

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

Inquiry Regarding the Commission's )  
Electric Transmission Incentives Policy )

Docket No. PL19-3-000

**JOINT REPLY COMMENTS OF  
THE ALUMINUM ASSOCIATION, THE AMERICAN CHEMISTRY COUNCIL,  
THE AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN PUBLIC  
POWER ASSOCIATION, BLUE RIDGE POWER AGENCY, THE CALIFORNIA  
MUNICIPAL UTILITIES ASSOCIATION, THE CALIFORNIA PUBLIC UTILITIES  
COMMISSION, THE CITIES OF ANAHEIM, AZUSA, BANNING, COLTON,  
PASADENA, AND RIVERSIDE, CALIFORNIA, THE ELECTRICITY CONSUMERS  
RESOURCE COUNCIL, THE INDUSTRIAL ENERGY CONSUMERS OF AMERICA,  
THE KANSAS CORPORATION COMMISSION, MARYLAND OFFICE OF PEOPLE'S  
COUNSEL, THE MODESTO IRRIGATION DISTRICT, THE NATIONAL  
ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE NEW YORK  
PUBLIC SERVICE COMMISSION, NORTHERN CALIFORNIA POWER AGENCY,  
THE OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA,  
THE PUBLIC UTILITY LAW PROJECT OF NEW YORK, THE TRANSMISSION  
AGENCY OF NORTHERN CALIFORNIA, AND  
THE VIRGINIA OFFICE OF THE ATTORNEY GENERAL  
DIVISION OF CONSUMER COUNSEL**

August 26, 2019

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Inquiry Regarding the Commission’s )                      Docket No. PL19-3-000  
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**REPLY COMMENTS OF  
THE JOINT COMMENTERS**

Pursuant to the March 21, 2019 Notice of Inquiry (“Incentive NOI” or “NOI”)<sup>1</sup> and the May 21, 2019 Notice of Extension of Time issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”), these joint reply comments are submitted by the Aluminum Association, the American Chemistry Council, the American Forest & Paper Association, the American Public Power Association, Blue Ridge Power Agency, the California Municipal Utilities Association, the California Public Utilities Commission, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California, the Electricity Consumers Resource Council, the Industrial Energy Consumers of America, the Kansas Corporation Commission (“KCC”),<sup>2</sup> Maryland Office of People’s Counsel, the Modesto Irrigation District, the National Association of State Utility Consumer Advocates, the New York Public Service Commission, Northern California Power Agency, the Office of the People’s Counsel for the District of Columbia, the Public Utility Law Project of New York, the

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<sup>1</sup> *Inquiry Regarding the Commission’s Elec. Transmission Incentives Policy*, 166 FERC ¶ 61,208 (2019), 84 Fed. Reg. 11,759 (March 28, 2019), *correction published*, 84 Fed. Reg. 13,033 (April 3, 2019).

<sup>2</sup> The KCC is the regulatory body vested with jurisdiction and responsibility under Kansas statutes to regulate rates for the sale of electricity and natural gas to consumers within the State of Kansas. See K.S.A. § 66-101, *et seq.* The KCC represents the interests of Kansas ratepayers in proceedings before this Commission to help ensure that wholesale transmission costs that flow through to Kansas ratepayers are just and reasonable. Though the KCC was not a signatory to the Joint Commenters’ June 26, 2019 initial comments, it is concurrently filing separate reply comments in this proceeding to express its support for those comments.

Transmission Agency of Northern California, and the Virginia Office of the Attorney General Division of Consumer Counsel (collectively, “Joint Commenters”).<sup>3</sup>

## **I. INTRODUCTION**

Joint Commenters appreciate the opportunity to provide these reply comments regarding the issues raised in the Commission’s Incentive NOI. Our initial comments provided a detailed response to the NOI, addressing virtually all of the issues raised by the Commission’s 105 individually-numbered questions. These reply comments focus more narrowly on a number of key issues that, we submit, are particularly important to ensuring that the Commission’s electric transmission policies under section 219 of the Federal Power Act (“FPA”) result in just and reasonable rates.<sup>4</sup>

Joint Commenters explained in our initial comments that transmission investment has been robust in recent years, and this pace is expected to continue for the near future. The relevant trends are not in dispute; the initial comments of the Edison Electric Institute (“EEI”) and other public utility transmission owner representatives, as well as other commenters, highlighted the significant levels of transmission investment over the last decade. This evidence strongly supports a conclusion that there is no need for the Commission to liberalize incentives, particularly revenue-enhancing incentives, simply to promote transmission investment.

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<sup>3</sup> The Joint Commenters other than the KCC were listed and described in the Appendix to the initial comments filed on June 26, 2019, which is incorporated herein by reference.

<sup>4</sup> As explained in our initial comments, Joint Commenters have joined together as an ad hoc group to prepare consensus-based comments. While Joint Commenters generally support the policy recommendations set out in these reply comments, not every Joint Commenter necessarily fully supports every position set out in them. Some of the Joint Commenters may also be filing individual reply comments in this docket and/or joining in additional comments being filed by other groups. The fact that Joint Commenters have submitted these comments should not be taken as an indication that any of the Joint Commenters share other positions expressed in other sets of reply comments being filed by other Joint Commenters in this docket.

While current transmission investment levels are healthy, it is reasonable to ask whether the “right” kind of transmission is being built in all cases. This question is the focal point of much of the NOI, as the Commission inquires whether it should depart from its current “risks and challenges” approach and focus instead on encouraging projects that might provide particular benefits or that reflect certain project characteristics. As Joint Commenters explained in our initial comments, developing the most beneficial and cost-effective transmission solutions is principally a planning issue, not a question of incentives. A wide-range of commenters agreed with the importance of the planning process in ensuring beneficial transmission investment. Indeed, a number of the commenters urging changes to the Commission’s incentives policies appear to be primarily concerned with perceived deficiencies in the regional and interregional transmission planning processes rather than with the Commission’s incentives framework itself.

Eliminating or modifying the current “risks and challenges” approach in favor of an “expected benefits” or “project characteristics” framework in an effort to promote certain categories of benefits, however, would be inconsistent with FPA section 219 and would likely interfere with the regional transmission planning processes the Commission has sought to promote. Rather than modify its policies for awarding project-specific incentives, the Commission should assess whether, and, if so, why, transmission planning processes may not always produce the most beneficial and cost-effective projects, as the Commission’s rules and policy contemplate. From a rate incentive perspective, the Commission should seek to harmonize its transmission planning and incentive policies by requiring project approval as part of the relevant regional transmission planning process as a prerequisite for receiving incentive rate treatment, particularly for revenue-enhancing incentives.

Although the Joint Commenters do not endorse changes in the Commission’s incentive policies to focus on particular benefits or characteristics, the initial comments do support a conclusion that the Commission should encourage joint ownership of transmission facilities by non-public utilities, as Joint Commenters have recommended. A number of commenters also urge the Commission to adopt policy changes to endorse new technologies, particularly technologies to enhance the operation of existing facilities. As with many other potential objectives identified in the NOI, this is primarily a planning issue, not a question of incentives. If the Commission determines there is a need to reform its transmission incentive policy to promote particular objectives, however, promoting transmission technologies that cost-effectively increase the capacity or efficiency of existing facilities could be a constructive area of focus.

The Joint Commenters continue to oppose retention of the return on equity (“ROE”) incentive adders for independent transmission companies (the “Transco Adder”) and for membership in a Regional Transmission Organization (“RTO”) or Independent System Operator (“ISO”) (the “RTO Adder”). With respect to the Transco Adder, the Commission should reject the “clarification” requested by ITC Holdings Corp. (“ITC”) that the Commission will not reduce the adder for lack of independence unless a Transco is operating within the same RTO or ISO as its affiliated market participants. Joint Commenters explained in our initial comments that the RTO Adder should also be eliminated, or at least subject to a phase out. Despite the substantial attention devoted to this issue by transmission owner commenters, supporters of the RTO Adder fail to offer a compelling basis for retaining the adder in its current form.

The Commission should also reject arguments that 100 percent recovery of construction work in progress (“CWIP”) and/or abandoned plant costs should be awarded automatically or

adopted as a general Commission ratemaking practice. These incentives should be reserved for projects that face identifiable risks and challenges that the incentives may help address. Nor should the Commission modify its incentive policies to allow public utilities to capitalize certain operation and maintenance (“O&M”) costs (such as vegetation management costs and communication/cybersecurity expenses). If public utilities incur expenses that they believe are in the nature of capital costs, they may propose such rate treatment for the Commission’s review.

Finally, the Commission should limit the duration of incentives, as discussed in Joint Commenters’ initial comments, including limiting project-specific ROE adders to no more than fifteen years. Nothing in FPA section 219 requires incentives to be continued for any particular length of time, and, from the Commission’s initial adoption of incentive rules in Order No. 679,<sup>5</sup> the Commission contemplated that incentives could be of limited duration and subject to meeting identifiable metrics.

## **II. REPLY COMMENTS**

### **A. Approach to Incentive Policy**

#### **1. The Commission Should Retain the Risks and Challenges Framework for Project-Specific Incentives**

- a. The Evidence Cited in the Initial Comments Supports a Conclusion that the Commission’s Existing Incentive Approach is Generally Sound

The Commission’s existing “risks and challenges” framework remains appropriate for evaluating project-specific incentive requests, as Joint Commenters and numerous other commenters explained in their initial comments.<sup>6</sup> By requiring that applicants for project-

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<sup>5</sup> *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”).

<sup>6</sup> *See, e.g.*, California Independent System Operator, Inc. (“CAISO”) Comments at 4-11; California Public Utilities Commission (“CPUC”) Comments at 43; Delaware Municipal Electric Corporation (“DEMEC”) Comments at 15-17; Joint Commenters Comments at 8-17; Massachusetts Municipal Wholesale Electric Company and New

specific incentives demonstrate “that the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant,”<sup>7</sup> the Commission’s rules help ensure that incentives appropriately target impediments to beneficial transmission investment. And with the 2012 Policy Statement’s emphasis on risk mitigation, including the expectation that applicants would use risk-reducing incentives prior to seeking an incentive ROE adder,<sup>8</sup> the Commission’s current incentive approach strikes an appropriate balance between consumer and investor interests. Notably, EEI and other transmission owner commenters acknowledge the value of risk-reducing incentives under the Commission’s risks and challenges framework.<sup>9</sup>

Certainly the evidence cited in the initial comments does not show that transmission owners and developers are withholding investment for want of more lucrative incentives, particularly return-enhancing incentives. Industry statistics cited by Joint Commenters and others show that transmission investment in recent years has been robust and is expected to remain so, buoyed by the availability of formula rates and healthy, stable returns.<sup>10</sup> EEI, the

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Hampshire Electric Cooperative Inc. (“MMWEC/NHEC”) Comments at 4-5; National Rural Electric Cooperative Association (“NRECA”) Comments at 14-16; Southern New England State Agencies Comments at 13-17; Transmission Access Policy Study Group (“TAPS”) Comments at 14-25.

<sup>7</sup> 18 C.F.R. § 35.35(d) (2019) (emphasis in the original).

<sup>8</sup> See *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129, at P 16 (2012) (“2012 Policy Statement”). The risk-reducing incentives include allowing 100 percent recovery of CWIP, recovery of 100 percent of pre-commercial costs, and recovery of 100 percent of prudently-incurred transmission project costs when the project is abandoned for reasons outside the applicant’s control. See 2012 Policy Statement at P 11. These risk-reducing incentives may be contrasted with return-enhancing incentives, such as ROE adders or hypothetical capital structures.

<sup>9</sup> See, e.g., EEI Comments at 32-33 (arguing that “[g]oing forward, the Commission should continue to evaluate the risks and challenges of a project but also should consider the benefits a project provides and should be flexible in evaluating request for incentives.”); PJM Transmission Owners (“TOs”) Comments at 13 (asserting that “it is crucial that the Commission retain the existing risks and challenges framework”). Joint Commenters specifically address the proposed “flexible” approach to awarding project-specific incentives in section II.A.2 below.

<sup>10</sup> See Joint Commenters Comments at 10-11; MMWEC/NHEC Comments at 5; NRECA Comments at 7, n.20; New England States Committee on Electricity (“NESCOE”) Comments at 5; New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel (“NJ Parties”) Comments at 7-15; Ohio Consumers’ Counsel (“OCC”) Comments at 5-6; Southern New England State Agencies Comments at 4-9; TAPS Comments at 15-16; see also R Street Institute Comments at 1-2 (observing that “[t]ransmission investment in the United States has increased rapidly over a twenty-year period, multiplying nearly tenfold from 1996 to 2016, and it shows no signs of declining).

trade association for investor-owned utilities, highlights this pace of investment in its initial comments, stating that its “members invested \$21.9 billion in transmission infrastructure in 2017 and expect to invest an additional \$90 billion in the transmission system through 2021 . . . .”<sup>11</sup>

Some commenters cite the increase in transmission investment as a clear indication that incentives have worked and that they should be further liberalized to promote additional investment.<sup>12</sup> While it is logical to assume that transmission incentives – particularly the Commission’s risk-reducing incentives – have facilitated the increase in transmission investment to some degree, it is difficult, if not impossible, to draw clear conclusions after the fact about the relationship between incentives and investment. The commenters contending that incentives have promoted transmission investment generally rely on mere assertions without offering any empirical evidence showing a causal link between more generous incentives and greater levels of investment.<sup>13</sup> The lack of empirical support showing the relationship between incentives and investment undermines claims that more generous incentives are needed at this time.<sup>14</sup> The

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Utility regulatory commissions’ base return on equity (ROE) awards are at a higher premium over the risk-free rate than in the past.” (footnote omitted)).

<sup>11</sup> EEI Comments at 7-8.

<sup>12</sup> *See, e.g.*, EEI Comments at 7-11; MISO TOs Comments at 1-2; PJM TOs Comments at 2-4; WIRES Comments at 3.

<sup>13</sup> *See, e.g.*, EEI Comments at 6 (asserting that “[e]xperience has shown that the existing transmission incentives established pursuant to section 219 encourage transmission investment”); MISO TOs Comments at 4-5 (asserting that “[t]he Commission’s current rate incentive policies have fostered the development of significant transmission projects that otherwise may be delayed or abandoned absent approval of transmission incentives.”); PJM TOs Comments at 7 (asserting that “[t]he existing incentives required by Section 219 and implemented by Order No. 679 have been effective in promoting transmission development and providing critical risk mitigation and investment certainty necessary to attract the capital required for building transmission infrastructure during the time they have been in place.”); WIRES Comments at 3 (asserting that “[t]he Commission’s incentives policies have contributed to a resurgence in transmission investment during the last two decades, and thus offer a strong baseline for the Commission’s policy going forward.”). As Joint Commenters noted in our initial comments, there was no drop-off in transmission investment after the Commission issued its 2012 Policy Statement, suggesting that project-specific ROE adders did not (and do not) play a major role in driving transmission investment. *See* Joint Commenters Comments at 12.

<sup>14</sup> *See* Joint Commenters Comments at 12; NJ Parties Comments at 18-21; NRECA Comments at 2-9; Transmission Dependent Utility (“TDU”) Systems Comments at 4-7.



evidence does not demonstrate that transmission owners and developers are withholding investment due to a need for additional incentives, particularly return-enhancing incentives.<sup>15</sup>

The increase in transmission investment in recent years, moreover, has already generated significant transmission cost increases for customers in many regions, and the Commission should not increase this burden by adopting policies that provide unnecessarily generous project-specific incentives – particularly return-enhancing incentives.<sup>16</sup> And as Joint Commenters and others have observed, concerns about whether the right kind of transmission is being constructed likely have more to do with the planning process, cost allocation, and other complications that more lucrative incentives are unlikely to be able to address.<sup>17</sup>

b. The Risks and Challenges Framework Conforms to the Requirements of FPA Section 219

It is also essential to recognize that the risks and challenges approach conforms the Commission’s incentive rules and policies to the requirements of FPA section 219. To be eligible for project-specific incentives under section 219, a project must benefit consumers by ensuring reliability or reducing the cost of delivered power by reducing transmission congestion.<sup>18</sup> Simply establishing that a project will benefit consumers, however, is not a sufficient basis to award an incentive under FPA section 219. As detailed in the initial

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<sup>15</sup> See, e.g., Comments of Invenergy Wind Development North America, LLC, *et al.* (“Invenergy”) Comments at 8 (arguing that “[i]t makes no sense to continue to award ROE incentives as a matter of course when there are so many companies ready, willing and able to construct new transmission.”).

<sup>16</sup> See, e.g., DEMEC Comments at 2 & n.7; Joint Commenters Comments at 14-15; Northern California Power Agency (“NCPA”) Comments at 6; Resale Power Group of Iowa (“RPGI”) Comments at 8-15; TAPS Comments at 17; *see also* Docket Nos. PL19-3 and PL19-4, Joint Letter Regarding Notices of Inquiry and Increasing Transmission Costs (Aug. 23, 2019).

<sup>17</sup> See, e.g., Americans for a Clean Energy Grid (“ACEG”) Comments at 10-12; American Wind Energy Association (“AWEA”) Comments at 2-5; Joint Commenters Comments at 13-14; NRECA Comments at 15-16; Public Interest Organizations Comments at 1-2.

<sup>18</sup> 16 U.S.C. § 824s(a); *see also* 18 C.F.R. § 35.35(d) (2019).

comments of Joint Commenters and others,<sup>19</sup> the risks and challenges component of the current incentives framework implements the Commission’s “nexus” requirement for project-specific incentives,<sup>20</sup> which is intended to ensure that “incentives are not provided in circumstances where they do not materially affect investment decisions.”<sup>21</sup> 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 . . . .”<sup>22</sup> As the Commission put it succinctly in Order No. 679, incentives granted under FPA section 219 are not simply a “bonus for good behavior.”<sup>23</sup> The Commission’s incentive rules are to “benefit consumers by providing real incentives to encourage new infrastructure, not simply increasing rates in a manner that has no correlation to encouraging new investment.”<sup>24</sup> The D.C. Circuit recently summarized the function of the nexus requirement under FPA section 219, noting 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.”<sup>25</sup> In this

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<sup>19</sup> See Joint Commenters Comments at 15-17; *see also, e.g.*, California Independent System Operator (“California ISO”) Comments at 2-3 (observing that “there is no direct correlation between the net benefits a project approved in a regional transmission planning process provides or the type of transmission need a project meets, and the ROE adder that is necessary to attract capital or encourage a developer to build the project.”); Southern New England State Agencies Comments at 14-16 (discussing the nexus test’s relationship to incentive rate requirements); TAPS Comments at 28 (explaining that “a benefits-based approach would sever the nexus test’s essential tether to Section 219’s focus on awarding incentives necessary to *promote* development, yielding incentive outcomes exceeding those available under the current approach that are not rationally related to the statute’s goal of inducing investment.”).

<sup>20</sup> See generally 2012 Policy Statement at PP 6-7.

<sup>21</sup> Order No. 679-A at P 25; *see also* Order No. 679 at P 26.

<sup>22</sup> Order No. 679 at P 26; *see also* 16 U.S.C. § 824s(d) (requiring that all rates approved under the Commission’s FPA section 219 implementing regulations must satisfy the just and reasonable requirements of FPA sections 205 and 206).

<sup>23</sup> Order No. 679 at P 26 (internal quote omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 133 (D.C. Cir. 2019).

way, the risks and challenges framework helps ensure compliance with longstanding 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.”<sup>26</sup>

Parties calling for the Commission to award project-specific incentives based on expected benefits or project characteristics generally fail to reconcile such an approach with the need to show a nexus between a requested incentive and the project investment decision in order to comply with the just and reasonable standard. Project benefits are necessary, but not sufficient, to satisfy the requirements of FPA section 219 for granting transmission investment incentives.<sup>27</sup> Section 219 does not permit departures from the fundamental statutory standards that determine the lawfulness of all rates subject to the Commission’s jurisdiction, and the risks and challenges framework helps to establish that a nexus exists between a requested incentive and a project investment decision and, consequently, ensure that an incentive is just and reasonable and not simply a “bonus for good behavior.”<sup>28</sup>

c. Abandoning the Risks and Challenges Framework is Not an Appropriate Way to Address Concerns with the Transmission Planning Process

A number of the comments urging the Commission to move away from the current risks and challenges framework in favor of some form of a “benefits” approach are grounded, to a significant degree, in concerns that the regional and interregional planning processes have been unsuccessful in consistently identifying the most beneficial and cost-effective transmission

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<sup>26</sup> *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955).

<sup>27</sup> See Joint Commenters Comments at 22; Southern New England State Agencies Comments at 14-16.

<sup>28</sup> Order No. 679 at P 26 (internal quote omitted); see also, e.g., RPGI Comments at 6-8; TAPS Comments at 27-28.

projects.<sup>29</sup> The comments of the Public Interest Organizations, for example, include a number of broad planning and cost allocation reforms that have little to do with incentives under FPA section 219.<sup>30</sup> A particular focus of some of these comments is the promotion of new or advanced technologies, particularly technologies that might increase the efficiency of existing transmission facilities.<sup>31</sup> Some commenters also raise concerns with implementation of competitive transmission projects under Order No. 1000.<sup>32</sup>

While Joint Commenters are sympathetic to concerns that Commission-approved transmission planning processes may not always result in the identification of the most beneficial transmission projects (or non-transmission alternatives), it would not be appropriate for the Commission to adopt changes to its policies for project-specific incentives in order to address deficiencies in the planning or cost allocation process.<sup>33</sup> The mandatory regional planning processes required by Order No. 1000 are intended to ensure that the “more efficient or cost-effective” solutions are identified to address regional transmission needs. The process must

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<sup>29</sup> See, e.g., ACEG Comments at 10-12; AWEA Comments at 2-5; Advanced Energy Buyers Group Comments at 4-9; Advanced Energy Economy (“AEE”) Comments at 14-15, 23-25; Public Interest Organizations Comments at 5-7; R Street Institute Comments at 2; WATT Coalition Comments at 4. ITC, while proposing a wish list of lucrative incentives, appears to agree that problems in the planning process can impede beneficial transmission. See ITC Comments at 3 (“While a reasoned return on equity . . . policy and sufficient incentives create opportunities to deploy capital, those investments can only be made after they have been identified and approved in regional planning processes. As a consequence, the availability of outcome-specific financial incentives may have little-to-no impact on whether a specific grid investment is pursued if the planning process is itself prohibitive.”).

<sup>30</sup> Public Interest Organizations Comments at 6-7; see also ACEG Comments at 7 (arguing that “it is time for the Commission to adopt a broader policy focused on promoting proactive and holistic grid planning and cost allocation rules that will provide the greatest level of benefits to consumers and support our nation’s policy goals.”); AWEA Comments at 5 (concluding that “additional reforms would largely be needed to make the incentives truly effective for moving new transmission projects forward.”).

<sup>31</sup> See ACEG Comments at 31-33; AWEA Comments at 19-21, 25-26; AEE Comments at 4-5, 20-21; Public Interest Organizations Comments at 34-36; WATT Coalition Comments at 4-9.

<sup>32</sup> See, e.g., Invenergy Comments at 8-13; LSP Transmission Holdings II, LLC Comments at 9-11; NextEra Energy Transmission, LLC Comments at 6-7, 20.

<sup>33</sup> See Joint Commenters Comments at 26 (“Transmission incentives policy should not be used to compensate for transmission planning deficiencies”).

consider transmission needs driven by public policy requirements,<sup>34</sup> and it must assess transmission and non-transmission alternatives on a comparable basis.<sup>35</sup> Order No. 1000 also adopted requirements for interregional coordination among public utility transmission providers.<sup>36</sup> The Commission expressly adopted the transmission planning reforms in Order No. 1000 to help ensure investment in the “right transmission facilities” as the industry evolved.<sup>37</sup>

Thus, a properly-functioning regional planning process should already be identifying the more efficient or cost-effective projects to ensure reliability and reduce the cost of delivered power by reducing transmission congestion, as commenters observed.<sup>38</sup> The California ISO specifically highlighted this point in its initial comments with respect to the idea of using ROE incentives to promote specific benefit objectives, 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.”<sup>39</sup> California ISO observed that such an incentive would be inappropriate since “[r]egional transmission planners are already required to plan their systems to meet reliability, economic, and public policy needs they identify.”<sup>40</sup> As California ISO suggests, a transmission incentive framework focused on promoting benefits that should already be the focus of the regional planning processes is unreasonable and unnecessary.

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<sup>34</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, at P 203 (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”).

<sup>35</sup> *Id.* at P 148.

<sup>36</sup> *See id.* at PP 393-404.

<sup>37</sup> *Id.* at P 50.

<sup>38</sup> *See* Joint Commenters Comments at 24-25; TAPS Comments at 29-30.

<sup>39</sup> California ISO Comments at 10.

<sup>40</sup> *Id.*

The Joint Commenters recognize the possibility that the lower capital costs of some new transmission technologies like dynamic line rating systems and flow controls may provide some transmission owners with a disincentive to adopt them.<sup>41</sup> Joint Commenters respectfully submit, however, that this is not the sort of obstacle to potentially beneficial infrastructure that transmission incentives should address. A properly functioning regional planning process should consider and incorporate current “best practices” in use by the transmission industry, and transmission providers with cost-based rates have an obligation to make prudent investments based on such industry standards. The Commission has made clear that incentives should not simply be a bonus for *good* behavior,<sup>42</sup> and using a “benefits” incentive framework to promote utilization of technologies that transmission owners should have been adopting anyway would effectively reward *bad* behavior.<sup>43</sup>

Further, adoption of a benefits framework for evaluating project-specific incentives could actually interfere with the transmission planning process, particularly if incentives are awarded for projects that are not reviewed or approved within the context of a regional transmission planning process, as Joint Commenters described in our initial comments.<sup>44</sup> TAPS’ initial comments echoed these concerns: “[p]iecemeal consideration of the benefits of individual projects requesting incentives would substitute a contentious Commission litigation (likely

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<sup>41</sup> See AEE Comments at 20-21; WATT Coalition Comments at 4; see also Joint Commenters Comments at 76. As TAPS observes, however, if a public utility’s return allowance accurately reflects the utility’s cost of capital, it should not have an incentive to increase capital assets simply to generate additional return dollars. See TAPS Comments at 77 & n.221; see also R Street Institute Comments at 6.

<sup>42</sup> Order No. 679 at P 26.

<sup>43</sup> Joint Commenters note that the Commission recently scheduled a two-day technical conference on transmission line ratings, including dynamic and ambient-adjusted ratings. *Managing Transmission Line Ratings*, Docket No. AD19-15-000, Notice of Technical Conference (June 28, 2019) and Supplemental Notice of Technical Conference (Aug. 20, 2019). This technical conference will likely inform the issue of whether and how these technologies should be considered in the transmission planning process.

<sup>44</sup> See Joint Commenters Comments at 22-26.

requiring an evidentiary hearing) that short-changes crucial factors that are best developed through a robust planning process.”<sup>45</sup>

Rather than change the framework for evaluating project-specific incentive requests in response to concerns with the efficacy of the transmission planning process, the Commission could focus on seeking to ensure that regional planning process rules are structured to fulfill the Commission’s goals of identifying beneficial transmission projects or non-transmission alternatives. The Commission could increase scrutiny of transmission project reviews or clarify what is considered adequate consideration of advanced technologies. Some parties suggest even broader steps in their initial comments.<sup>46</sup> Joint Commenters submit that assessing specific transmission planning process issues is beyond the scope of this NOI, and, in any event, would be highly fact- and region-specific. The upcoming technical conference on transmission line ratings in Docket No. AD19-15, for example, may be the appropriate forum in which to assess planning-related issues with respect to certain technologies. The Commission should also endeavor to harmonize its incentive and planning policies. In particular, the Commission should not award incentives to promote projects that have not been evaluated in the regional planning process, as Joint Commenters argued in our initial comments.<sup>47</sup>

d. An Expected Benefits Framework Would Be Difficult to Implement

An “expected benefits” framework would also face practical challenges because identifying and quantifying project benefits would be difficult and contentious.<sup>48</sup> These

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<sup>45</sup> TAPS Comments at 30.

<sup>46</sup> See, e.g., Public Interest Organizations Comments at 6-7.

<sup>47</sup> See Joint Commenters Comments at 17-18. See also, e.g., TAPS Comments at 43-51; TDU Systems Comments at 15.

<sup>48</sup> See Joint Commenters Comments at 26-27; TAPS Comments at 32-33.

challenges would be all the more acute if, as some commenters suggest, the Commission were to consider incentive requests based on multiple benefits, and/or benefits other than promoting reliability or reducing transmission congestion.<sup>49</sup> Any adoption of an “expected benefits” framework would require a thoroughly reviewable, transparent, and robust methodological framework. Most categories of benefits identified in the NOI have very underdeveloped economic valuation methods and, thus, pursuing an “expected benefits” framework would lack an empirical basis and would likely not have the consent of stakeholders. As discussed above, the evidence is not clear concerning the extent to which the Commission’s existing incentives policy has been effective in realizing any additional benefits like congestion reduction.

The incentives policy must ensure a causal connection with conventional benefits before expanding into unconventional benefits like “resilience” and “security.” These kinds of benefits are especially unsuitable to an expected benefits framework under current conditions. Security and resilience metrics are in a nascent state, and far from being translatable into economic valuation (benefits).<sup>50</sup> An ad hoc approach to transmission resilience and security benefits lacks a prudency gauge to weigh costs and benefits. The lack of an economic framework for resilience and security benefits has been a major concern voiced in other dockets by consumer groups.<sup>51</sup>

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<sup>49</sup> See, e.g., EEI Comments at 25-26 (arguing that the benefits considered under the Commission’s incentive policies “would include, but not be limited to, ensuring reliability or reducing the cost of delivered power by reducing transmission congestion.”); Public Interest Organizations Comments at 9-10 (citing numerous benefit categories for consideration).

<sup>50</sup> For example, a 2018 convening of experts on the economics of grid resilience concluded that “[g]iven limited data about new threats that could lead to large, long duration outages, metrics of resilience are yet to be fully developed and more efforts to create a well formulated and widely accepted definition of resilience would be helpful to policy development.” See Workshop Summary at: [https://media.rff.org/documents/RFF\\_workshop\\_summary\\_final\\_0.pdf](https://media.rff.org/documents/RFF_workshop_summary_final_0.pdf). Similarly, a 2017 Pacific Northwest National Laboratory report concludes that it is crucial for resilient grid architectures to have a clear definition and quantifiable concept, yet efforts to-date have relied upon *ad hoc* definitions that lack underlying rigor. Available at [https://gridarchitecture.pnnl.gov/media/advanced/Electric\\_Grid\\_Resilience\\_and\\_Reliability.pdf](https://gridarchitecture.pnnl.gov/media/advanced/Electric_Grid_Resilience_and_Reliability.pdf).

<sup>51</sup> See, e.g., *Security Investments for Energy Infrastructure Technical Conference*, Docket No. AD19-12-000, Post-Technical Conference Comments of the Electricity Consumers Resource Council (May 24, 2019), available at:



Any attempt to alter transmission incentives for resilience and security must first reconcile the concerns of consumers in these other proceedings.

## **2. The Commission Should Reject a “Flexible” Approach to Considering Project-Specific Incentives**

EEI and a number of other transmission owner commenters encourage the Commission to take a “flexible” approach to considering project-specific incentives and “allow public utilities to support the need for incentives by demonstrating benefits or risks (or both benefits and risks) that support the need for incentives based on a variety of characteristics.”<sup>52</sup> EEI argues that the expected benefits the Commission could consider “would include, but not be limited to, ensuring reliability or reducing the cost of delivered power by reducing transmission congestion,”<sup>53</sup> and could extend to the expected benefits and project characteristics listed in the NOI and other identified project benefits.<sup>54</sup>

This flexible approach to awarding incentives cannot be squared with the requirements for just and reasonable incentive rates. It has all the flaws of the “expected benefits” approach discussed above with the added problem that it would permit applicants to “mix and match” risk and challenges claims with assertions of expected benefits in a seemingly standard-less claim for project incentives. This approach, unlike the Commission’s current incentive policy, would allow applicants to benefit from risk-reducing incentives based on claimed risks and challenges

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<https://elcon.org/comments-of-elcon-docket-no-ad19-12-000-security-investments-for-energy-infrastructure-technical-conference/>.

<sup>52</sup> EEI Comments at 3; *see also id.* at 26 (arguing that “the Commission should allow public utilities to propose the specific package of incentives (e.g., ROE incentives or rate treatments) requested for a particular project and to demonstrate that the benefits of the project, the risk and challenges of the project, or a combination thereof, warrant the grant of those incentives.”); *see also, e.g.*, Consolidated Edison Co. of N.Y., Inc. and Orange and Rockland Utilities, Inc. Comments at 5; Exelon Corporation (“Exelon”) Comments at 16-19; PJM TOs Comments at 13; PPL Electric Utilities Corp. Comments at 4-5.

<sup>53</sup> EEI Comments at 25.

<sup>54</sup> *Id.* at 25-26.

while profiting from an enhanced ROE based on project benefits, and without clearly articulating how application of these two incentive frameworks produce a just and reasonable result. Indeed, under this flexible incentives framework, transmission owners and developers could be awarded incentives for the benefits associated with projects that they are required to build – projects that may have been selected in the planning process precisely to achieve those benefits.<sup>55</sup> Further, awarding incentives to promote objectives other than those that “benefit[] consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion,”<sup>56</sup> as some commenters suggest,<sup>57</sup> would be inconsistent with FPA section 219.<sup>58</sup>

The example provided by the PJM TOs of a flexible incentive approach highlights the problems with it.<sup>59</sup> They postulate a situation in which “a transmission owner seeking a project-specific ROE incentive for a baseline reliability project in PJM demonstrates that the project will also improve the security and resilience of the PJM transmission system,”<sup>60</sup> arguing that “the Commission should take those benefits into consideration when determining the level of ROE

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<sup>55</sup> See, e.g., Joint Commenters Comments at 29 (arguing that “[e]ven without a ‘risks and challenges’ analysis, the expected benefits could not be so amorphous that projects a transmission provider is required to undertake as part of its core business obligations would satisfy the criteria for eligibility to receive incentives.”); NESCOE Comments at 10 (observing that “a project’s expected benefits are established through the identification of the project need”); Southern New England State Agencies Comments at 14 (explaining that “the likelihood and magnitude of a project’s net benefits compared to alternatives is what distinguishes prudent investment from imprudent investment; those factors do not show that additional incentives, beyond generous base returns on equity investment, are needed or warranted.”); TAPS Comments at 34-37 (arguing that, if the Commission shifts to an “expected benefits” framework, it “should not provide above-cost incentives for investments that TOs already have an obligation to make”).

<sup>56</sup> 16 U.S.C. § 824s(a).

<sup>57</sup> See EEI Comments at 26.

<sup>58</sup> See, e.g., Order No. 679-A at P 86 (explaining that “[t]he stated purpose of section 219 is to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power.”); Order No. 679 at PP 41-43.

<sup>59</sup> See PJM TOs Comments at 26-27.

<sup>60</sup> *Id.*

incentive that is appropriate for the project.”<sup>61</sup> What, the Commission should ask, would customers receive in exchange for the additional basis points of allowed ROE they would be funding? Even assuming that “security and resilience” benefits could be satisfactorily quantified in this context,<sup>62</sup> the project has already been identified in the planning process as necessary to address a reliability need, and the designated PJM transmission owner would have an obligation to build the project. If the project faced particular risks or challenges, the transmission owner might be able to justify risk-reducing incentives to mitigate those risks, or in an extreme case, an incentive ROE adder. But simply awarding a higher ROE for benefits of a project that has already been identified as necessary for system reliability would represent nothing more than a windfall to the transmission owner. A core aim of transmission incentives policy is to ensure beneficial projects are built in the most economical fashion, and artificially raising an ROE undermines this objective by inflating costs for a project that would otherwise be built.<sup>63</sup>

While the PJM TOs suggest that “[a]llowing for additional or increased incentives in these instances would incentivize transmission owners to develop projects that achieve multiple goals, even if the project is selected for development based on only one of the benefits provided,”<sup>64</sup> this only highlights the potential conflict with the transmission planning process. In an effort to justify incentives, transmission owners or developers might pursue “benefits” that are not identified in, or supported by, the transmission planning process. With respect to resilience and security in particular, there are separate docketed proceedings addressing these issues. To

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<sup>61</sup> *Id.*

<sup>62</sup> *See* Joint Commenters Comments at 26-27.

<sup>63</sup> *See, e.g.,* Joint Commenters Comments at 30 (arguing that, under an expected benefits framework, “the Commission should require a demonstration that there is a causal relationship between each incentive sought and the consumer benefits to be derived from that incentive.”).

<sup>64</sup> PJM TOs Comments at 26-27.

the extent deficiencies exist in transmission benefit accounting, such matters are more appropriately examined in a review of transmission expansion planning processes.

### **3. If the Commission Adopts an Expected Benefits Approach, it Should Implement Adequate Safeguards**

As Joint Commenters explained in our initial comments, if the Commission were to pursue an “expected benefits” framework for project-specific incentives, it should adopt adequate safeguards on such incentives. Specifically, the Commission should condition any approval of project-specific incentives upon: (1) the project being approved in the regional transmission planning process; (2) the submittal of evidence demonstrating that there is a causal relationship between each incentive sought and the consumer benefits to be derived from that incentive; and (3) a demonstration through a cost-benefit analysis that the benefits to be gained by consumers materially exceed the costs of the requested incentives.<sup>65</sup>

#### **B. Incentive Objectives**

The Joint Commenters addressed each of the enumerated incentive objectives in our initial comments.<sup>66</sup> These reply comments focus more narrowly on two of these incentive objectives – improving existing transmission facilities and ownership by non-public utilities.

##### **1. Improving Existing Transmission Facilities**

A number of parties argue in their initial comments that the Commission should reform its transmission incentive policy to promote technologies that will increase the capacity or efficiency of existing facilities.<sup>67</sup> The WATT Coalition and other commenters endorse a specific

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<sup>65</sup> See Joint Commenters Comments at 32-33.

<sup>66</sup> See *id.* at 40-66.

<sup>67</sup> See, e.g., AEE Comments at 19-23; AWEA Comments at 19-21; Public Interest Organizations Comments at 34-36; WATT Coalition Comments at 2-9.

“shared savings” proposal to encourage the adoption of these technologies by public utility transmission owners.<sup>68</sup>

As Joint Commenters explained in our initial comments and in section II.A.1.c above, these arguments appear to be grounded in concerns about the transmission planning process and/or assertions that transmission owners have been slow to adopt certain beneficial technologies. Joint Commenters do not believe it would be appropriate to address planning process concerns by requiring customers to split production cost savings with public utilities to encourage them to adopt technologies that the utilities should be considering in the first place.

To the extent the Commission determines there is a need to reform its transmission incentive policy to promote particular objectives, however, Joint Commenters would acknowledge that promoting transmission technologies that cost-effectively increase the capacity or efficiency of existing facilities could be a constructive area of focus. In particular, the Commission should focus on technologies with large cost savings relative to traditional projects. The WATT Coalition and others correctly note that FPA section 219(b)(3) specifically requires that the Commission’s incentive rules encourage deployment of such transmission technologies. Any incentives targeted at these technologies must be justified on a cost-benefit basis, and should not be awarded for routine maintenance or industry-standard technology.

As discussed above, however, altering the Commission’s transmission incentives policy will, at best, yield limited change in technology deployment, because the fundamental obstacles rest in transmission planning processes. Joint Commenters encourage the Commission to thoroughly identify barriers to advanced, low-cost technology adoption through other forums, such as the upcoming technical conference in Docket No. AD19-15-000.

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<sup>68</sup> See WATT Coalition Comments at 5-8.

## **2. Ownership by Non-Public Utilities**

Joint Commenters' initial comments observed that 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.<sup>69</sup> Other commenters similarly highlighted the benefits associated with joint ownership by non-public utilities.<sup>70</sup>

Joint Commenters, MMWEC/NHEC, NRECA, and TAPS all offered a similar approach to promoting non-public utility joint ownership, which Joint Commenters urge the Commission to adopt. Specifically, the Commission should strengthen its encouragement for non-public utility joint ownership within the current incentive framework, under which consideration of joint ownership arrangements is among the risk mitigation measures that an applicant may demonstrate before seeking an incentive ROE.<sup>71</sup>

### **C. Existing Incentives**

#### **1. ROE-Adder Incentives**

##### **a. Transmission-Only Companies**

ITC and GridLiance each submitted initial comments encouraging the Commission to continue awarding the Transco Adder, contending that the Transco business model continues to provide benefits to customers and should be supported by the adder.<sup>72</sup> Even if the Commission accepts the claims that Transcos can provide certain benefits relative to public utilities affiliated

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<sup>69</sup> Joint Commenters Comments at 54-56.

<sup>70</sup> See GridLiance Comments at 2-20; NRECA Comments at 9-11, 30-33; TAPS Comments at 6-14, 85-87.

<sup>71</sup> See Joint Commenters Comments at 56-57; MMWEC/NHEC Comments at 7-8; NRECA Comments at 9-11, 30-33; TAPS Comments at 10-14, 85-87.

<sup>72</sup> See ITC Comments at 25-33; GridLiance Comments at 20-31. GridLiance's comments include a report concluding that, in the Southwest Power Pool and Midcontinent Independent System Operator regions, Transcos invest in transmission at a higher rate relative to investor-owned utilities. See GridLiance Comments at 21-24 & Attachment B.

with other market participants, the relevant question here is whether it is reasonable to provide a significant ROE adder to public utilities that adopt the Transco business model. The Joint Commenters' initial comments anticipated, and fully rebutted, the arguments for retaining the Transco Adder.<sup>73</sup> Rather than burden the record with a recitation of those points, the Joint Commenters' limit this reply to ITC's affirmative proposal for revising the Transco Adder.

Citing alleged "uncertainty that has been created by recent Commission precedent,"<sup>74</sup> ITC asks the Commission to "clarify that it will not reduce a Transco adder for reasons related to independence unless a Transco is operating within the *same* RTO or ISO as its affiliated market participants."<sup>75</sup> In support of its request, ITC claims that its clarification is consistent with Order No. 2000 and the definition of "market participant" in 18 C.F.R. 35.34(b)(2).<sup>76</sup>

While Joint Commenters continue to maintain that the Transco Adder should be eliminated, the Commission should, at a minimum, reject ITC's requested clarification. Just last month, the Commission rejected an identical claim about alleged uncertainty surrounding Commission precedent on the Transco Adder. Citing the *NextEra New York* decision on which ITC's initial comments rely, the Commission explained that "*NextEra New York* demonstrates that the Commission *does* examine affiliated market participants outside the same RTO as the transmission owner."<sup>77</sup> The Commission also explained that "the definition of a Transco adopted in Order No. 679 places no geographic limitation on the scope of relevant affiliate

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<sup>73</sup> Joint Commenters Comments at 66-71.

<sup>74</sup> ITC Comments at 30 (citing *Consumers Energy Co. v. International Transmission Co.*, 165 FERC ¶ 61,021 (2018); *NextEra Energy Transmission New York, Inc.*, 162 FERC ¶ 61,196 (2018) ("*NextEra New York*").

<sup>75</sup> *Id.* (emphasis in original); see also *id.* at 33 ("The Commission should use this proceeding to clarify that Transcos remain eligible for the maximum Transco adder as long as they do not have affiliated market participants operating *within the same RTO or ISO.*") (emphasis in original).

<sup>76</sup> *Id.* at 30-31.

<sup>77</sup> *Consumers Energy Co. v. International Transmission Co.*, 168 FERC ¶ 61,035, at P 13 (2019) (emphasis in original).

relationships.”<sup>78</sup> In addition, the Commission rejected arguments that Order No. 2000 and 18 C.F.R. 35.34(b)(2) require that the Commission’s evaluation of a transmission owner’s level of independence must be limited to affiliates in the relevant RTO.<sup>79</sup> In contrast, the Commission “conclude[d] that it would be virtually impossible to apply a geographically delineated standard.”<sup>80</sup> Nothing in ITC’s initial comments supports a finding that these recent determinations do not or should not apply equally to ITC’s requested clarification, and thus, the Commission should reject it.

#### b. RTO/ISO Participation

The Joint Commenters’ initial comments urged the Commission to reconsider granting the RTO Adder for participation in an RTO or ISO, and argued that, at a minimum, the Commission should distinguish between any inducement needed to join an RTO/ISO and the lower level of inducement to remain a transmission owner within an RTO by phasing out the RTO Adder over time.<sup>81</sup> A number of other commenters also urged the Commission to eliminate or modify the RTO Adder.<sup>82</sup> Despite the substantial attention devoted to this issue in the initial comments by transmission owner commenters,<sup>83</sup> supporters of the RTO Adder fail to offer a compelling basis for retaining the adder in its current form.

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<sup>78</sup> *Id.* at P 12.

<sup>79</sup> *Id.* at PP 14-15.

<sup>80</sup> *Id.* at P 15.

<sup>81</sup> Joint Commenters Comments at 71-75.

<sup>82</sup> *See, e.g.*, CPUC Comments at 50; MMWEC/NHEC Comments at 5-6; NJ Parties at 21-24; Public Interest Organizations at 30-31; Southern New England State Agencies at 38-39; TAPS Comments at 96-101; TDU Systems Comments at 25-29.

<sup>83</sup> *See, e.g.*, EEI Comments at 17-24; Exelon Comments at 36-42; MISO TOs Comments at 6-10; PJM TOs Comments at 14-21; WIRES Comments at 6-7; *see also* PJM Comments at 1-11.



Commenters that support continuation of the RTO Adder point to FPA section 219(c), which states that the Commission’s transmission incentive rules under section 219 “shall . . . provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”<sup>84</sup> This provision does not compel the Commission to award incentives, let alone an ROE adder, to every utility that joins or remains in an RTO. Section 219(c) does not refer to ROE adders at all. Thus, even if the Commission were to conclude that section 219(c) requires the Commission to provide incentives for utilities participating in an RTO/ISO, it does not obligate the Commission to continue awarding *ROE adders* to satisfy any such requirement. As some commenters suggest, the Commission could consider other forms of incentives if it concludes that section 219(c) requires some form of incentive for RTO/ISO membership.<sup>85</sup>

Section 219(c) does not obligate the Commission to award the RTO Adder (or any other incentive) if it would not be just and reasonable.<sup>86</sup> 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.<sup>87</sup> The Commission recognized the need for such a nexus when it characterized the RTO/ISO adder as “an *inducement* for utilities to join, and remain in” RTOs/ISOs.<sup>88</sup> 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. As Commissioner Glick recently observed, however, “[t]he Commission’s current approach to incentivizing RTO

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<sup>84</sup> 16 U.S.C. § 824s(c).

<sup>85</sup> See, e.g., Organization of MISO States (“OMS”) Comments at 13-14; Organization of PJM States, Inc. (“OPSI”) Comments at 11.

<sup>86</sup> See 16 U.S.C. § 824s(d).

<sup>87</sup> As R Street Institute observes, “[t]he term ‘incentive’ necessarily implies that the Commission is urging the incentivized party toward some action.” R Street Institute Comments at 7.

<sup>88</sup> Order No. 679-A at P 86 (emphasis added); see also *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 974-75 (9th Cir. 2018) (“*CPUC v. FERC*”).

participation hands transmission owners across the country hundreds of millions of dollars every year with little indication that any of that money makes a meaningful difference in their decisions to enter or remain in an RTO.”<sup>89</sup>

Despite the number of comments on the issue, none of the transmission owner commenters actually provide any evidence that the RTO Adder is instrumental to their determination to join and/or remain in an RTO; their arguments are based instead on generalized claims about the benefits and alleged risks of RTO/ISO membership. The RTO Adder, moreover, 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. Raising costs on consumers unnecessarily runs counter to the objective of having RTO/ISOs in the first place. 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.<sup>90</sup> State regulators and policymakers have retained RTO/ISO support based on the complete value proposition of membership. Moreover, experience to date indicates that transmission owners typically have little practical opportunity to unilaterally remove themselves from any RTO/ISO membership altogether. Most cases where transmission owners have left one

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<sup>89</sup> *Pacific Gas and Elec. Co.*, 168 FERC ¶ 61,038, Comm’r Glick *concurring* at P 4 (2019).

<sup>90</sup> *See, e.g.*, CPUC Comments at 50; NJ Parties at 6; OMS Comments at 13-14; OPSI Comments at 11.

RTO/ISO have been motivated by their pursuit to change RTO/ISOs, not to leave them altogether.<sup>91</sup>

Supporters of the RTO Adder point to the Commission's statements that the basis of the adder is recognition of the benefits that flow from RTO/ISO membership, arguing that these benefits continue to justify the adder.<sup>92</sup> But RTO/ISO membership benefits also flow to the transmission-owning members, and, in the thirteen years since Order No. 679 was issued, the organized wholesale markets administered by RTO/ISOs have evolved greatly, with the RTOs/ISOs reporting significant efficiency and reliability gains.<sup>93</sup> The benefits of RTO/ISO participation, combined with many public utilities' now longstanding membership in an RTO/ISO, arguably have reduced or eliminated any influence the adder may have ever had on decisions to join or remain in an RTO/ISO. As noted, above, the RTO adder actually reduces the net benefit of joining an RTO, which decreases the value proposition of membership to consumers.<sup>94</sup>

The Commission should dismiss suggestions that the RTO Adder is justified by the alleged risks and burdens associated with transmission owners' participation in RTOs and

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<sup>91</sup> Concerns that phasing out the RTO Adder would encourage transmission owners to withdraw and rejoin RTOs/ISOs in pursuit of the adder, *see* MISO TOs Comments at 18, are unrealistic, and, in any event, could be easily addressed by Joint Commenters' suggestion that the RTO Adder would be a "single use incentive." Joint Commenters Comments at 73.

<sup>92</sup> *See* Order No. 679 at P 331; Order No. 679-A at P 86; *see also* EEI Comments at 18-19; MISO TOs Comments at 6-10; PJM TOs Comments at 14-21; WIRES Comments at 6-7; *see also* PJM Comments at 1-11.

<sup>93</sup> *See* Joint Commenters Comments at 71; *see also, e.g.,* Duquesne Light Company Comments at 5 (asserting that "[t]he benefits of RTO participation initially enumerated when the RTO Incentive adder was first implemented have increased exponentially.").

<sup>94</sup> Even assuming, *arguendo*, that the cost of the 50 basis point RTO Adder is outweighed by RTO benefits generally as transmission owner commenters argue, this does not support an otherwise unjustified and unreasonable adder. The just and reasonable standard does not permit "even a little unlawfulness." *Consumer Fed'n of Am.*, 515 F.2d 347, 358 n.64 (D.C. Cir. 1975), quoting *FPC v. Texaco, Inc.*, 417 U.S. 380, 399 (1974).

ISOs.<sup>95</sup> These arguments are at odds with the assertion that the basis for awarding the adder is the benefits that flow from RTO/ISO membership. The Commission did not cite the alleged risks of RTO/ISO participation as a basis for an RTO Adder in Order No. 679 or Order No. 679-A, and, as discussed above, transmission owners do not establish that the adder is instrumental in their determination to join and/or remain in an RTO/ISO. Even if RTO/ISO membership imposes certain risks on transmission-owning members that are not offset by the benefits of such membership, the parties making this argument do not show that a reasonable base ROE fails to adequately account for these risks, let alone that the standard 50 basis points adder for RTO/ISO participation is appropriately calibrated to address any such risks. Although the Commission now relies on national proxy groups for setting the base ROE for electric utilities,<sup>96</sup> 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. Further, 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,”<sup>97</sup> and, thus, the alleged generic risks of participating in an RTO/ISO are not a reasonable basis for awarding the 50 basis point RTO Adder.

Eliminating the adder (or phasing it out after a period of time) for existing RTO/ISO members would neither contravene FPA section 219 nor unreasonably undermine the

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<sup>95</sup> See, e.g., EEI Comments at 23; Exelon Comments at 39-40; MISO TOs Comments at 16; PJM Comments at 5; PJM TOs Comments at 18-10, 21.

<sup>96</sup> See *S. Cal. Edison Co.*, 131 FERC ¶ 61,020, at PP 27-30 (2010), *reh'g denied*, 137 FERC ¶ 61,016 (2011) *review granted in part and denied in part sub nom. S. Cal. Edison Co.*, 717 F.3d 177 (D.C. Cir. 2013).

<sup>97</sup> Order No. 679 at P 326.

expectations of existing RTO/ISO participants, as some commenters suggest.<sup>98</sup> Contrary to EEI's contention that "[t]he statute is clear that the Commission should provide an incentive not just for joining, but also for remaining in, an RTO/ISO,"<sup>99</sup> FPA section 219(c) refers only to incentives for each utility that "joins" an RTO or ISO,<sup>100</sup> and does not mandate that incentives awarded pursuant to the provision must persist for the entire time the utility remains an RTO/ISO participant. 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 under section 219(c)), and transmission-owning participants in RTOs/ISOs do not have a justifiable expectation that the Commission's RTO/ISO incentive adder rules will remain unchanged no matter how circumstances change.<sup>101</sup>

Moreover, although not required, Joint Commenters' proposal to phase out the RTO Adder for both new and existing RTO members reflected a rebuttable presumption that such phase out was warranted.<sup>102</sup> Transmission utilities, we explained, could rebut the presumption with evidence that the risks or financial constraints associated with the public utility's continued RTO/ISO participation would not be adequately compensated if the adder were reduced or eliminated.<sup>103</sup> As noted above, none of the transmission owner commenters offered any such evidence here.

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<sup>98</sup> See, e.g., EEI Comments at 23; MISO TOs Comments at 15-16.

<sup>99</sup> EEI Comments at 19.

<sup>100</sup> 16 U.S.C. § 824s(c).

<sup>101</sup> Prospectively eliminating or phasing out the RTO/ISO adder certainly would not violate the rule against retroactive ratemaking, as EEI alleges. See EEI Comments at 26, n.67.

<sup>102</sup> See Joint Commenters Comments at 74-75.

<sup>103</sup> *Id.*

A number of the initial comments argued that, in granting the RTO Adder, the Commission should not distinguish between utilities that are legally compelled to join or remain in an RTO/ISO and utilities whose participation is truly voluntary.<sup>104</sup> These arguments are inconsistent with Order No. 679 and longstanding precedent, recently reaffirmed as to the RTO/ISO adder in particular,<sup>105</sup> that incentives are not justified if they seek to induce conduct that is already legally required.<sup>106</sup>

State requirements obligating transmission owners to join or remain in an RTO or ISO do not allow states to make determinations under FPA section 219, as the PJM TOs suggest.<sup>107</sup> The Commission retains full authority to determine eligibility for RTO/ISO participation incentives, but, in exercising that authority, it must take into consideration the relevant circumstances of the applicant, including whether state law – or some other legal requirement – compels the utility to

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<sup>104</sup> See EEI Comments at 23; Exelon Comments at 40-41; MISO TOs Comments at 18-19; PJM Comments at 9-10; PJM TOs Comments at 20-21; WIRES Comments at 6.

<sup>105</sup> 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* 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 propose modifications to 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.

<sup>106</sup> See Joint Commenters Comments at 17. Arguments that it would be unduly discriminatory to distinguish between voluntary and involuntary participation in awarding the adder, see PJM TOs Comments at 21, overlook the fact that Order No. 679 currently requires the Commission to consider such distinctions. See *CPUC v. FERC*, 879 F.3d at 978-79. If anything, it would be unduly discriminatory to allow all customers in an RTO/ISO to be charged the same RTO Adder as an inducement for RTO/ISO participation when the transmission owners are not similarly situated as to the need for such inducement. Cf. *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 27-28 (D.C. Cir. 1982) (explaining that “charging the same price to two purchasers where the seller’s costs with respect to each differ must . . . be considered discrimination”) (internal quotes and citations omitted).

<sup>107</sup> PJM TOs Comments at 21 (arguing that “[r]emoving the RTO Incentive in response to state action will effectively allow the states, and not the Commission, to determine whether the RTO Incentive is available for a particular transmission owner’s RTO membership.”); see also WIRES Comments at 6 (asserting that “[a]ny state law mandate that utilities participate in an RTO/ISO, should not be allowed to override FERC policy or create uncertainty about the merit of the incentive or the direction or sustainability of Commission policy.”).

participate in an RTO or ISO, thereby obviating the justification for awarding the adder as an inducement to RTO/ISO participation. Moreover, 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.

## 2. Non-ROE Transmission Incentives

### a. The Abandonment and CWIP Incentives

The Commission's abandonment and CWIP incentives should be retained in their current form,<sup>108</sup> and the Commission should reject arguments that these incentives should be awarded automatically in certain circumstances.<sup>109</sup>

The Commission's longstanding policy has been that responsibility for the prudently-incurred costs of cancelled projects should be shared evenly between investors and customers.<sup>110</sup> In awarding the abandonment incentive, the Commission departs from this policy in particular cases "to encourage transmission development by reducing the risk of non-recovery of costs."<sup>111</sup> Thus, the entire concept behind the abandonment incentive is to help ameliorate the risk associated with a particular beneficial project, thereby making it more likely that the project will

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<sup>108</sup> See Joint Commenters Comments at 77-80.

<sup>109</sup> See, e.g., EEI Comments at 15-16 (abandonment incentive should be awarded automatically for projects approved in a regional planning process); ITC Comments (the Commission's policy should be updated "to make these non-ROE incentives automatically available (subject to a section 205 filing) for projects that are approved through a regional planning process"); MISO TOs Comments at 10 (for CWIP and abandonment incentives, "the Commission should revise its regulations and policies to allow 100 percent recovery of such costs routinely as a ratemaking method, rather than treating abandoned plant recovery and CWIP as incentives for which a transmission developer must apply in advance and satisfy all of the requirements applicable to other transmission rate incentives."); PJM TOs at 22 (arguing that the Commission "should amend its existing incentive policy to make all projects that a transmission owner is directed to build by an RTO or a government entity be eligible for 100% recovery of prudently incurred abandonment costs.").

<sup>110</sup> See Joint Commenters Comments at 88-89; see also *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d at 132; *New England Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016, at pp. 61,068, 61,081-83, *order on reh'g*, 43 FERC ¶ 61,285 (1988).

<sup>111</sup> Order No. 679 at P 163.

be completed and benefit customers. The incentive should be reserved, as it is now, for projects that face identifiable risks and challenges that the abandonment incentive may help address. Awarding the incentive automatically for all projects approved in a regional transmission planning process would leave the Commission without any basis to conclude that the incentive is actually encouraging particular investments by reducing their risk, *i.e.*, there would be no way to identify a nexus between the incentive and the project investment for particular projects.<sup>112</sup> Thus, while approval of a project in a regional transmission plan should certainly be a prerequisite for awarding the abandonment incentive (or any other incentive),<sup>113</sup> regional transmission planning approval does not justify automatically allowing 100 percent cost recovery for an abandoned project.

The PJM TOs contend that it would be appropriate to automatically apply the abandonment incentive in all cases in which “a transmission owner is directed to build a project by an RTO or a government entity.”<sup>114</sup> They argue that, in these situations, “the concerns raised by the Commission in orders rejecting the abandonment incentive (*i.e.*, that the incentive must be used to *incentivize* conduct) do not apply, because the transmission owner is required to build a project that has already been found to support the policy objectives in Section 219 . . . .”<sup>115</sup> This is an actually argument for *not* applying the abandonment incentive to such a project, insofar as incentives should not be awarded to promote actions that a utility is legally compelled to

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<sup>112</sup> See *San Diego Gas & Elec. Co.*, 913 F.3d at 133 (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.”).

<sup>113</sup> See Joint Commenters Comments at 80.

<sup>114</sup> PJM TOs Comments at 23; see also, *e.g.*, American Electric Power Company, Inc. (“AEP”) Comments at 18; Exelon Comments at 43-46.

<sup>115</sup> PJM TOs Comments at 23 (emphasis in original); see also AEP Comments at 18; Exelon Comments at 44-45.



undertake.<sup>116</sup> In any case, the abandonment incentive can help promote beneficial transmission development for risky and challenging projects that a transmission owner may have an obligation to build by reducing capital costs.<sup>117</sup>

Automatically awarding risk-reducing incentives, like the abandonment and CWIP incentives, would be particularly problematic if the Commission were to adopt an “expected benefits” framework for considering project-specific incentives. Such an approach would allow transmission owners and developers to benefit from the “best of both worlds” at customers’ expense – automatically reduced risk associated with risk-reducing incentives, coupled with lucrative return-enhancing incentives based on project benefits. Thus, if the Commission considers automatic approval of risk-reducing incentives it should, at a minimum, specify that a transmission owner will not be entitled to such automatic approval if the transmission owner also requests an ROE incentive adder or other return-enhancing rate incentives for the project. In such a case, the applicant should be required to make a filing supporting the entire package of incentives without pre-approval of any incentives.<sup>118</sup>

#### b. Capitalization of Certain Other Costs

A number of parties argue that the Commission should permit public utilities to capitalize certain costs typically treated as expenses, particularly vegetation management program costs and communication/cybersecurity investments.<sup>119</sup> It is not necessary or appropriate to permit these costs to be capitalized as a form of incentive rates under FPA section 219. These are

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<sup>116</sup> See, e.g., *CPUC v. FERC*, 879 F.3d at 974-975 (observing that an “incentive cannot ‘induce’ behavior that is already legally mandated.”).

<sup>117</sup> See, e.g., *San Diego Gas & Elec. Co.*, 913 F.3d at 138.

<sup>118</sup> Joint Commenters Comments at 61.

<sup>119</sup> See, e.g., AEP Comments at 20-22; EEI Comments at 27; Exelon Comments at 34-25; ITC Comments at 11; PJM TOs Comments at 29-30; WIRES Comments at 9-10.

generally necessary and ongoing operations and maintenance costs that should not be capitalized.<sup>120</sup> The commenters raising this issue do not offer any compelling evidence that public utilities have been unable to recover these costs. With respect to infrastructure security investments in particular, the recent FERC-DOE technical conference on security infrastructure investment showed that cost recovery for security investments has not been a problem.<sup>121</sup> Further, as TAPS observed in its initial comments, 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.<sup>122</sup> If public utilities are incurring expense that they believe are in the nature of capital costs, they should propose such rate treatment for the Commission's review, but this should not be an incentive under FPA section 219.

### **3. Duration of Incentives**

The Joint Commenters recommend that the Commission limit the duration of transmission incentives, particularly revenue-enhancing incentives.<sup>123</sup> The RTO adder, if it is retained at all, should be phased out over time as discussed in our initial comments and in section II.C.1.b above. Project-specific ROE adders should sunset after fifteen years.<sup>124</sup>

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<sup>120</sup> See, e.g., *Cambridge Elec. Light Co.*, 84 FERC ¶ 61,049, at 61,218 (1998) (“[A] public utility does not usually earn a return on O&M expenses.”); *Georgia Power Co.*, Office of Enforcement Letter Order, Docket No. FA15-6 (2017), Division of Audits and Accounting Audit Report at 54-55 (providing that the Commission’s accounting regulations generally require vegetation management costs incurred in existing rights-of-way not associated with construction of an asset to be charged as a maintenance expense in the accounting period that the costs are incurred and that to be capitalized as part of transmission plant, the vegetation management cost would have had to meet the requirements for a substantial addition or betterment under the Commission’s accounting regulations).

<sup>121</sup> See Joint Commenters Comments at 46-49.

<sup>122</sup> TAPS Comments at 77 & n.221.

<sup>123</sup> See Joint Commenters Comments at 92-95.

<sup>124</sup> See *id.*

Commenters that seek to retain incentives for the life of a project fail to offer any reasonable basis for such long-term incentive rates.<sup>125</sup> Transmission owner commenters generally contend that removing incentives after the passage of a certain amount of time would create regulatory uncertainty and interfere with capital attraction.<sup>126</sup> Transmission owners do not offer any empirical evidence that eliminating a project-specific ROE adder after a certain period of time would interfere with the ability to attract capital for the project on reasonable terms. Project risks and challenges – as well as benefits – become much more attenuated over time, making it unreasonable to guarantee a particular ROE adder for the life of a project. Further, capital costs can change over time, undermining claims that any particular ROE adder is appropriate for the life of a project.<sup>127</sup> Indeed, transmission owner arguments that an ROE adder should apply for the life of a particular project are at odds with their acknowledgment in the ROE NOI that it would be inappropriate to use a “vintaging” approach to setting ROE.<sup>128</sup> The fifteen-year duration for project-specific incentives proposed in Joint Commenters’ initial comments strikes a reasonable balance between investor and consumer interests. This period is consistent with the fifteen year horizon incorporated in PJM’s regional transmission expansion plan process, consistent with the recognition that projecting system needs and performance beyond that horizon – let alone isolating the benefits of a particular project – is likely to be unduly speculative.

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<sup>125</sup> See, e.g., EEI Comments at 8-9; ITC Comments at 14; PJM TOs Comments at 13; WIRES Comments at 11-12.

<sup>126</sup> See *id.*

<sup>127</sup> See, e.g., *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 693 (1923) (explaining that a “rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.”).

<sup>128</sup> Docket No. PL19-4-000, EEI Comments at 23-25 (June 26, 2019); Docket No. PL19-4-000, PJM TOs Comments at 41-42 (June 26, 2019).

EEI points to the Commission’s observation in in Order No. 679 that “[i]t can be important to investors making long-term investments in long-lived facilities to be assured that a ratemaking proposal adopted prior to construction of those facilities will not later be altered in a manner that undermines the basis for the financing of those facilities.”<sup>129</sup> In making this statement, however, the Commission did not suggest that transmission owners and their investors should be assured of benefitting from an incentive return for the life of a project; the Commission simply noted that “it may be necessary to authorize incentives that may extend over several years.”<sup>130</sup> Moreover, the Commission indicated in the very same paragraph that, in applying for incentives, transmission owners should specify how long the requested incentives should remain in place.<sup>131</sup> But “to ensure that ratepayers are also adequately protected,”<sup>132</sup> the Commission specified that it would “require any applicants seeking such a fixed term for its plan to explain how ratepayers can be assured that such a plan is delivering the benefits that formed the basis for the Commission’s approval of it.”<sup>133</sup> Thus, from their inception, the Commission’s incentive rules under FPA section 219 have contemplated that incentives would be of limited duration and subject to meeting identifiable metrics. Joint Commenters’ proposal that project-specific incentives sunset after fifteen years is consistent with this approach.

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<sup>129</sup> EEI Comments at 8 (quoting Order No. 679 at P 36).

<sup>130</sup> Order No. 679 at P 36.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The Commission explained that applicants could, for instance, “propose periodic progress assessments with appropriate metrics . . . .” *Id.*

### III. CONCLUSION

Joint Commenters appreciate the opportunity to offer these comments on the Commission's Incentive NOI, and we respectfully request that the Commission consider our views in taking any action on its transmission incentives regulations and policy.

Respectfully submitted,

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