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**

REPLY 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,[1] and the Commission's May 11, 2021 Notice Granting Extensions of Time, the New England States Committee on Electricity ("NESCOE") submits these Reply Comments.[2] These Reply Comments address certain points made by commenters on the Commission's proposal to modify its 2020 proposals[3] addressing the return on equity ("ROE") adder incentive for transmitting and electric utilities that join Transmission Organizations.[4]

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

2 NESCOE filed initial comments in response to the Supplemental NOPR on June 25, 2021 ("NESCOE Initial Comments").

3 *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Proposed Rulemaking, 170 FERC ¶ 61,204, *errata notice*, 171 FERC ¶ 61,072 (2020).

4 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 Reply Comments.

I. REPLY COMMENTS

A. FPA Section 219 Does Not Provide an Entitlement to an ROE Adder at All, Let Alone in Perpetuity.

Transmission owning public utilities and their trade associations argue strenuously in opposition to the Commission's proposal to place a time-limit on the Transmission Organization ROE adder incentive. These arguments, with which the Commission is quite familiar, posit for example that "[t]he statute does not distinguish between utilities that have newly joined a Transmission Organization and those that joined a Transmission Organization more than three years ago. Instead, the statute directs the Commission to provide incentives 'to *each'* utility 'that joins a Transmission Organization.'"[5] In support of its position, the Edison Electric Institute ("EEI") appended an affidavit by Joe Barton, who served on the House-Senate Energy Conference Committee and sponsored the Energy Policy Act of 2005.[6] EEI's view is that the Barton Affidavit proves that "contrary to the Commission's current interpretation, section 219(c) does not explicitly or implicitly limit the duration of the incentive for joining a Transmission Organization."[7]

Such comments fail to acknowledge that nothing in FPA section 219(c) provides transmission owners an entitlement to a 50-basis point ROE adder—or to any level adder, for that matter—in the first instance, let alone indefinitely.[8] Plain and simple, the statute does not define what the incentive should be. Rather, the Energy Policy Act of 2005[9] directed the

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5 Comments of Exelon Corporation, Docket No. RM20-10-000 (filed June 25, 2021), at 4 (emphasis added by Exelon).

6 Initial Comments of the Edison Electric Institute, Docket No. RM20-10-000 (filed June 25, 2021) ("EEI Initial Comments"), Attachment A - Affidavit of the Honorable Joe Barton ("Barton Affidavit").

7 EEI Initial Comments at 18.

8 *See* NESCOE Initial Comments at 9-10.

9 Energy Policy Act of 2005 § 1241, Pub. L. No. 109-58, 119 Stat. 594 (2005).

Commission to adopt incentive-based rate treatments by rulemaking, and in this rule, to provide for "incentives" to utilities that join Transmission Organizations.[10] Given that the statute does not require the that this incentive take the form of ROE adder,[11] the notion that FPA section 219 requires a *permanent* Transmission Organization ROE adder incentive is unsupportable.

EEI adds a new twist that further demonstrates the faulty logic in this argument. EEI contends that "[n]ot only would a time limit violate the statutory command to 'establish' and 'provide' an incentive; it would also be in serious tension with Congress's decision to tether the incentive to a utility's 'rate.' Rates are continuous, are recovered by public utilities that are part of a Transmission Organization on a monthly basis and are subject to adjustment under sections 205 and 206 of the FPA. Therefore, Congress's reference to 'rate[s]' without a time limit on the length of the incentive for joining a Transmission Organization implies that Congress wanted the incentive to be collected as part of collecting rates—which is ongoing."[12] This creative, albeit strained, interpretation of the statue seems to be suggesting that because Congress directed the Commission to ensure that the Transmission Organization incentive would be recoverable in utilities' rates, therefore the incentive must be an adder to base ROE. This is unsupported and ignores that there are other incentives for which transmission owners receive rate recovery that are tethered to their rates: *e.g.*, an abandoned plant incentive or the ability to recover 100 percent of construction-work-in progress, to name a few. And it ignores the fact that the statute never mentions increasing the ROEs that transmission owners receive.

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[10] FPA sections 219(a), (c), 16 U.S.C. §§ 824s(a), (c).

[11] *See* Supplemental NOPR at P 16; Supplemental NOPR, Christie, Comm'r, concurring at PP 5, 11.

[12] EEI Initial Comments at 19 (citing 16 U.S.C. § 824s(a)).

B. Arguments That the Commission Has Failed To Make a Finding That the Existing Rates of Public Utility Transmission Owners Are Unjust and Unreasonable Are Inaccurate.

The New England Transmission Owners argue that the Commission "has an obligation to show that the existing ROEs of participating transmission owners are outside the broad zone of just and reasonable rates before it can reduce them."[13] They argue that "the Commission fails to comply with the statutory requirements for reducing public utility rates under section 206, as recently described by the Court of Appeals for the District of Columbia in *Emera Maine*. Specifically, the Supplemental NOPR fails to make an explicit finding that any transmission ROEs, including the 50 basis points for RTO participation, are unjust and unreasonable because they are outside the zone of reasonableness described in *Emera Maine* as the mandatory step one of section 206 inquiry."[14]

The New England Transmission Owners' arguments are wrong for two reasons. First, procedurally, this is a *proposed* rule, and NESCOE fully expects that in any final rule, the Commission will explicitly make the requisite findings under FPA section 206 that the existing ROE incentive rates are unjust and unreasonable.

Second, and more substantively, the New England Transmission Owners misstate the Commission's section 206 burden. The United States Court of Appeals for the D.C. Circuit expressly rejected the same argument that the New England Transmission Owners make here. There, the New England Transmission Owners "argue[d] that FERC must show that an existing rate is 'entirely outside the zone of reasonableness' before it can exercise its section 206

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[13] Comments of the New England Transmission Owners in Opposition to Elimination of the RTO Participation Incentive, Docket No. RM20-10-000 (filed June 25, 2021) ("NETOs Initial Comments"), at 4.

[14] *Id.* at 20.

authority to change that rate."[15] Responding to that argument, the Court held that "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."[16] Again, NESCOE anticipates that the Commission will fully satisfy its legal burden—as articulated by the Court, not by the New England Transmission Owners—in any final rule in this proceeding.

The New England Transmission Owners also argue that the proposed changes to modify the Transmission Organization ROE adder incentive do not apply to them because their adder was adopted before Order No. 679 was issued.[17] Here, again, NESCOE believes that the Commission is well aware of the circumstances under which various transmission owners, including the New England Transmission Owners, received their respective incentive ROE adders, and fully expects the Commission to hew to the FPA section 206 burden it bears in adopting any future compliance directives related to a final rule reforming the Transmission Organization ROE adder incentive.

C. Arguments That the Transmission Organization ROE Adder Incentive Should Be Retained in Perpetuity Because of Benefits to Consumers Miss the Mark.

As is the case with the statutory interpretation arguments, the argument that the Transmission Organization ROE adder incentive can never be eliminated because of the vast benefits it provides to consumers is one with which the Commission is very familiar. WIRES, for example, contends that the benefits of RTO membership accrue primarily to consumers, not

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[15] *Emera Maine v. FERC*, 854 F.3d 9, 22-23 (D.C. Cir. 2017) (citation omitted).

[16] *Id*. at 24 (emphasis in original) (citing *Pub. Serv. Comm'n of N.Y. v. FERC*, 642 F.2d 1335, 1350 n.27 (D.C. Cir. 1980)).

[17] NETOs Initial Comments at 25-39.

utilities.[18] Arguments along these lines fall into the trap of conflating Transmission Organization benefits with the need for perpetual Transmission Organization ROE adder incentives.[19] Importantly, such comments provide no insight into the costs to consumers of either the Transmission Organization ROE adder incentive or the costs of participating in Transmission Organizations. As NESCOE previously advocated, there is a critical need for transparency around the costs of any incentives on a going forward basis.[20]

In light of the factual debate regarding the costs and benefits accruing to transmission owners and customers resulting from transmission owner participation in Transmission Organizations,[21] and a dearth of readily accessible information about how much the incentives themselves have cost consumers, it appears one issue on which there may be agreement is the need for greater transparency. This underscores the need to implement the recommendation NESCOE made last year that the Commission ensure that reporting requirements are sufficiently robust to enable the Commission to evaluate its transmission incentives policies—including the Transmission Organization ROE adder incentive.[22]

D. The Supplemental NOPR's Proposals Do Not Constitute an Impermissible Retroactive Rule.

Several transmission owners argue that reforming the Transmission Organization ROE adder incentive to limit its duration to three years would violate the rule against retroactive ratemaking. For example, "[t]he proposed rule has an impermissible retroactive effect because

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[18] Comments of WIRES, Docket No. RM20-10-000 (filed June 25, 2021), at 12.

[19] *See* Comments of the New England State Committee on Electricity, Docket No. RM20-10-000 (filed July 1, 2020) ("NESCOE 2020 NOPR Comments"), at 21-22.

[20] *Id.* at 46-48.

[21] *See, e.g.,* EEI Initial Comments at 15 (arguing that the Commission does not provide support for what it contends are "speculative assertions" regarding "what the 'substantial benefits' to participating utilities are").

[22] NESCOE 2020 NOPR Comments at 47-48.

the Commission is attempting through a generic rule to change the outcome of proceedings finalized long ago. Although administrative agencies may enact rules in a manner that make past investments worth less (provided they are not arbitrary and capricious in doing so), an agency may not enact retroactive rules unless explicitly provided by Congress."[23] EEI similarly argues that placing a three-year limit on the Transmission Organization ROE adder incentive is the equivalent of revoking it, which is the same as never having implemented it in the first place.[24]

These arguments are wrong. A retroactive rule would occur if the Commission were to issue a final rule that eliminated the Transmission Organization ROE adder incentive as of the original effective date. And if the Commission were to require transmission owners to refund to consumers the millions of dollars collected over the past fifteen years, that would be impermissible retroactive ratemaking. What the Commission is proposing is a forward-looking rule. Arguments that revising the Transmission Organization ROE adder incentive to place a three-year limitation on it constitutes a retroactive rule are the same as arguments that transmission owners are entitled to permanent legacy status for their Transmission Organization ROE adder incentive.

EEI contends that "[s]ince many, if not the overwhelming majority of, current Transmission Organization members have been members for more than three years, the Commission's proposal would have the same effect as if the Commission revoked the section 219(c) incentive entirely. Indeed, for those utilities, the Commission's proposal would have the same effect as if Congress amended the FPA to remove section 219(c) from the U.S. Code."[25]

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[23] NETOs Initial Comments at 41.

[24] EEI Initial Comments at 16 ("section 219(a) does not authorize the Commission to re-establish the incentive, let alone to dis-establish the incentive, years after the statutory deadline.").

[25] EEI Initial Comments at 16.

Again, if this hyperbolic statement were true, then consumers would be receiving millions of dollars in refunds—which the Commission has not proposed. As noted above, such arguments assume that FPA section 219(c) created an entitlement to a 50 basis-point ROE adder in the first instance—an assumption that NESCOE has explained is incorrect.[26] Additionally, such comments suggest that the Commission is not entitled to revise its transmission incentives rule. NESCOE is unaware of any precedent to support such a proposition.

To the extent the commenters are concerned about the 30-day compliance directive, the Commission could consider whether that is an appropriate timeframe for directing removal of the Transmission Organization ROE adder incentive from transmission owner tariffs.

E. There Is No Evidence That the Supplemental NOPR's Proposals Would Hinder Clean Energy Goals.

The New England Transmission Owners argue that the Commission's proposed rule to limit the Transmission Organization ROE adder incentive would "single handedly mute any chance the Biden Administration has in accomplishing its clean energy goals."[27] As an initial matter, FPA section 219(b), which sets forth the goals of the rule the Commission was directed to issue, does not mention promoting clean energy. Moreover, notwithstanding their lengthy comments, the New England Transmission Owners do not provide any evidence demonstrating that the Transmission Organization ROE adder incentive has, in fact, led to transmission investment that is specifically tailored to supporting clean energy.

NESCOE has long been engaged with ISO-NE and stakeholders in the region on ways to ensure that the transmission grid supports state renewable energy laws and policies. Even with

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[26] *See* NESCOE Initial Comments at 9-10.

[27] NETOs Initial Comments at 54.

the Transmission Organization ROE adder incentive that transmission owners have had for more than 15 years in New England, there is a significant problem in that "ISO-NE currently does not conduct a routine transmission planning process that helps to inform all stakeholders of the amount and type of transmission infrastructure needed to cost-effectively integrate clean energy resources and [distributed energy resources] across the region. The need for such planning has become paramount."[28] The recommendations in the *Advancing the Vision* report are much more likely to advance the Biden Administration's clean energy goals than is allowing the shareholders of transmission owners to continue to receive a Transmission Organization ROE adder incentive indefinitely.

Finally, NESCOE notes that environmental organizations that are likely more concerned about whether the Biden Administration accomplishes its clean energy goals than transmission owners do not seem concerned that placing a three-year limit on the Transmission Organization ROE adder incentive would threaten the chances of these goals being met.[29] Rather, while "recogniz[ing] that the RTOs/ISOs provide numerous benefits to customers and market participants, including facilitating the integration of renewable resources and reducing production costs, among others,"[30] this coalition of environmental groups emphasized that "the RTO-Participation Incentive 'serves as free money, lacking any proof of inciting action or decisions across the industry.'"[31] In short, comments by transmission owners that placing a time

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[28] *New England Energy Vision Statement: Report to the Governors – Advancing the Vision* (June 2021), at 10, available at https://bit.ly/3jraE33.

[29] *See, e.g.,* Joint Comments of Public Interest Organizations, Docket No. RM20-10-000 (filed June 25, 2021), at 2. Public Interest Organizations are Natural Resources Defense Council, Sierra Club, Southern Environmental Law Center, Sustainable FERC Project, and Western Grid Group.

[30] *Id*.

[31] *Id*. at 4 (quoting Joint Comments of Public Interest Organizations, Docket No. RM20-10-000 (filed July 1, 2020) at 23.).

limit on their Transmission Organization ROE adder incentive will hurt clean energy goals must be taken with a very large grain of salt.

II. CONCLUSION

NESCOE respectfully requests that the Commission consider these Reply Comments along with its Initial Comments in developing any final rule on the Transmission Organization ROE adder incentive.

Respectfully Submitted,

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