

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

**Electric Transmission Incentives Policy Under )  
Section 219 of the Federal Power Act )**

**Docket No. RM20-10-000**

**COMMENTS OF THE  
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to the Supplemental Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on April 15, 2021,<sup>1</sup> and the Commission’s May 11, 2021 Notice Granting Extensions of Time, the New England States Committee on Electricity (“NESCOE”) files comments in response to the Commission’s proposal to modify its 2020 proposals<sup>2</sup> addressing the return on equity (“ROE”) adder incentive for transmitting and electric utilities that join Transmission Organizations.<sup>3</sup>

**I. DESCRIPTION OF COMMENTER**

NESCOE is the Regional State Committee for New England. It is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff that ISO New England Inc. (“ISO-NE”) administers.<sup>4</sup> NESCOE’s mission is to represent the interests of the

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

<sup>2</sup> *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Proposed Rulemaking, 170 FERC ¶ 61,204 (2020), *errata notice*, 171 FERC ¶ 61,072 (2020) (“March 2020 NOPR”).

<sup>3</sup> The Supplemental NOPR uses the term “Transmission Organization” to mean a Regional Transmission Organization (“RTO”) or Independent System Operator (“ISO”), consistent with Federal Power Act (“FPA”) section 219. Supplemental NOPR at n.5 (citing 16 U.S.C. § 796(29)). NESCOE likewise uses the term Transmission Organization to mean RTO/ISO in these comments.

<sup>4</sup> *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

citizens of the New England region by advancing policies that will provide electricity at the lowest possible price over the long term, consistent with maintaining reliable service and environmental quality.<sup>5</sup> These comments represent the collective view of the six New England states.

NESCOE has participated actively in this rulemaking, having filed comments last year in response to the March 2020 NOPR in this docket.<sup>6</sup> Prior to that, in response to the Commission’s Notice of Inquiry (“NOI”),<sup>7</sup> NESCOE provided its views on the scope and implementation of the Commission’s electric transmission incentives regulations and policies.<sup>8</sup> And two-and-a-half years ago, NESCOE submitted a letter to the Commissioners urging them to adopt reforms to the Commission’s transmission incentives policies that would better ensure that consumers pay no more than just and reasonable rates, inclusive of transmission incentives.<sup>9</sup>

## II. INTRODUCTION AND SUMMARY

NESCOE commends the Commission for responding meaningfully to consumer cost concerns that NESCOE and others have identified regarding transmission incentives policies over the last several years. In its prior comments, NESCOE urged the Commission not to adopt

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<sup>5</sup> See Sept. 8, 2006 NESCOE Term Sheet (“Term Sheet”) that was filed for information as Exhibit A to the Memorandum of Understanding among ISO-NE, the New England Power Pool (“NEPOOL”), and NESCOE (the “NESCOE MOU”). Informational Filing of the New England States Committee on Electricity, Docket No. ER07-1324-000 (filed Nov. 21, 2007). Pursuant to the NESCOE MOU, the Term Sheet is the binding obligation of ISO-NE, NEPOOL and NESCOE.

<sup>6</sup> Comments of the New England State Committee on Electricity, Docket No. RM20-10-000 (filed Jul. 1, 2020) (“NESCOE NOPR Comments”).

<sup>7</sup> *Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208 (2019).

<sup>8</sup> Comments of the New England States Committee on Electricity, Docket No. PL19-3-000 (filed June 26, 2019) (“NESCOE NOI Initial Comments”); Reply Comments of the New England States Committee on Electricity, Docket No. PL19-3-000 (filed Aug. 26, 2019) (“NESCOE NOI Reply Comments”).

<sup>9</sup> NESCOE Letter to the Commissioners, New England States’ Comments on Transmission Incentive Rates (Dec. 20, 2018) (“NESCOE 2018 Incentives Letter”) at 2, available at [http://nescoe.com/wp-content/uploads/2018/12/NESCOE\\_IncentiveRatesLetter\\_20Dec2018.pdf](http://nescoe.com/wp-content/uploads/2018/12/NESCOE_IncentiveRatesLetter_20Dec2018.pdf).

proposals to increase transmission incentives without any analysis of whether existing incentives have achieved their intended goals.<sup>10</sup> NESCOE further urged the Commission to reassess those policies in light of changes to regional planning processes, among other things.<sup>11</sup> In the time since the Commission implemented its transmission incentives policies, it has issued major orders removing barriers to transmission investments such as Order No. 1000,<sup>12</sup> Order No. 890,<sup>13</sup> and Order No. 845.<sup>14</sup> Unfortunately, for the most part, the March 2020 NOPR proposed “reforms” that vastly expanded the incentives available to utilities without regard for whether the incentives were narrowly tailored to achieve their intended goal or their impact on consumer costs.

In the New England region, transmission owning utilities have been receiving a 50-basis point ROE adder “incentive” for Transmission Organization participation since 2004.<sup>15</sup> While arguments in favor of retaining or increasing this ROE adder incentive point to the benefits of Transmission Organization membership bestowed upon consumers,<sup>16</sup> such arguments fail to

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<sup>10</sup> NESCOE NOI Initial Comments at 7-8; NESCOE NOPR Comments at 47-48.

<sup>11</sup> See NESCOE NOI Initial Comments at 7-11; NESCOE NOPR Comments at 2-6.

<sup>12</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>13</sup> *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, *order on reh’g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>14</sup> *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043 (2018), *order on reh’g and clarification*, Order No. 845-A, 166 FERC ¶ 61,137 (2019), *order on reh’g and clarification*, Order No. 845-B, 168 FERC ¶ 61,092 (2019).

<sup>15</sup> *Bangor Hydro-Elec. Co., et al.*, 106 FERC ¶ 61,280, at P 245 (2004), *order on reh’g*, 109 FERC ¶ 61,147 (2004), *aff’d sub nom. Maine Pub. Utilities Comm’n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

<sup>16</sup> See, e.g., Supplemental NOPR, Chatterjee, Comm’r, dissenting at P 6 (summarizing benefits identified by the Midcontinent ISO, PJM Interconnection L.L.C., the Southwest Power Pool, Inc, and ISO-NE).

acknowledge the benefits that membership has provided the transmission owning utility members, and they noticeably fail to shed light on what the 50-basis-point adder has cost consumers over the fifteen plus years.<sup>17</sup> Utilities have rarely exited Transmission Organizations given the benefits membership accords them,<sup>18</sup> and NESCOE is unaware of any transmission company exiting or seeking to exit ISO-NE. It is well past time to reevaluate the reasonableness of the Transmission Organization ROE adder incentive, especially in the case of transmission owners that joined RTOs/ISOs many years ago, as is the case in New England. NESCOE applauds the Commission for taking this step at this time.

NESCOE generally supports the approach that the Supplemental NOPR takes in addressing the discrete issue of the Transmission Organization ROE adder incentive. Nonetheless, NESCOE continues to believe that further reforms are very much needed on other aspects of the Commission's transmission incentives policies, as discussed in its earlier comments. NESCOE hopes that the Commission will continue to reassess these policies through the lens of ensuring that transmission rates remain just and reasonable, as is required by FPA section 219.<sup>19</sup>

NESCOE also generally supports the proposals in the Supplemental NOPR. The level of the Transmission Organization ROE adder incentive in the March 2020 NOPR had it backwards

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<sup>17</sup> As noted in then-Commissioner Glick's dissent to the March 2020 NOPR, one analysis estimates the direct cost of a 50 basis point ROE adder to be roughly \$400 million per year and growing. March 2020 NOPR, Glick, Comm'r, dissenting in part ("Glick March 2020 NOPR Dissent") at P 19, n. 26 (citing TAPS Comments at 97). The significant challenge in ascertaining with precision how much the RTO adder incentive has cost New England consumers since it was implemented speaks to the overall lack of reporting on transmission incentives to inform consideration of whether incentives are achieving their stated objectives.

<sup>18</sup> See Comments of Transmission Dependent Utility Systems, Docket No. PL19-3-000 (filed June 26, 2019), at 28 and n.68.

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

in proposing an increased incentive. NESCOE further agrees that this incentive should no longer be available in perpetuity, but rather, that it should be available only for a specified time period. In this way, it truly would be an incentive for *joining* a Transmission Organization, not a continuing windfall for remaining a member of a Transmission Organization for years and years. And NESCOE agrees that the incentive should not be available to utilities that are under a legal obligation to join a Transmission Organization. Providing an incentive to a utility for doing something it is otherwise obligated to do is not an incentive at all; it is free money.

However, NESCOE opposes one aspect of the Supplemental NOPR. The proposal to codify a 50-basis-point adder incentive would make it impossible for the Commission to fulfill its statutory obligation to ensure that rates are just and reasonable. While NESCOE appreciates the Commission's attempt to rebalance a previously one-sided and unsupported proposal, this proposal suffers from the same flaw as did the March 2020 NOPR's proposal to set a fixed 100 basis-point ROE adder.<sup>20</sup> NESCOE urges the Commission not to adopt this aspect of the Supplemental NOPR's proposals and instead to reaffirm the burden it placed on utilities in Order No. 679<sup>21</sup> to demonstrate, on a case-by case-basis, that the level of the Transmission Organization ROE adder incentive is appropriate.<sup>22</sup>

The Supplemental NOPR sets the Commission's policies on the right path. Supporters of overly generous incentives seem to have lost sight of the core mission of the Commission—to ensure that rates remain just and reasonable. The Commission's incentive rule never promised

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<sup>20</sup> See March 2020 NOPR at PP 97, 99.

<sup>21</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).

<sup>22</sup> *E.g.*, Order No. 679 at P 20 (“Before adopting any incentive-based rate treatments for a particular company, the Commission will need to determine that the applicant has justified its specific incentive request.”).

an ROE adder incentive at any particular level for participation in a Transmission Organization until the end of time. To the contrary, in Order No. 679, the Commission declined to “make a generic finding on the duration of incentives that will be permitted for public utilities that join Transmission Organizations.”<sup>23</sup> It is reasonable for the Commission, fifteen years later, to reevaluate the question of the duration of ROE adder incentives that will be permitted for utilities that join Transmission Organizations. Indeed, given the Commission’s overarching mandate to ensure just and reasonable rates—which itself was an integral part of FPA section 219<sup>24</sup>—it would be irresponsible for the Commission *not* to periodically reevaluate and reform its incentive program, as the Supplemental NOPR now proposes.

### III. COMMENTS

#### A. Incentive for Joining Rather than Remaining in Transmission Organizations

##### 1. The Commission Should End the Perpetual ROE Adder “Incentive” for Utilities that Remain in Transmission Organizations.

In its NOPR Comments, NESCOE strongly opposed the March 2020 NOPR’s proposal to make the Transmission Organization ROE adder incentive available in perpetuity.<sup>25</sup> NESCOE’s view has not changed, and it strongly supports the Supplemental NOPR’s withdrawal of this proposal. Simply put, allowing utilities to retain the Transmission Organization ROE adder incentive in perpetuity is not supported by any evidence of need. To the contrary, allowing utilities that have joined Transmission Organizations to continue to receive this ROE adder incentive forever results in a windfall to those transmission owning utilities. Nor does allowing

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<sup>23</sup> *Id.* at P 327.

<sup>24</sup> 16 U.S.C. § 834s(d), *supra* n.19.

<sup>25</sup> NESCOE NOPR Comments at 19, 23-27.

utilities to continue to receive the ROE adder incentive without any end point have any basis in the statute.

a. The Supplemental NOPR Recognizes the Dearth of Evidence Justifying Utilities To Retain the Transmission Organization ROE Adder Incentive in Perpetuity.

The Supplemental NOPR’s proposal to cease treating the Transmission Organization ROE adder incentive as the gift that keeps on giving is well supported. It is particularly inappropriate to “incentivize” utilities to stay in Transmission Organizations given the large impact that the ROE adder incentive has on ratepayers.<sup>26</sup> As NESCOE explained in its NOPR Comments, nothing in the record, including evidence of RTO/ISO benefits, justifies continuing an ROE adder incentive at all.<sup>27</sup> The Supplemental NOPR gets it right by disentangling the issue of benefits that customers receive from their utilities’ participation in Transmission Organizations from a need for the ROE adder incentive to continue for over fifteen years and counting. On this point, NESCOE appreciates that the Commission proposes to reverse course from the March 2020 NOPR, which had conflated Transmission Organization benefits with the need for perpetual Transmission Organization ROE adder incentives.

Additionally, as NESCOE previously pointed out, it is unaware of any evidence that the Transmission Organization ROE adder incentive ever actually played a role in the formation of and continued participation in RTOs/ISOs.<sup>28</sup> The Supplemental NOPR takes into account comments submitted by utilities and RTOs/ISOs contending that consumers reap substantial benefits from utilities being members of Transmission Organizations as justification for retaining

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<sup>26</sup> Supplemental NOPR at P 8.

<sup>27</sup> NESCOE NOPR Comments at 20-23.

<sup>28</sup> *Id.* at 21.

the ROE adder incentive in perpetuity.<sup>29</sup> Arguments attempting to justify a forever entitlement to this ROE adder incentive ignore the vast benefits that utilities themselves receive by being members of Transmission Organizations. Such arguments also fail to factor into their quantification of benefits what the ROE adder incentives have cost consumers over the past decade and a half. And these costs are not insignificant.<sup>30</sup> These costs are expected to continue to increase as transmission investments have continued to rise over the years.<sup>31</sup> Given the dearth of evidence on the role that the ROE adder incentive played in inducing utilities to join Transmission Organizations in the past, there is nothing that forms a reasonable basis to believe that the Transmission Organization ROE adder incentive might play a future role in the formation of new Transmission Organizations and/or joining of existing ones. Putting a time limit on the incentive, as the Supplemental NOPR now proposes, is more than justified. It is long overdue.

b. The Supplemental NOPR's Proposal Is Consistent with FPA Section 219.

The Commission states its belief “that it is reasonable to read FPA section 219(c) to direct the Commission to provide an incentive for ‘join[ing]’ a Transmission Organization and not for remaining in a Transmission Organization in perpetuity.”<sup>32</sup> NESCOE agrees with this reasonable interpretation. Nothing in FPA section 219(c) expressly states that the Transmission Organization incentive was intended to last forever. Arguments in favor of this interpretation rest on an expansive view of the word “join” that is contrary to a common understanding of the

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<sup>29</sup> Supplemental NOPR at P 14.

<sup>30</sup> *See supra* n.17.

<sup>31</sup> Supplemental NOPR at P 14.

<sup>32</sup> *Id.* at P 6.

word—one in which “join” means the same thing as “join and remain a member of” a Transmission Organization.

Arguments in favor of a perpetual ROE adder incentive also ignore the plain meaning of the term “incentive.” That is, something that induces behavior. The behavior to be encouraged and rewarded here is, as the statute says, *joining* a Transmission Organization. There is an obvious distinction between an incentive designed to encourage a utility to join a Transmission Organization—which a time-limited incentive could accomplish—versus one designed to encourage a utility to *remain* in a Transmission Organization. As a practical matter, utilities that join Transmission Organizations are unlikely to leave because of the significant cost savings in the form of congestion cost relief or less expensive power due to access to economic dispatch of supply gained in joining a Transmission Organization,<sup>33</sup> and they do not need an ROE adder incentive to remain. Indeed, RTOs/ISOs may have exit fees for transmission-owning utilities that seek to depart.<sup>34</sup>

Beyond agreeing with the Supplemental NOPR’s interpretation of FPA section 219(c) as reasonable, NESCOE believes it is, in fact, *unreasonable* to read FPA section 219(c) as requiring a perpetual ROE adder incentive for joining a Transmission Organization when there is nothing in the statute that requires the Commission, in the first place, to grant utilities that form of incentive for joining a Transmission Organization. NESCOE strongly agrees with the Supplemental NOPR’s conclusion that FPA section 219 does not require an incentive for RTO/ISO participation to be an ROE adder.<sup>35</sup>

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<sup>33</sup> Cases of utilities leaving Transmission Organizations altogether are rare. See TDU Systems NOPR Comments at 28, n.68.

<sup>34</sup> See *Louisville Gas and Electric Co., et al.*, 114 FERC ¶ 61,282, at PP 57-60 (2006) (addressing exit fee).

<sup>35</sup> Supplemental NOPR at P 16.

FPA section 219(c) provides that “[i]n the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”<sup>36</sup> The statute does not prescribe the form of incentive. It does not require this incentive to be an adder to the base ROE. NESCOE believes Commissioner Christie has it precisely right, that:

absent a clear declaration from Congress that a FERC-authorized incentive must take the form of an ROE adder—which it did not require for RTO participation incentives—awarding an ROE adder for any length of time as a ‘reward’ for joining an RTO/ISO may be inconsistent with FPA section 219’s concurrent mandate that rates must be just and reasonable and not unduly discriminatory or preferential.<sup>[37]</sup>

As discussed below, there are alternative, non-ROE incentives that are more appropriate for the Transmission Organization incentive besides ROE adders. There is no statutory entitlement to a higher ROE, period, let alone in perpetuity.

If the Commission insists on retaining the Transmission Organization ROE adder incentive, it should not be a permanent give-away. If the purpose of the Transmission Organization ROE adder incentive is indeed to encourage membership in a Transmission Organization, then that purpose can be accomplished by providing an incentive to *new* members for a limited time period.

- c. A Three-Year Limit Strikes an Appropriate Balance Between the Need to Incentivize Joining a Transmission Organization and Ensuring Consumer Costs are Just and Reasonable.

NESCOE generally supports the Commission’s view that a three-year limit on the ROE adder incentive for joining a Transmission Organization achieves a reasonable balance between

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<sup>36</sup> 16 U.S.C. 824s(c).

<sup>37</sup> Supplemental NOPR, Christie, Comm’r, concurring at P 11.

incentives for utilities seeking to join Transmission Organizations and consumer interests. And importantly, it is certainly more justified than keeping the ROE adder incentive in perpetuity.<sup>38</sup>

NESCOE supports the Supplemental NOPR's proposal that the Transmission Organization ROE adder incentive should be unavailable to a utility that switches Transmission Organization memberships.<sup>39</sup> That utility presumably is switching because of the benefits it anticipates receiving from membership in the new Transmission Organization. Accordingly, the time limitation that the Commission ultimately establishes for the Transmission Organization membership incentive should not be extended in the case of a utility choosing to leave one Transmission Organization for another. Although this scenario seems unlikely, NESCOE commends the Commission for ensuring customers are protected in this instance. Similarly, if the assets owned by the utility seeking the ROE adder incentive were already under the operational control of a Transmission Organization but subsequently sold or transferred, the Transmission Organization ROE adder incentive should not be extended beyond the three-year limit.<sup>40</sup>

Finally, NESCOE supports the proposal to require, pursuant to FPA section 206, that each utility that has previously received ROE incentives for joining and remaining in a Transmission Organization for more than three years submit a compliance filing within 30 days removing the incentive from its tariff.<sup>41</sup>

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<sup>38</sup> See NESCOE July 2020 Comments at 20-27.

<sup>39</sup> Supplemental NOPR at P 20.

<sup>40</sup> *Id.* at P 21.

<sup>41</sup> *Id.* at P 11.

## **B. Transmission Organization Incentive Level**

### **1. NESCOE Strongly Supports Rejecting the March 2020 NOPR's Proposal to Double the Level of the Transmission Organization ROE Adder Incentive; However, There Is Still No Justification for 50-Basis Points Across the Board.**

NESCOE strongly supports the Supplemental NOPR's proposal to reject the March 2020 NOPR's proposal to—without any record evidence demonstrating the need—double the level of the Transmission Organization ROE adder incentive.<sup>42</sup> The current proposal is a step in the right direction towards helping to ensure that rates remain just and reasonable. However, the Supplemental NOPR does not justify an automatic generic 50-basis point adder to base ROEs for utilities joining Transmission Organizations. It points out that this is the level that has been awarded consistently in the past and suggests “that there is no compelling reason to potentially vary on a case-by-case basis the level”<sup>43</sup> of the adder incentive. However, this ignores that in certain circumstances, even a 50-basis point adder may not be warranted.

Codifying a generic 50-basis point adder would be divorced from any analysis of (i) whether the benefits to a particular case warrant it, and (ii) more importantly, whether the resulting ROE may exceed the zone of reasonableness, thus rendering it no longer just and reasonable. As discussed in Section B.2, below, the level of the ROE adder incentive must be subject to a case-by-case review to ensure that the overall ROE, and, in turn, the overall rates paid by consumers, remain just and reasonable. This cannot be achieved if the Commission were to adopt the Supplemental NOPR's proposal to codify the 50-basis point level ROE adder incentive.

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<sup>42</sup> *Id.* at PP 12-13.

<sup>43</sup> *Id.* at P 15.

**2. If the Commission, Nonetheless, Codifies the 50-Basis Point Level, It Must Ensure There Are Adequate Safeguards to Protect Consumers.**

If the Commission decides that 50-basis points is the default level of the adder, it still must expressly require that the overall ROE—base ROE plus incentive adders—does not exceed the upper end of the zone of reasonableness. Setting a 50-basis point default ROE adder without examining whether the resulting ROE is just and reasonable would be an abdication of the Commission’s responsibility to ensure that rates are not unjust and unreasonable. The Commission must not eliminate the burden it placed on utilities in Order No. 679 to demonstrate, on a case-by-case basis, that the sum of all ROE adder incentives—including the Transmission Organization ROE adder incentive—remains appropriate.

NESCOE acknowledges the Commission’s view that codifying the 50-basis point level will provide financial certainty to developers, increase transparency and reduce administrative burden of application process,<sup>44</sup> but these factors cannot overcome a rate that is unjust and unreasonable. If the Commission insists on adopting this proposal, NESCOE urges it to confirm that the overall ROE—inclusive of *all* ROE adder incentives, including the Transmission Organization incentive at issue here—must still be below the cap on the upper end of zone of reasonableness. And if the Commission decides to codify the 50-basis point ROE adder incentive level, this too must become part of the regulatory text.

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<sup>44</sup> *Id.*

- a. Departing from Reliance on the Upper End of the Zone of Reasonableness Would Be Contrary to Longstanding Commission and Court Precedent.

FPA section 219(d) provides that incentive rates “are subject to the requirements of sections 824d and 824e that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”<sup>45</sup> In Order No. 679, the Commission explained:

[B]ecause the approved ROE, including the impact of an incentive, will be within the zone of reasonableness, we consider this provision consistent with section 205 of the FPA. *We will not create specific ROE adders (e.g., 100 basis points); the Commission has always considered a range of returns in determining the appropriate ROE and we see no reason to depart from this practice.* Though some commenters assert that the incentive need not be cost-based and therefore can justifiably be above the upper-end of the zone of reasonableness, we believe a return *within the zone* will be adequate to attract new investment and consistent with the intent of Congress in section 219.<sup>[46]</sup>

The Commission clarified in Order No. 679-A that although it “has broad discretion to establish returns on equity anywhere *within the zone of reasonableness*, we must be careful in the manner we exercise this discretion....Rather, each applicant will, first, be required to justify a higher ROE under the required nexus test and, second, to justify where *in* the zone of reasonableness that return should lie.”<sup>47</sup> Although Order No. 679 was discussing the section 219(b)(2) ROE adders here, the same logic applies to the Transmission Organization ROE adder incentive that the Supplemental NOPR proposes to codify at 50 basis points.

Preapproving a 50-basis point ROE adder without any analysis would be contrary to decades of long-standing precedent, which relies on the upper end of the zone of reasonableness

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<sup>45</sup> 16 U.S.C. 824s(d).

<sup>46</sup> Order No. 679 at P 93 (emphasis supplied).

<sup>47</sup> Order No. 679-A at P 7 (emphasis supplied).

to determine the total ROE cap, inclusive of incentives.<sup>48</sup> As just one of many examples, the Commission held in 2008 that “the combined package of incentives will be capped at the high end of the zone of reasonableness and, therefore, is just and reasonable.”<sup>49</sup> The Supplemental NOPR does not explain why the Commission should now ignore its own long-standing precedent that has consistently relied on capping incentives at the top of the zone of reasonableness.

Having returns on equity remain within the zone of reasonableness has been a fundamental means of ensuring that transmission incentives remain just and reasonable (even before Congress’ enactment of FPA section 219). As the D.C. Circuit held, “[a]s long as the rate selected by the Commission is *within* the zone of reasonableness, FERC is not required ‘to adopt as just and reasonable any particular rate level.’”<sup>50</sup> Conversely, “[a]bsent procedural or methodological flaws, the court may only set aside a rate that is *outside* a zone of reasonableness.”<sup>51</sup>

In upholding the incentive adder that the Commission approved in 2004 for New England transmission owners, the Court relied on the fact that the Commission had ensured that it did not

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<sup>48</sup> Order No. 679 at PP 92-93.

<sup>49</sup> *Northeast Utils. Serv. Co.*, 124 FERC ¶ 61,044, at P 71 (2008). *See also Central Maine Power Co.*, 125 FERC ¶ 61,079, at P 73 (2008) (“Our granting of a 125 basis point adder, in conjunction with its 11.64 percent base level ROE as determined by the Opinion No. 489 Rehearing Order, results in a 12.89 percent ROE (10.4 + 0.5 + 0.74 + 1.25) and falls within the upper range of the zone of reasonableness of 7.3 percent to 13.5 percent.”); *Desert Southwest Power, LLC*, 135 FERC ¶ 61,143, at P 96 (2011) (“Our determination here is subject to Desert Southwest’s overall ROE, including the incentive ROE adders granted here, falling within the zone of reasonable returns.”); *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,078, at P 33 (2019) (“We condition our approval on the adder being applied to a base ROE that has been shown to be just and reasonable, and subject to the resulting ROE being within the applicable zone of reasonableness, as may be determined in the hearing and settlement judge procedures ordered below”) (footnotes omitted).

<sup>50</sup> *Emera Maine v. FERC*, 854 F.3d 9, 23 (D.C. Cir. 2017) (“*Emera*”) (emphasis supplied) (citation omitted).

<sup>51</sup> *Id.* (emphasis supplied) (quoting *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002)). *See also Emera* at 24 (“while showing that the existing rate is entirely outside the zone of reasonableness may illustrate that the existing rate is unlawful, that is not the *only* way in which FERC can satisfy its burden under section 206.”) (emphasis in original) (citing *Pub. Serv. Comm’n of N.Y. v. FERC*, 642 F.2d 1335, 1350 n.27 (D.C. Cir. 1980)).

exceed the zone of reasonableness: “In FERC’s words on rehearing... ‘it is appropriate . . . to adjust the allowed return for [TOs] that undertake commitments designed to enhance the overall competitiveness and efficiency of the wholesale markets, *so long as the resulting rate of return is within the range of reasonable returns.*’ Given the expertise implicated in FERC’s determination, *and the measures it took to explain and cabin the adder*, the court can conclude that the determination meets this minimum standard for reasonableness.”<sup>52</sup>

To the extent the Supplemental NOPR is suggesting that the Commission need not undertake any case-by-case analysis of the Transmission Organization ROE adder incentive, this proposal would violate the requirement in FPA section 219(d) that “[a]ll rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”<sup>53</sup> And it would fail to support the Commission’s duty under the FPA to ensure that consumers are not charged excessive costs.<sup>54</sup>

b. Other Non-ROE Incentives Are Currently in Effect and May Be More Appropriate for Transmission Organization Incentives.

The Supplemental NOPR asks whether there are alternative, non-ROE incentives that are more appropriate for the Transmission Organization incentive besides ROE adders. The short

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<sup>52</sup> *Maine PUC v. FERC*, 454 F.3d 278, 289 (D.C. Cir. 2006) (emphasis supplied) (quoting *ISO New England, Inc.*, 109 FERC ¶ 61,147, at P 207 (2004) (additional citation omitted).

<sup>53</sup> 16 U.S.C. § 824s(d).

<sup>54</sup> *NextEra Energy Res. v. FERC*, 898 F.3d 14, 21 (D.C. Cir. 2018) (“The Commission must protect . . . consumers from excessive rates and charges.”) (cleaned up); *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (“It is long-established that the primary aim [of the FPA] is the protection of consumers from excessive rates and charges.”) (cleaned up); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1207 (D.C. Cir. 1987) (Starr, J., concurring) (“The Commission stands as the watchdog providing a complete, permanent and effective bond of protection from excessive rates and charges.”) (cleaned up).

answer is “yes.” In fact, utilities that are transmission owning members of Transmission Organizations are already receiving such incentives. As NESCOE explained previously, there are many non-ROE adder incentives that the Commission has made available to transmission owning members of Transmission Organizations.<sup>55</sup>

### C. Voluntariness

#### 1. Transmission Organization ROE Adder Incentives Should Only Be Available to Utilities That Voluntarily Join Transmission Organizations.

The Commission should make the Transmission Organization ROE adder incentive available only to transmission utilities that join a Transmission Organization voluntarily. It is well past time for the Commission’s transmission incentive policies to recognize, as then-Commission Glick articulated:

what should be a bedrock principle of any effort to administer section 219: That incentives must actually incentivize something. A payment that does not incentivize anything is a handout, not an incentive. Handing out customers’ money to transmission owners without a strong belief that that money will induce beneficial conduct is unjust and unreasonable and inconsistent with Congress’ intent behind section 219.<sup>[56]</sup>

In short, an incentive should incentivize something. Reviewing courts will no doubt take note of that axiom in considering challenges to the Commission’s transmission incentives

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<sup>55</sup> See NESCOE July 2020 Comments at 20-23 (explaining that utilities that have joined and remain members of Transmission Organizations still receive an array of risk-reducing incentives such as the Abandoned Plant Incentive. Utility members of Transmission Organizations are able to obtain relief from the requirement to purchase energy and capacity from Qualifying Facilities in most instances, and also have the advantage of being able to charge market-based rates for power because the geographic region over which their market power is measured is much larger). Additionally, the Commission has relieved utility members of Transmission Organizations with capacity markets of the obligation to submit indicative screens to obtain or retain authority to sell energy, ancillary services and capacity at market-based rates. *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, Order No. 861, 168 FERC ¶ 61,040, at PP 1, 4 (2019), *order on reh’g and clarification*, Order No. 861-A, 170 FERC ¶ 61,106 (2020).

<sup>56</sup> Glick March 2020 NOPR Dissent at P 4 (citations omitted).

policies, including changes to the Transmission Organization incentive. The United States Court of Appeals for the Ninth Circuit did just that only a few years ago. In that case, the Court found that the Commission’s determination that a utility was entitled to ROE incentive adders for *remaining* in the California ISO was arbitrary and capricious, was an unreasonable interpretation of Order No. 679 and thus an unexplained departure from longstanding policy, and created a generic adder in violation of Order No. 679.<sup>57</sup> The Court explained: “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.”<sup>58</sup>

Having “voluntariness” as a criterion for receipt of the Transmission Organization ROE adder incentive would help prevent the Commission from retaining a generic adder for Transmission Organization participation, which the Commission expressly declined to do in Order No. 679.<sup>59</sup> The Commission should adopt this reform so that it can address the individual circumstances of each particular utility.

The Supplemental NOPR seeks input on how to apply a standard of “voluntariness.”<sup>60</sup> The burden should be on the applicant seeking this incentive to demonstrate as part of its FPA section 205 filing that it is voluntarily joining a Transmission Organization. While the Commission should address such requests on a case-by-case basis, the Commission can provide some general guidance in a final rule. In particular, where a utility is obligated to join a

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<sup>57</sup> *Cal. Public Util. Comm’n v. FERC*, 879 F.3d 966, 973 (9th Cir. 2018).

<sup>58</sup> *Id.* at 974-75 (citing to Order No. 679-A at P 86).

<sup>59</sup> *See* Order No. 679 at P 326 (stating that the Commission would “consider specific incentives on a case-by-case basis”).

<sup>60</sup> Supplemental NOPR at P 19.

Transmission Organization as a result of a legal mandate or directive, it is difficult to see how joining the Transmission Organization could be construed as “voluntary.” Examples could include where a state statute required a utility to join the Transmission Organization, or where the Commission or a state regulatory commission imposed a requirement on a utility to join a Transmission Organization, perhaps as a condition to receiving approval for a merger. These examples are not intended to be exhaustive.

The Supplemental NOPR also asks whether there should be a voluntariness exception based on whether states and/or other relevant electric retail regulatory authorities support receipt of the ROE adder incentive.<sup>61</sup> The Commission should proceed cautiously in considering such an exception. This type of exception would warrant substantially more discussion in the case of a multi-state region like New England where consumers in multiple states would be exposed to increased regional rates resulting from one or a subset of states supporting that exception.

#### **IV. CONCLUSION**

For the reasons discussed above, NESCOE respectfully requests that the Commission consider its comments in developing any final rule on the Transmission Organization ROE adder incentive.

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

Respectfully Submitted,

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