

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**COMMENTS OF
INDUSTRIAL ENERGY CONSUMERS OF AMERICA,
THE AMERICAN FOREST & PAPER ASSOCIATION,
THE PJM INDUSTRIAL CUSTOMER COALITION, AND
THE COALITION OF MISO TRANSMISSION CUSTOMERS**

The American Forest & Paper Association, Industrial Energy Consumers of America, the PJM Industrial Customer Coalition, and the Coalition of MISO Transmission Customers (the “American Manufacturers”) welcome the opportunity to submit these Initial Comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Supplemental Notice of Proposed Rulemaking (“Supplemental NOPR”) on transmission rate incentives. The American Manufacturers firmly support the Commission’s proposal to revise Section 35.35(f) of the Commission’s regulations to end the Transmission Organization Incentive for all utilities that have already been in a Transmission Organization¹ for three years or more.² Further, the American Manufacturers support the Commission’s proposal to set the Transmission

¹ For consistency with Federal Power Act (“FPA”) section 219, these Comments follow the Commission’s lead and use the term “Transmission Organization,” rather than “RTO/ISO” or another term. A Transmission Organization is defined as a Regional Transmission Organization (RTO), Independent System Operator (ISO), independent transmission provider, or other organization finally approved by the Commission for the operation of transmission facilities. 16 U.S.C. § 796(29).

² *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 175 FERC ¶ 61,035, 86 Fed. Reg. 21972-01 (Apr. 26, 2021) (the “Supplemental NOPR”).

Organization Incentive at 50-basis-points for no more than three years for utilities that join a Transmission Organization.³

The Commission’s Supplemental NOPR is a dramatic improvement for consumers over the Commission’s previously issued NOPR (the “2020 NOPR”).⁴ In these Comments, the American Manufacturers recommend that the Commission further clarify its proposal, and (1) limit the incentive to utilities that *voluntarily* join a Transmission Organization, (2) set the level of incentive at no more than 50 basis points, (3) provide the incentive only to utilities that have not previously been a member of a Transmission Organization, (4) limit the incentive such that it applies to new rate base only if that new rate base is added from projects that occur within regional transmission planning processes, and (5) recognize that any limit to the incentive does not diminish the substantial benefits of membership in a Transmission Organization.

I. BACKGROUND

In the Supplemental NOPR, the Commission proposes to amend Section 35.35(f) of the Commission’s regulations to adopt a 50-basis-point Return on Equity (“ROE”) adder for three years after a transmitting utility turns over operational control of its transmission facilities to a Transmission Organization.⁵ Additionally, pursuant to the Commission’s authority under FPA section 206, the Commission proposes to require each utility that has already received an incentive for joining and remaining in a Transmission Organization for three or more years to submit a compliance filing to revise its tariff to remove the incentive.⁶

³ *Id.*

⁴ See *Electric Transmission Incentives Policy Under Section 21 of the Federal Power Act*, 85 FR 18784, 170 FERC ¶ 61,204, errata notice, 171 FERC ¶ 61,071 (Apr. 2., 2020) (the “2020 NOPR”).

⁵ Supplemental NOPR; 18 C.F.R. § 35.35.

⁶ Supplemental NOPR at P 1.

This is not the first time the Commission has proposed to amend Section 35.35(f) of the Commission’s regulations to provide an ROE incentive adder to transmitting utilities for joining a Transmission Organization. In the 2020 NOPR regarding transmission rate incentives, the Commission proposed a flurry of transmission incentives, including a proposal to double the ROE adder to 100 basis points for transmitting utilities that join or remain in a Transmission Organization.⁷ The Commission proposed the incentive to utilities that “join *and/or continue to be a member* of an ISO, RTO, or other Commission-approved Transmission Organization” first adopted in Order Nos. 679 and 679-A.⁸ The Commission’s proposal in the 2020 NOPR would have provided the ROE incentive adder for transmitting utilities that continue to be a member of a Transmission Organization, despite the statutory language in FPA section 219 that the Commission provide an incentive just for “join[ing]” a Transmission Organization. The American Manufacturers firmly opposed that proposal.

In the 2020 NOPR, the Commission stated that its objective was to revise its transmission incentives policy “to more closely align with the statutory language of FPA section 219.”⁹ In this Supplemental NOPR, the Commission proposes an incentive approach that actually would more closely align with the statutory language of FPA section 219. Section 219(c) specifically gives the Commission authority to “provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”¹⁰ Through the Supplemental NOPR, the Commission seeks to revise its 2020 NOPR by proposing to make available a 50-basis-point Transmission

⁷ See 2020 NOPR.

⁸ *Id.*; *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 FR 43293, 116 FERC ¶ 61,057, at P 326 (2006), *order on reh’g*, Order No. 679-A, 72 FR 1152, 117 FERC ¶ 61,345 (2006), *order on reh’g* 119 FERC ¶ 61,062 (2007) (emphasis added).

⁹ 2020 NOPR at P 2; P 24 (“The reforms proposed to the Commission’s transmission incentives policy will both help to reflect recent changes in the industry and transmission planning and more closely align with the statutory language of FPA section 219.”).

¹⁰ 16 U.S.C. § 824s(c).

Organization Incentive to transmitting utilities for three years upon joining a Transmission Organization. Additionally, pursuant to FPA section 206, the Commission has proposed to require any utility that has received an incentive for joining and remaining in a Transmission Organization for three or more years to submit a compliance filing and revise its tariff to remove the incentive. The American Manufacturers support the Commission's proposal in the Supplemental NOPR and recommend that the Commission make additional findings to protect consumers while encouraging utilities to join a Transmission Organization.

II. COMMENTS

The American Manufacturers support the Commission's Supplemental NOPR to provide a three-year Transmission Organization Incentive, and for such incentive to end for any utility that has already been a member of a Transmission Organization for three years. The statutory language in FPA section 219 does not support an ROE incentive in perpetuity for utilities that remain in a Transmission Organization.¹¹

Additionally, to both protect consumers and encourage utilities to join a Transmission Organization, the Commission should limit the incentive to utilities that *voluntarily* join a Transmission Organization, set the level of incentive at no more than 50 basis points, provide the incentive only to utilities that have not previously been a member of a Transmission Organization, make the incentive available for new rate base only if that new rate base is added as a result of projects that are occurring within regional transmission planning processes, and recognize that any limit to the incentive does not diminish the substantial benefits of Transmission Organization membership.

¹¹ 16 U.S.C. 824s(c).

- a. The plain language of Section 219(c) supports the Commission’s proposal to provide the Transmission Organization Incentive for three years upon *joining* a Transmission Organization and to end the incentive for utilities that have already received the incentive for three years or more.**

The Commission’s proposal reflects a reading of the statute that is both reasonable and entitled to deference. Section 219(c) gives the Commission authority to “provide for incentives to each transmitting utility or electric utility that *joins* a Transmission Organization.”¹² There is nothing in Section 219 that requires the Commission to give an incentive to utilities for *remaining in* a Transmission Organization. There is nothing in Section 219 that entitles utilities to receive an incentive in perpetuity. There is no statutory text that conflicts with the Commission’s interpretation. The Commission’s interpretation of Section 219(c) contained in the Supplemental NOPR more closely aligns with the plain language of the statutory text and should be adopted.

Further, the Commission’s interpretation of Section 219(c) meets the purposes set forth by Congress in Section 219(a) – “the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities *for the purpose of benefitting consumers* by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”¹³ The Supplemental NOPR would accomplish the purpose set forth in Section 219(a) to establish an incentive that benefits consumers. The Supplemental NOPR is also more consistent with Section 219(a)’s requirement for incentive-based rate treatment, as the Transmission Organization Incentive would be an incentive to join a Transmission Organization instead of a subsidy to all utilities that remain in a Transmission Organization.

¹² 16 U.S.C. § 824s(c) (emphasis added).

¹³ 16 U.S.C. § 824s(a) (emphasis added).

Additionally, regarding any argument that the Supplemental NOPR would provide an incentive just to a small subset of utilities, the Commission should recognize that each utility within a Transmission Organization has, at some point or another, joined the Transmission Organization. Eliminating the incentive for utilities that have already been in a Transmission Organization for three years or more does not provide the incentive to just a subset of utilities. Instead, the Supplemental NOPR would put an end to the subsidy that some utilities have received for far too long and replace the subsidy with an actual incentive for joining a Transmission Organization. The Supplemental NOPR would be consistent with the requirement in Section 219(a) that any incentive be established “with the purpose of benefitting consumers.”¹⁴ Accordingly, the Commission’s interpretation of Section 219(c) would provide an incentive consistent with the purposes set forth by Congress and the Commission’s requirement to establish just and reasonable rates.

b. The Commission should limit the Transmission Organization Incentive to transmitting utilities that voluntarily join a Transmission Organization.

The Transmission Organization Incentive should only be available to utilities that *voluntarily* join a Transmission Organization. As has been recently affirmed, “[a]n 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.”¹⁵ If the Transmission Organization Incentive is provided to utilities that are required to join a Transmission Organization, whether by state law or other means, then it is not an incentive at all.

¹⁴ 16 U.S.C. § 824s(a).

¹⁵ *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 975 (9th Cir. 2018); *id.* at 974 (“When membership is not voluntary, the incentive is presumably not justified.”).

In the Supplemental NOPR, the Commission requests comment on whether the Transmission Organization Incentive should be available only to transmitting utilities that join a Transmission Organization voluntarily, how the Commission should apply the standard, and how the Commission should determine whether the utility's decision to join a Transmission Organization is voluntary.¹⁶ The Commission should find that any utility that joins a Transmission Organization by means of a merger condition, settlement agreement, or other legal obligation has not voluntarily joined the Transmission Organization. To do something voluntarily, by definition, is to do it of one's own free will. If a utility joins a Transmission Organization as a means of compliance with a merger condition, settlement agreement, or other legal obligation, then it is not acting voluntarily to join a Transmission Organization.

A clear ruling to this effect would promote administrative efficiency by removing any responsibility for the Commission to review a merger, settlement, or state or federal law to determine if the utility has been required to join a Transmission Organization. The Commission should not impose upon itself the responsibility to review mergers and settlements to determine if the obligation to join the Transmission Organization was proposed or agreed to by the transmitting utility. It would be much easier for the Commission to declare that joining a Transmission Organization by means of merger condition, settlement agreement, or other legal obligation (e.g., state or federal law) is not a voluntary decision by the transmitting utility. Accordingly, even if the transmitting utility voluntarily enters into the merger or settlement that contains the obligation, the transmitting utility should not qualify to receive the Transmission Organization Incentive. That is not to say that utilities that engage in mergers or settlements cannot join a Transmission Organization and receive the incentive. Rather, the Commission should find that, if the utility is

¹⁶ Supplemental NOPR at P 19.

required to join a Transmission Organization as a condition of the merger or settlement, only then is the utility precluded from receiving the Transmission Organization Incentive.

c. The Commission should limit the Transmission Organization Incentive to no more than 50 basis points.

In the Supplemental NOPR, the Commission proposes to adopt a 50-basis-point ROE adder consistent with Commission precedent.¹⁷ The Commission stated that it believes that a 50-basis-point Transmission Organization Incentive for three years provides a material incentive to join a Transmission Organization without unduly burdening ratepayers. Generally, the American Manufacturers agree. Historically, some parties have argued that the incentive for joining or remaining in a Transmission Organization should be higher, while others have argued that such incentive should be lower or eliminated.¹⁸ The American Manufacturers support a lower ROE incentive for joining a Transmission Organization because the benefits to the utility of being in a Transmission Organization, such as access to competitive markets and regional transmission planning, provide sufficient benefit without the need for additional incentive. However, the American Manufacturers appreciate the Commission's efforts to protect consumers while complying with the statutory language in FPA section 219 that the Commission provide an incentive for "join[ing]" a Transmission Organization. Accordingly, the American Manufacturers believe the Commission's proposed 50-basis-point ROE adder meets the proper balance between protecting consumers while providing an incentive that more closely aligns with the statutory language of FPA section 219.

¹⁷ Supplemental NOPR at P 12-16.

¹⁸ See 2020 NOPR, 170 FERC ¶ 61,204 at P 94; *see, e.g.*, AEP Comments at 9; Alliant Comments at 13-14; APPA Comments at 54-56; Avangrid Comments at 15-16; California State Water Project Comments at 10, 15-16; California Utilities Comments at 11; Connecticut Commission Comments at 27-28; Eastern Massachusetts Municipals Comments at 33-34; EEI Comments at 15-17; Eversource Comments at 15-16; Exelon Comments at 12-19; ITC Comments at 8-9; Public Interest Organizations Comments at 23; TAPS Comments at 107-108; WIRES Attachment at 12.

- d. The Commission should provide that a transmitting utility is only eligible for the Transmission Organization Incentive if it has not previously been a member of a Transmission Organization.**

The Transmission Organization Incentive should not be available to any utility that has previously been a member of a Transmission Organization. The purpose of the Transmission Organization Incentive is to encourage utilities to join a Transmission Organization, not to leave a Transmission Organization and then return for the purpose of gaming the Commission's regulations to get the incentive ROE added. The Commission should find that only utilities that have not previously been a member of a Transmission Organization are eligible for the ROE incentive. This would be consistent with the Commission's intent and the plain language of FPA section 219 to provide an incentive for utilities to *join* a Transmission Organization. Further, such a finding would discourage utilities from changing membership between Transmission Organizations or altering their ownership structures just to obtain an incentive.

Additionally, the Commission should find that a transmitting utility may not receive the Transmission Organization Incentive for transmission plant in service if the asset was already under the operational control of a Transmission Organization, whether as part of an affiliate or a separate owner. The Commission should prohibit utilities from restructuring asset ownership internally or selling assets to a separate corporate entity to receive the Transmission Organization incentive, to prevent similar gamesmanship of the Commission's regulations. Again, the purpose of the Transmission Organization Incentive is to encourage the transfer of operational control to a Transmission Organization of transmission assets that are outside the operational control of a Transmission Organization. To that end, the Commission should prohibit utilities from leaving and returning to a Transmission Organization, restructuring, or selling assets just for the purpose of artificially boosting their ROE with the Transmission Organization Incentive. The litmus test for purposes of whether a utility is joining and remaining in a Transmission Organization should

be the operational control of the bulk of the utility's transmission assets. Likewise, additions to plant in service during the three-year window for receipt of the Transmission Organization Incentive should not reset the three-year limit on receipt of the Transmission Organization Incentive.

- e. The Commission should limit the Transmission Organization Incentive for new rate base additions only to new rate base for projects that occur within regional transmission planning processes.**

The Transmission Organization Incentive should not be available to projects that occur outside of regional transmission planning processes. Projects occurring outside of regional transmission planning processes include, for example, projects classified as Supplemental Projects in PJM and Other Projects in MISO. The Commission should prohibit the Transmission Organization Incentive from providing an incentive to utilities to do what they are already supposed to do - adequately maintain their facilities in a prudent, cost-effective manner.¹⁹

Transmission Organizations engage in regional transmission planning processes at regular intervals to evaluate the need for new transmission projects. These processes evaluate the need to preserve system reliability, reduce grid congestion, interconnect new generation, accommodate load growth, and replace aging infrastructure. Regional transmission projects generally require the approval of the Board of the Transmission Organization. Applying the Transmission Organization Incentive to all projects in rate base, including Supplemental Projects (PJM) and Other Projects (MISO), provides an improper price signal for transmission owners to rebuild existing facilities instead of competing for regionally planned projects that provide system-wide benefits. Accordingly, the Commission should find that the Transmission Organization Incentive

¹⁹ See *New England Power Pool*, 97 FERC ¶ 61,093 at 61,477 (2001), *order on reh'g*, 98 FERC ¶ 61,249 (2002) (denying incentive for maintenance/construction pilot project that would "unjustly reward" the committee "for doing what it is supposed to do, i.e., to adequately maintain its facilities in a prudent, cost-effective manner.").

is only available to new rate base if that new rate base is associated with projects that occur within regional transmission planning processes.

f. The Commission should recognize that any limit to the Transmission Organization Incentive does not diminish the substantial benefits of Transmission Organization membership.

The Commission’s proposal to place reasonable limits on the Transmission Organization Incentive, such as limiting the level of the incentive to 50 basis points and its duration to three years, does not diminish or ignore the benefits to consumers or utilities provided by Transmission Organizations. Commissioners Chatterjee and Danly each respectfully dissent from the Commission’s Supplemental NOPR under the theory that benefits to consumers provided by Transmission Organizations are so great that the incentive should be much greater.²⁰ They assert that Transmission Organizations “have been enormously successful in generating billions of dollars of annual benefits to consumers.”²¹ Even if this premise were correct, it does not justify a sharing of those benefits with public utilities that are members of a Transmission Organization. The relevant consideration is whether there is a lack of Transmission Organization benefits *to member utilities* that warrants the granting of an incentive to join a Transmission Organization. Transmission Organizations provide transmission utilities with access to more developed organized markets, optimization of transmission assets, and regional transmission planning. Further, the rate base for most transmitting utilities has risen considerably since the Transmission Organization Incentive was first adopted by the Commission.²² These benefits justify membership

²⁰ Supplemental NOPR at dissent of Chatterjee, dissent of Danly.

²¹ *Id.*

²² Transmission investment by investor-owned electric companies and stand-alone transmission companies has steadily grown from \$8.6 billion in 2006 to \$23.4 billion in 2019, with \$26.1 billion projected in 2020 and \$27.1 billion projected in 2021. See EEI Business Analytics Group, Historical and Projected Transmission Investment, at 1 (Nov. 2020)

in a Transmission Organization without the need for any additional incentive. Absent any statutory mandate, transmission owners that join a Transmission Organization would not be entitled to receive a Transmission Organization Incentive. However, FPA section 219 states that the Commission shall provide incentives to utilities that join a Transmission Organization. The Supplemental NOPR fulfills and complies with this FPA section 219 mandate, by means of a reasonable three-year 50-basis-point ROE adder for joining a Transmission Organization. The American Manufacturers agree with the Supplemental NOPR that, with the clarifications discussed above, an incentive along those lines complies with the statutory mandate and should not go any further.

III. CONCLUSION

The American Manufacturers support the Commission's proposal to limit the Transmission Organization Incentive to 50 basis points and for three years, and for such incentive to end for utilities that have already been in a Transmission Organization for three years or more. The American Manufacturers recommend that the Commission limit the incentive to utilities that *voluntarily* join a Transmission Organization, set the incentive at no more than 50 basis points, provide the incentive only for transmission assets over which a Transmission Organization has previously not had operational control, provide the incentive for new rate base only if the new rate base is associated with projects that occur within regional transmission planning processes, and find that incentive limits do not diminish the benefits of Transmission Organization membership.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By: /s/ Robert A. Weishaar, Jr.

Robert A. Weishaar, Jr.
1200 G Street NW, Suite 800
Washington, DC 20005
Phone: (202) 898-5700
Fax: (717) 260-1765
Email: bweishaar@mcneeslaw.com

Bryce A. McKenney
21 East State Street, 17TH Floor
Columbus, OH 43215
Phone: (614) 719-2842
Fax: (614) 469-4653
Email: bmckenney@mcneeslaw.com

Counsel to the American Manufacturers

Dated: June 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 25th day of June, 2021.

/s/ Robert A. Weishaar, Jr.

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
1200 G Street, NW, Suite 800
Washington, DC 20005
Phone: (202) 898-5700
Fax: (717) 260-1765
Email: bweishaar@mcneeslaw.com

Counsel to the American Manufacturers