incorrectly asserts that it may adopt a basis point cap above the top end of the range of reasonableness because "ROE incentives may meet a different test for just and

[135] *Id.* at P 74.

[136] *Id.* at P 76.

reasonable rates than for a base ROE."[137] To be sure, an incentive ROE may exceed the base ROE, but that does not mean that the test for a just and reasonable incentive ROE is different than for the authorized base ROE. Under the capital attraction principles described in the Supreme Court's *Hope* and *Bluefield* decisions,[138] a just and reasonable return is "commensurate with returns on investments in other enterprises having corresponding risks" and "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain [a utility's] credit and to attract capital."[139]

The capital attraction standard does not cease to apply in the context of incentive returns; the courts have made clear that incentive rates must be justified by the capital attraction needs of the project.[140] The NOPR, however, simply proposes "that ROE incentives up to and including this [250 basis point] cap will be just and reasonable as required by section 219(d)"[141] without any explanation how a cap at that level relates to the capital attraction standards for a just and reasonable ROE. Under the NOPR's proposal, a utility could potentially be rewarded with 250 basis points of incentives based on individual project benefits and RTO/ISO membership, irrespective of the level of return required to attract capital given the business and financial risks of the utility or a project for which it is receiving incentives. Indeed, the Commission states that this 250 basis point cap would apply "to all public utilities regardless of their associated risk

[137] *Id.* at P 78.

[138] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944); *Bluefield Waterworks Improvement Co. v. Pub. Serv. Comm'n of W.V.*, 262 U.S. 679 (1923).

[139] *Hope Nat. Gas Co.*, 320 U.S. at 603; *see also Bluefield*, 262 U.S. at 693 (explaining that "[t]he return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.").

[140] *See, e.g., City of Detroit*, 230 F.2d at 817 (the Commission must show that an incentive rate increase "is in fact needed, and is no more than is needed, for the purpose.").

[141] NOPR at P 80.

profiles."[142] Capping incentive ROEs at the top of the zone of reasonableness, while an imprecise approach to linking total incentives to capital attraction requirements, is supported by the logic that it restricts the overall ROE to the level that is theoretically required by the most risky transmission company, and, thus allows for an incentive adder at the same time it affords customers a level of protection from wholly exorbitant rates.[143]

Even if the Commission has the authority to set an incentive ROE above the top end of the zone of reasonableness, the Commission does not offer any reasoned basis for departing from its current policy of capping total ROE, inclusive of incentives, at the top end of the range. The NOPR asserts that the proposed policy shift is "due to changing investment conditions."[144] This assertion, however, is unaccompanied by any further explanation; the Commission does not even identify what it means by "changing investment conditions," let alone draw a connection between any such changing investment conditions and the alleged need to set incentive ROEs above the zone of reasonableness. Nor does the Commission provide any support for its conclusory assertion that "given the Commission's experience with the transmission incentives policy under FPA section 219, we believe that this existing limit on ROE incentives may no longer be adequate to attract new investment in transmission facilities, as required by FPA section 219."[145] This assertion, in fact, is completely contradicted by the Commission's concessions that transmission investment has been generally robust in the aggregate and that the impact of its current incentive policies remains unclear.[146]

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[142] *Id.*

[143] *See* NOPR, Comm'r Glick Dissent at P 28.

[144] NOPR at P 77.

[145] *Id.* at P 79.

[146] *See id.* at PP 26, 115.

The closest the NOPR comes to providing a concrete rationale for allowing total ROE adders to exceed the range of reasonableness is its observation that the current policy might constrain incentive adders for above-average risk utilities that have a high base ROE.[147] The Commission states in this regard that "[w]e do not believe it was the intent of Congress to preclude utilities with above-average risk profiles from receiving ROE incentives."[148] APPA acknowledges there conceivably could be unusual situations where using the top of the zone of reasonableness as a cap on incentive adders could limit a utility with a high base ROE from receiving all the incentive adders for which it might otherwise be able to qualify under the Commission's rules. The NOPR does not establish, however, that this has been, or is likely to be, a persistent concern sufficient to justify a significant change in policy. The unusual exception should not serve as the basis for changing the rule for all utilities. More fundamentally, whether any utility in the situation described by the Commission is treated unreasonably would depend on the specific circumstances presented, and, in particular, whether the utility would be deprived of a return adequate to attract capital to a proposed project on reasonable terms.

2. The NOPR Does Not Support the Proposed 250 Basis Point Cap on Incentive Adders

The NOPR's proposal to allow up to 250 basis points of ROE adders is arbitrary and should be revised. There is no explanation whatsoever in the NOPR as to how the Commission settled on 250 basis points – as opposed to any other figure – as the cap on ROE adders. The number appears to be completely subjective, yet the Commission proposes to find in all cases "that ROE incentives up to and including this cap will be just and reasonable as required by

[147] *Id.* at P 79.

[148] *Id.*

section 219(d)."[149] A proposed 250 basis point cap that lacks any explanation, let alone a nexus to the capital attraction needs of a particular project, cannot be considered just and reasonable.

If the 250 basis point cap is grounded in the unspoken assumption that a project should have an opportunity to vie for multiple incentive ROE adders described in the NOPR (*i.e.*, economic benefit adder, reliability benefit adder, technology adder, and 100 basis point RTO/ISO adder), that is an inappropriate rationale for the cap. As discussed above, a single project should not be eligible to receive both the economic and reliability benefit ROEs. Further, as APPA explains below, the Commission should limit the RTO Adder to no more than 50 basis points, to the extent it is retained at all. Thus, a more reasonable limit on total ROE adders would be 150 basis points, inclusive of the RTO Adder.

3. The Commission Should Limit Incentives to the Lower of a Basis Point Cap or the Top End of the Range

Although the Commission does not justify the NOPR's proposed 250 basis point figure, the concept of applying a fixed cap on incentives has merit. Such a cap might serve as an appropriate limit on total incentives when the top end of the zone of reasonableness, for example, reflects a high-end outlier, albeit one that has passed the Commission's screens for unreasonable proxy group results.[150] The chances that a high end outlier might remain in the range have been increased by the Commission's recent decision in Opinion No. 569-A to modify the high-end outlier test to allow a proxy company with a cost of equity estimate that is 200% of the median.[151] While the top end of the zone of reasonableness provides an upper limit on a just and reasonable incentive return, it would be fully appropriate also to apply a fixed basis point cap on

[149] *Id.* at P 80.

[150] *See, e.g.*, *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 569-A, 171 FERC ¶ 61,154, at PP 152-55 (2020).

[151] *Id.* at P 154.

total incentive adders, and adopt a policy that total ROE adders are limited to the lower of the basis point cap or the top end of the zone of reasonableness. As discussed above, a fixed cap of 150 basis points may be appropriate if the Commission proceeds with the NOPR's proposals. Use of a fixed cap would serve the Commission's goal of providing transmission owners and developers with transparency and increased certainty about the potential availability of incentives, while also ensuring that the statutory just and reasonable requirement is met through retention of the policy that total ROE may not exceed the top end of the zone of reasonableness.

4. The Commission Should Not Allow Applicants to Seek Removal of Caps on Previously-Granted Incentives

The NOPR requests comment "on whether the Commission should allow applicants, on a case-by-case basis, to seek removal of the zone-of-reasonableness conditions placed on previously granted incentives and to replace those restrictions with a hard cap on the incentives they have been granted."[152] The Commission should reject this idea out of hand. Aside from the fact that it would be unjust and unreasonable to award an incentive ROE that exceeds the top of the zone of reasonableness, the Commission has long recognized that an incentive, by definition, can only encourage *future* behavior.[153] Any effort to increase the incentive adder for projects that have already been built, or are in the process of being built, would contravene "the obvious proposition that the Commission will not, and cannot, create incentives to motivate conduct that has already occurred."[154]

[152] NOPR at P 81.

[153] *See, e.g.*, *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d at 137-38.

[154] *Id.* (internal quotes and citations omitted).

G. Retention of Non-ROE Incentives

APPA does not object, in principle, to the continued use of non-ROE incentives, as part of a properly-structured incentive framework.[155] The Commission's current policy focusing primarily on these risk-reducing incentives is reasonably sound. The combination of risk-reducing incentives with additional ROE adders untethered to any nexus to project investment requirements, however, is not just and reasonable, as discussed above. The Commission should retain its current incentive framework, including the nexus test and evaluation of the total package of incentives.

H. Elimination of the Transco ROE Incentive

APPA supports the NOPR's proposal to eliminate the Transco ROE incentive adder, and APPA agrees that the rationales cited by the Commission support a conclusion that the adder is no longer warranted.[156] In addition to the reasons discussed in the NOPR, APPA notes that there is nothing in FPA section 219 that specifically addresses incentives to promote Transcos.

The same reasons that support prospective elimination of the adder also warrant removing previously-awarded Transco ROE incentive adders.[157] Incentives are intended to encourage future action, and there is no basis to continue to provide an incentive adder to reward an organizational form that the Commission finds does not provide particular benefits to consumers, let alone the specific benefits required by FPA section 219.[158] The Commission has an ongoing obligation to ensure that rates subject to its jurisdiction are just and reasonable (a requirement that FPA section 219(d) expressly makes applicable to incentives granted under

[155] *See* NOPR at PP 82-84.

[156] *See id.* at PP 85-90.

[157] *See id.* at P 91 (requesting comment "regarding how the Commission should treat Transco ROE Incentives that were previously granted.").

[158] *Id.* at PP 85-90.

section 219), and Transcos do not have a justifiable expectation that the Commission's incentive adder rules will remain unchanged no matter how circumstances change. Accordingly, the Commission should make a generic finding under FPA section 206 that continued application of the Transco adder is unjust and unreasonable and direct Transcos that have been awarded the adder to make a single issue compliance filing removing the adder.

I. The NOPR's Proposals to Retain and Increase the RTO Adder Are Unjust and Unreasonable

In comments on the NOI, APPA and the other Joint Commenters argued that the Commission should eliminate the 50 basis point ROE adder granted for joining or remaining in an RTO/ISO, or, at a minimum, the adder should phase down over time to reflect the distinction between an incentive to encourage joining an RTO/ISO and one for voluntarily remaining an RTO/ISO member.[159] Ignoring these arguments, the NOPR literally doubles down on the RTO Adder, proposing to increase the adder from 50 to 100 basis points. The NOPR also offers to grant the adder to RTO/ISO participants "regardless of the voluntariness of their participation."[160]

The NOPR does not provide any reasonable basis for its proposal to simply double the current RTO Adder. The NOPR cites no evidence that an increase to the adder is necessary to encourage RTO/ISO participation, nor does the NOPR offer any rationale for why 100 basis points might be an appropriate figure to promote such participation. The Commission's reasoning departs from prior precedent and contravenes court decisions addressing the adder. Indeed, it is difficult to see the proposal as anything other than an unjustified stratagem to increase equity returns for transmission owners, which is particularly inequitable at a time when

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[159] *See* Joint Commenters NOI Comments at 71-76; Joint Commenters NOI Reply Comments at 23-30.

[160] NOPR at P 98.

transmission customers are saddled with increasing transmission costs. Because the Commission's proposals with respect to the RTO Adder are unjust and unreasonable and fail to comply with principles of reasoned decision-making, the Commission should not adopt them in any final rule in this proceeding.

1. The Commission's Proposal to Double the RTO Adder Lacks Any Reasoned Basis and Should Not Be Adopted

The Commission seeks to justify increasing the RTO Adder by pointing to increased benefits of RTOs/ISOs generally.[161] APPA questions whether broad-based RTO benefits can reasonably serve as a justification for an incentive adder in the absence of evidence that the adder is actually needed to encourage RTO/ISO membership. Transmission-owning members of RTOs and ISOs share in the membership benefits, which should *reduce* any need to award incentives to encourage RTO/ISO participation. The benefits of RTO/ISO participation, combined with many public utilities' now longstanding membership in an RTO/ISO, arguably have diminished or eliminated any influence the adder may have ever had on decisions to join or remain in an RTO/ISO. Increasing the RTO Adder would actually reduce the net benefit of joining an RTO, which decreases the value proposition of membership to consumers.

Notwithstanding the voluminous record developed in the NOI proceeding, the NOPR does not point to any concrete evidence that there is a need to increase the RTO Adder to encourage utilities to join or remain in RTOs or ISOs. As APPA and the other Joint Commenters pointed out in their reply comments in the NOI docket, none of the transmission owner commenters actually provided any evidence that the RTO Adder is instrumental to their determination to join and/or remain in an RTO.[162] The lack of evidence should not be

[161] *See id.* at PP 93, 97.

[162] *See* Joint Commenters NOI Reply Comments at 25.

particularly surprising; whatever the level at which it is set, the RTO Adder is unlikely to be determinative in promoting RTO membership. Even in situations where a transmission owner's participation in an RTO/ISO is not legally required, the decision to join or remain in an RTO is not solely a decision of transmission owners – the decision is also influenced by other stakeholders and state regulators based on assessments that benefits are likely to outweigh the costs. A variety of governmental and non-governmental stakeholder interests at the state level influence the decision. To non-transmission owners, the adder actually deters support for RTO/ISO membership by reducing the net benefits of participation. In regions where RTOs/ISOs exist, there is generally state support for such membership, and many of these same regulators have objected to continuation of the RTO Adder in its current form. State regulators and policymakers have retained RTO/ISO support based on the complete value proposition of membership – a value proposition that will be reduced by an increase in the RTO Adder. Moreover, experience to date indicates that transmission owners typically have little practical opportunity to unilaterally remove themselves from any RTO/ISO membership altogether.

APPA recognizes that the Commission has previously cited RTO/ISO benefits as a rationale for the adder.[163] Even assuming general RTO/ISO benefits may provide a permissible basis for granting the RTO Adder, an assertion that benefits provided by RTOs/ISOs have increased in the past several years is not a reasoned basis for simply *doubling* the RTO Adder. Crucially, there is no evidence presented in the NOPR supporting a finding that doubling the adder will increase consumer benefits, yet that is the key criterion for awarding incentives under

[163] Order No. 679 at P 331.

FPA section 219.[164] Doubling the adder will, in fact, likely reduce consumer benefits through the imposition of increased costs without any change in RTO/ISO operations or services.

2. Increasing the RTO Adder For the Duties and Responsibilities of RTO/ISO Membership is Unreasonable and Would Double Compensate for Risks Accounted For in the Base ROE

The NOPR argues that the proposed increase to the RTO Adder also "recognizes the increased duties and responsibilities associated with RTO/ISO membership since the issuance of Order No. 679, including, *inter alia*, the development of regional transmission planning processes."[165] This is, in effect, an argument that the RTO Adder is justified by the risks and challenges of RTO/ISO participation. Such a rationale is inconsistent with the NOPR's proposed shift to a "benefits" framework, and it leaves consumers with the worst of both worlds: paying an RTO incentive adder to promote RTO benefits *and* to compensate transmission owners for the alleged risks and challenges of RTO participation.

The NOPR's emphasis on "the development of regional transmission planning processes" as a justification for increasing the RTO/ISO adder is particularly arbitrary because Order No. 679 specifically rejected arguments that utilities should receive incentives for engaging in regional coordination, noting that such coordination was required under Commission rules.[166] It is also arbitrary and illogical to base an increased *RTO* Adder on the obligation to participate in

[164] *See* 16 U.S.C. § 824s(a).

[165] NOPR at P 97. The other "increased duties and responsibilities" of RTO/ISO membership cited in the NOPR are: "loss of operational control of transmission facilities to a third party; an obligation to build new transmission facilities at the direction of the RTO/ISO; diminished decision-making control over assets while retaining the responsibility of maintaining the system; meeting reliability standards; obligations to obey RTO/ISO rules; and an obligation to provide electric service even when foundational agreements can change, thereby changing the terms and conditions under which the transmitting utility initially agreed to participate in the RTO/ISO." *Id.*

[166] Order No. 679 at P 332 (explaining that "[t]his increased coordination … would be mandatory, not optional, and therefore we will not offer at this time an incentive for such coordination.").

the regional planning process when the Commission's regional planning requirements are not limited to utilities in RTO/ISO regions.

The NOPR, moreover, does not demonstrate that the identified "duties and responsibilities" of RTO/ISO membership have increased in recent years, let alone to a degree that could justify doubling the RTO incentive adder.[167] The duties and responsibilities cited by the Commission are basic aspects of RTO/ISO participation that were applicable to transmission owners even when Order No. 679 was issued in 2006, and were certainly well-established in 2012 when the Commission last revisited its transmission incentive policy. For example, the NOPR cites the "loss of operational control of transmission facilities to a third party" as a duty or responsibility of RTO/ISO membership that allegedly supports doubling the RTO Adder.[168] But ceding operational control to a third-party is a core feature of RTO/ISO participation; it is, in fact, one of the four minimum characteristics of an RTO adopted by the Commission in Order No. 2000.[169] The Commission does not explain how this and the other "duties and responsibilities" of RTO/ISO membership have increased in a way that conceivably could support doubling the RTO Adder, even if compensating transmission owners for the duties and responsibilities of RTO/ISO membership were a valid basis for the RTO Adder.

In any case, the NOPR's suggestion that RTO/ISO transmission owners need to receive a significant ROE adder to compensate them for the duties and responsibilities of RTO membership is neither credible nor consistent with the Commission's policies for establishing just and reasonable equity returns. For example, one of the duties of RTO/ISO membership cited

[167] *See* NOPR, Comm'r Glick Dissent at P 24.

[168] NOPR at P 97.

[169] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom*. *Pub. Util. Dist. No. 1. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

by the Commission is the obligation to build new transmission facilities at the direction of the RTO/ISO.[170] Yet transmission owners, as discussed above, have been more than willing to invest in transmission in recent years, and this investment has been concentrated in RTO/ISO regions.[171] To the extent that the duties and responsibilities of RTO/ISO membership impose costs on public utility transmission owners, these costs are recovered in cost-based rates, almost universally through formula rates that minimize any risk of under-recovery.

Even if RTO/ISO membership imposes certain duties and obligations on transmission-owning members that are not offset by the benefits of such membership, the NOPR fails to explain why a 100 basis point adder (or even a 50 basis point adder) is justified to compensate for these obligations when they should already be fully reflected in the base ROE through the use of representative proxy companies in the Commission's ROE methodologies. Indeed, in Order No. 679, the Commission indicated that "issues concerning risk . . . are more appropriately addressed in the proceedings that evaluate proxy companies and set a zone of reasonableness."[172] The Commission sets the base ROE using a proxy group of companies that are representative of the risk profile of transmission operating companies. Although the Commission relies on national proxy groups for setting the base ROE for electric utilities, the prevalence of RTO/ISO participation by those proxies (through both their transmission and their affiliated merchant generation) makes it likely 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. Providing transmission owners a higher ROE based on the alleged duties and responsibilities of RTO

[170] *Id.*

[171] *See* Brattle Report, *supra* at n.20.

[172] Order No. 679 at P 326.

membership when those responsibilities are already accounted for in the base ROE would be unjust and unreasonable.

3. The Commission Should Not Grant the RTO Adder for Non-Voluntary Participation

The NOPR's proposal to grant the RTO Adder "regardless of the voluntariness" of participation is inconsistent with longstanding precedent, recently reaffirmed in *CPUC v. FERC* as to the RTO Adder in particular, that incentives are not justified if they seek to reward conduct that is already legally required.[173]

While FPA section 219 does not *expressly* provide that incentives should only be awarded to transmission owners that voluntarily participate in RTOs/ISOs,[174] section 219 does require all incentive rates to be just and reasonable, which requires adherence to the incentive rate principles described in section III.B above, including that incentives are not justified if they seek to induce conduct that is already legally required. In proposing to eliminate the voluntariness criteria for eligibility for the adder, the Commission conflates bonuses with incentives, and, in so doing, it is treating the adder as an end in itself. A just and reasonable incentive rate cannot simply be a bonus for good behavior; there must be a nexus between the incentive and the decision to join, or remain in, the RTO/ISO. The Commission recognized the need for such a nexus when it characterized the RTO/ISO adder as "an *inducement* for utilities to

[173] *See CPUC v. FERC*, 879 F.3d at 974 ("When membership is not voluntary, the incentive is presumably not justified."); *id*. at 975 ("An incentive cannot 'induce' behavior that is already legally mandated. Thus, the voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder."). Although the court's decision in *CPUC v. FERC* focused on whether the Commission had properly interpreted and applied the requirements of Order No. 679, the court specifically noted that Order No. 679 itself incorporated the Commission's "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." *Id.* at 977. Thus, even if the Commission were to modify its regulations under Order No. 679, it would still need to address why its "longstanding policy" that an incentive rate must encourage future, voluntary conduct to be just and reasonable should not still apply.

[174] *See* NOPR at P 98 (arguing that "FPA section 219 obligates the Commission to provide an incentive to each transmitting utility or electric utility that joins a Transmission Organization, independent of the obligation to do so.").

join, and remain in" RTOs/ISOs.[175] In other words, there must be some assurance that the RTO Adder is actually influencing a utility's decision to join or remain in an RTO/ISO. Congress didn't mandate bonuses for RTO/ISO participation, but rather inducements to join an RTO/ISO. It could not have meant for the Commission to give away money to a public utility's shareholders when doing so would not provide any inducement because the utility was already required to join and remain in an RTO/ISO.

Moreover, if the aim of the RTO Adder is to increase and maintain participation in RTOs and ISOs, it does not make sense to award an adder where state law – or some other legal requirement – ensures the same goal. A state law requirement for RTO/ISO participation would advance, not conflict with, the purpose of FPA section 219(c) and the Commission's efforts to promote membership in RTOs and ISOs.

The Commission cites arguments that not awarding the RTO Adder for involuntary participation "would create an uneven playing field in the competition for investment capital."[176] There is no requirement that all transmission owners have the same allowed ROE in order to maintain a "level playing field," irrespective of any factors that might bear on the ROE's determination.[177] There is no evidence cited in the NOPR to suggest that the lack of an RTO Adder would prevent a transmission owner from accessing capital on reasonable terms. In any case, a general aim to promote a level playing field in access to investment capital cannot justify charging consumers unjust and unreasonable rates that reflect an incentive adder aimed at inducing conduct that is already legally required.

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175 Order No. 679-A at P 86 (emphasis added); *see also CPUC v. FERC*, 879 F.3d at 974-75.

176 NOPR at P 98.

177 *See* NOPR, Comm'r Glick Dissent at P 23 n.39 (observing that "if there is an uneven playing field, that is the result of state law and I am unaware of any authority suggesting that the purpose of our incentive program is to mitigate the effects of state laws on particular transmission owners' relative ability to attract capital.").

4. The RTO Adder Should Not Apply to Projects that Do Not Go Through the Regional Planning Process

If the Commission retains the RTO Adder, the Commission should restrict eligibility for the adder to projects approved through the RTO/ISO regional transmission planning process. In particular, the RTO Adder should not be applied to projects such as Supplemental Projects in PJM or asset management projects in CAISO. These projects do not reflect full independent regional planning – one of the key intended benefits of RTO/ISOs. To promote regional planning, these non-regionally planned projects should not be entitled to the RTO Adder.

5. The Commission Should Phase Out the RTO Adder

Whatever level the Commission adopts for the RTO Adder, the Commission should consider phasing out the adder over time. No reasonable justification exists to continue any adder in perpetuity after a public utility has joined an RTO/ISO.

As APPA and the other Joint Commenters proposed in the NOI proceeding,[178] an RTO Adder awarded to a utility for joining an RTO/ISO should be allowed to remain in place at the initial level for a four-year period following the effective date of the public utility's membership start date, subject to reduction during the four-year period if warranted by a cap on the overall level of allowed ROE. At the conclusion of the four-year period, the RTO Adder should begin to phase out over a subsequent two-year period. For existing members of an RTO/ISO that are currently receiving the 50 basis point RTO Adder pursuant to Order No. 679, the Commission should initiate a process to phase out the RTO Adder by reducing the adder by 12.5 basis points per year over a four-year period.

[178] Joint Commenters NOI Comments at 74-75.

Limiting the RTO Adder to a set period of time would neither contravene FPA section 219 nor unreasonably undermine the expectations of existing RTO/ISO participants. FPA section 219(c) refers only to incentives for each utility that "joins" an RTO or ISO,[179] and does not mandate that incentives awarded pursuant to the provision must persist for the entire time the utility remains an RTO/ISO participant.

J. Transmission Technology Incentives

The NOPR proposes a number of incentives aimed at promoting the deployment of transmission technologies, including, but not limited to, those for advanced line rating management, transmission topology optimization, and power flow control.[180] The proposed incentives include: (1) a 100 basis point ROE adder on the cost of the specified transmission technology project; and (2) authorization to included certain deployment costs in rate base as a regulatory asset rather than treat these costs as an expense. The Commission also proposes that certain transmission technology pilot programs with costs under $25 million would receive a rebuttable presumption of eligibility for incentives.[181]

APPA supports the Commission's efforts to explore measures to achieve greater deployment of transmission technologies that increase the capacity, efficiency, or reliability of transmission facilities.[182] Cost-effective deployment of these technologies has the potential to improve the economic efficiency and reliability of the grid at a time when many public power utilities are facing sharply rising transmission expenses and continued exposure to often unpredictable congestion costs. Nonetheless, APPA does not believe that the NOPR shows that

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[179] 16 U.S.C. § 824s(c); *see also* NOPR, Comm'r Glick Dissent at P 19.

[180] NOPR at PP 101-103.

[181] *See id.* at P 112.

[182] *Id.* at P 101.

the proposed technology incentives would be reasonable or effective in seeking to promote transmission technologies.

1. The NOPR Does Not Demonstrate that the Technology Incentive Would be Effective

The issue of whether incentives would be an appropriate and effective way to increase the deployment of transmission technologies was explored at the Commission's two-day GETs workshop in Docket No. AD19-19-000.[183] Workshop participants supporting incentives generally argued that they are needed to overcome utilities' preference for more capital-intensive projects that offer greater return opportunities. The records developed at the workshop in Docket No. AD19-19-000 and the September 2019 workshop in Docket No. AD19-15-000, however, do not make a compelling case that transmission owner preference for more capital-intensive investment is the principal obstacle to GETs deployment at this time. For one thing, panelists at the September workshop indicated that deployment of ambient-adjusted ratings ("AARs") or dynamic line ratings ("DLRs") generally does not substitute for longer-term projects needed for reliability.[184] Other panelists questioned the notion that a preference for big-dollar projects makes transmission owners unwilling to consider GETs,[185] and the workshop discussions reflected numerous examples of transmission owners deploying or considering DLRs and other GETs.

[183] *See id.* at P 23.

[184] *See, e.g.*, Docket No. AD19-15-000, Workshop Transcript at 16-17 (Tsuchida) (arguing that use of DLR is not a competitor, but a complement, to new transmission lines); *see id.* at 98 (Murphy) (explaining that PJM "would not want to assess that the system is going to be reliable on a dynamic rating above the static in a future looking planning case"); *id.* at 144 (Kramer) (implementation of AARs does not alter the transmission system long-term planning requirements); *id.* at 253-54 (Smith) ("from a planning perspective, I think it would be a really hard sell to try to figure out how to change those ratings in those transmission lines when you're talking 3, 5, 10 years out in that evaluation").

[185] *See, e.g.*, GETs Tr. at 257 (Leovy); GETs Tr. at 332-33 (Millar).

Workshop panelists identified factors other than transmission owner preference for large projects that have thus far slowed deployment of GETs, including the unproven nature of the technologies, their cost-effectiveness relative to other options, potential operational complexity as more GETs are added to the grid, and the need for systems adaptation and training. The existence of these challenges suggests that a lack of rate incentives for GETs is not the primary problem, and that continued maturation of the technology, industry adaptation, and appropriate consideration of GETs in the transmission planning process are likely to result in increased GETs deployment without the need for new incentives. Awarding lucrative incentives to promote GETs deployments that transmission owners are – or should be – already considering would be unreasonable, and could even be counterproductive, as incentives might encourage parties to pursue projects eligible for incentives in lieu of other solutions that might be needed.[186] As Commissioner Glick notes, moreover, the workshop discussion in Docket No. AD19-19 suggested that ROE adders were unlikely to be an effective incentive for GETs, given the relatively small size of the investment.[187]

The Commission should focus its efforts on measures other than transmission rate incentives to promote deployment of GETs. For example, the Commission could encourage expanded and more effective use of AARs without the need for incentives, as this relatively straightforward tool is already in use in some regions and has the potential to provide customers with significant benefits without some of the planning complications presented by other GETs. Indeed, AARs should not even be considered a type of advanced transmission technology eligible for incentives under any final rule in this docket. The Commission could also adopt

[186] *See* GETs Tr. at 153-54 (Webb).

[187] *See* NOPR, Comm'r Glick Dissent at P 32.

policies to ensure that GETs are more systematically considered in the transmission planning process as solutions – or complements to solutions – for reliability or economic efficiency needs.[188]

2. Specific Comments on the Technology Incentive

If the Commission moves forward with the technology incentive proposal, any implementation of project-specific incentives should be subject to the conditions described in section III.D, above. Certain other features of the technology incentive proposal are reasonable and should be adopted if the Commission adopts the NOPR proposal, while other aspects of the proposal may be reasonable with some clarification or modification.

It would be reasonable, for example, to limit the ROE adder only to the cost of the specified transmission technology project, as the Commission proposes.[189] APPA also believes it is reasonable to require an applicant to show that the project meets a defined benefit-to-cost threshold, although APPA questions whether the benefit-to-cost ratio for the economic benefit incentive is necessarily the right metric for technology projects.[190] APPA also supports the proposed requirement to submit a transmission technology statement as part of an application for a transmission technology incentive.[191]

APPA recommends that the Commission clarify the proposed definition of what constitutes an eligible transmission technology, which, as proposed in the NOPR, is overly broad. The NOPR proposes that eligible technologies would encompass "transmission

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[188] *See, e.g.*, Docket No. AD19-19-000, Leovy Statement at 9; *see also, e.g.*, GETs Tr. at 283 (Glazer) (observing that transmission planners could "formalize a screening process to ensure that GETS were given consideration, and essentially build a record.").

[189] NOPR at P 105.

[190] *Id.* at P 103. The Commission should, at a minimum clarify whether the ex-ante or ex-post benefit-to-cost benchmark would be applied.

[191] *Id.* at P 111.

technology investment by utilities that enhance reliability, economic efficiency, capacity, and improve the operation of new or existing transmission facilities."[192] The Commission should clarify that eligible technologies would not include equipment, designs, and features that are well-established or technologies that are not novel or innovative.[193]

Finally, APPA believes the technology deployment incentive may be a reasonable approach to facilitate deployment of potentially beneficial projects, although APPA notes that if a public utility's allowed return is set at its actual cost of capital, the utility should be indifferent to whether these costs are treated as an expense or capitalized.

3. The NOPR Properly Eschews the Shared Savings Approach to GETs Deployment

The NOPR is on firm ground in not proposing a "shared savings" approach for GETs along the lines of the proposals discussed in the NOI comments and at the workshop in Docket No. AD19-19-000.[194] The workshop discussion identified a litany of problems with the shared savings model that preclude its adoption as a just and reasonable method for encouraging GETs.

The shared savings approach generally focuses on deploying GETs on existing transmission facilities and, in theory, generating congestion reduction benefits for customers.[195] These economic benefits would be calculated on an ex-ante basis, and the entity deploying the GETs would recover the cost of the GET itself, as well as a portion of the net savings that the GET deployment is projected to generate.[196] However, receipt of the shared savings benefit

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[192] NOPR, proposed 18 CFR § 35.35(e).

[193] *Cf. United Illuminating*, 167 FERC ¶ 61,126, at P 63, *reh'g denied*, 169 FERC ¶ 61,250 (2019) (finding that proposed project technology's was "not sufficiently novel or innovative" to support an incentive ROE under the 2012 Policy Statement risks and challenges framework).

[194] *See* NOPR at P 23.

[195] *See* WATT Coalition NOI Comments.

[196] *Id.*

would not be conditioned on the GET deployment actually generating congestion reduction benefits for customers.[197]

Under a shared savings proposal, consumers could be required to fund an exorbitant implied rate of return on the GETs investments.[198] The shared savings proposals are also problematic because they would guarantee the entity deploying the GET project or measure a share of hypothetical congestion cost savings, even if the savings never materialize. Drs. Bowring and Patton both contended that paying utilities a share of hypothetical congestion cost savings to encourage GETs deployment was a particularly unsound concept.[199]

It would not be reasonable to adopt a shared savings approach that pays excessive returns for GETs deployments when those deployments can be better promoted through more systematic consideration of these projects in the transmission planning process. It would be much more appropriate to focus on incremental improvements to that existing process to ensure that it can identify efficient and cost-effective GETs deployments (*e.g.*, by ascertaining transmission paths with severe congestion that GETs might alleviate at a lower cost than alternatives) rather than creating a lucrative new incentive structure to pay transmission owners to implement projects that should already be part of the existing process.

4. Pilot Programs

APPA believes that pilot programs and demonstration projects could be valuable and productive approaches to encouraging the cost-effective deployment of GETs. At the workshop on managing transmission line ratings in Docket No. AD19-15, for example, Dr. Xu described a New York Power Authority DLR demonstration project aimed at gaining experience with

[197] *Id.*

[198] *See* GETs Tr. at 307 (Bowring).

[199] *See* GETs Tr. at 306-309 (Bowring); GETs Tr. at 311-12 (Patton).

forecast DLR technology.[200] APPA, however, does not support the application of specific incentives to promote GETs pilot programs or demonstration projects. Some flexibility in accommodating pilot program designs may be appropriate provided the Commission closely monitors the benefits of such programs relative to the costs they impose, consistent with longstanding Commission policy concerning experimental rate programs.[201]

K. Disclosure of Anticipated Incentives

APPA strongly supports a requirement for public utilities seeking incentives to disclose all reasonably anticipated incentives to transmission planning regions as part of the public utility's transmission project proposal.[202] The requirement should apply to all incentive applications, not just those for an increased ROE because consideration of both risk-reducing and revenue-enhancing incentives may be relevant to whether a proposed transmission project is the most efficient and cost-effective solution.

L. Changes to FERC Form 730

APPA supports the NOPR's proposed changes to the information collected in FERC Form No. 730,[203] including the expansion of the scope of the reporting requirement to include "all public utilities that receive an incentive, other than the RTO Participation Incentive, for any transmission project to submit information on Form 730 regardless of the transmission project's size."[204]

[200] *See* Docket No. AD19-15 Workshop Tr. at 86-89; *see also* Docket No. AD19-15-000, "NYPA Experience with Dynamic Line Rating Technology" (Sept. 4, 2019) (presentation).

[201] *See, e.g.*, *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1238 (D.C. Cir. 2005).

[202] *See* NOPR at P 114.

[203] *Id.* at PP 115-125.

[204] *Id.* at P 122.

IV. CONCLUSION

APPA appreciates the opportunity to comment on the Commission's NOPR on transmission incentives, and asks the Commission to consider these comments in determining any further action to take in this proceeding. APPA urges the Commission to reconsider many of the proposed incentive policy changes described in the NOPR which, if adopted, are likely to increase transmission costs without any assurance of commensurate benefits for consumers.

Respectfully submitted,

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