UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Inquiry Regarding the Commission's Electric Transmission Incentives Policy	))	Docket No. PL19-3-000

COMMENTS OF
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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REPLY COMMENTS OF
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Pursuant to the Notice of Inquiry (NOI) issued by the Federal Energy Regulatory Commission (FERC or Commission) on March 21, 2019,[1] and the Notice of Extension issued in this docket on May 21, 2019, the National Rural Electric Cooperative Association (NRECA) submits these reply comments addressing the Commission's inquiries on the scope and implementation of its electric transmission incentives regulations and policies.

I. INTRODUCTION

NRECA submitted initial comments commending the Commission for taking the opportunity to reassess whether there is a need to "add to, modify, or eliminate"[2] elements of its electric transmission incentive policies and regulatory requirements.[3] Given the vast amounts of money consumers have paid for transmission investment since the Commission issued Order No. 679,[4] it is sensible for the Commission to evaluate its incentive policies to ensure they are achieving the purposes of benefiting consumers as required by section 219 of the Federal Power

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1 *Inquiry Regarding the Commission's Electric Transmission Incentives Policy*, Notice of Inquiry, 166 FERC ¶ 61,208 (2019) (NOI).

2 NOI at P 13.

3 Comments of the National Rural Electric Cooperative Association, Docket No. PL19-3-000 (June 26, 2019) (NRECA Initial Comments).

4 *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (Order No. 679), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

Act (FPA)[5] while ensuring that transmission rates—*with* incentives—remain just and reasonable, as is required by section 219(c) and by FPA sections 205 and 206.[6]

As NRECA explained in its initial comments, it fully supports the Commission's encouragement of transmission investment where such transmission is beneficial to load-serving entities (LSEs) and the consumers they serve. Section 219 requires that incentive rate treatments benefit consumers "by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[7] In addition, the Commission must exercise its authority under FPA sections 219, 205 and 206 "in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities…."[8] A just and reasonable and balanced approach is one which would allow for such incentives to continue but would ensure that incentives which increase costs to consumers are no more than necessary to produce demonstrable benefits to consumers as specified in the statute.[9]

Consistent with the 2012 Incentives Policy Statement,[10] NRECA believes that the Commission's existing framework for incentives is sufficiently flexible to accommodate new types of project benefits and characteristics that the Commission wishes to encourage. Accordingly, NRECA urges the Commission to continue to favor risk-reducing incentives over

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5 16 U.S.C. § 824s.

6 16 U.S.C. §§ 824d, 824e.

7 16 U.S.C. § 824s(a).

8 16 U.S.C. § 824q(b)(4).

9 "If the Commission contemplates increasing rates for the purpose of encouraging exploration and development ... it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose." *Farmers Union Cent. Exchange v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir. 1984) (internal quotation omitted).

10 *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (2012 Incentives Policy Statement).

return-enhancing incentives, because the benefits of the former are more narrowly tailored to the potential risks of investment and therefore are more likely to achieve the required consumer benefits. It is unreasonable, absent compelling circumstances, to give a developer return-enhancing incentives to compensate for risk that is already mitigated by risk-reducing incentives. NRECA reiterates its advice that the Commission not add new incentives without a concrete demonstration that existing transmission incentives are accomplishing the statutory purposes, and without record support for the notion that any new incentives are needed to accomplish these purposes, much less advance other policy goals.

NRECA is a signatory to a joint letter to the Commission submitted by a broad coalition on August 23, 2019, that expresses support for beneficial transmission investment and Commission policies that promote it, but urges the Commission to remember that the potential increased cost burden on transmission customers must remain a principal consideration in its evaluation of transmission incentives policies.[11]

In its reply comments below, NRECA responds to certain arguments made by commenters that would, if adopted, cause the Commission's incentives policies to stray from Congress' objectives in FPA section 219 and run afoul of the statutory requirement that all transmission rates be just and reasonable.[12]

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[11] Joint Letter Re: Docket Nos. PL19-3 and PL19-4 Notices of Inquiry and Increasing Transmission Costs, Docket No. PL19-3-000 (Aug. 23, 2019).

[12] NRECA highlights issues of concern below, but does not address every issue raised in comments, and its silence on an issue should not be construed as agreement.

II. COMMENTS

A. The Commission Should Not Entertain Requests To Change Its Policies To Allow Incentives To Exceed the Top of the Zone of Reasonableness.

In light of the Commission's concurrent inquiry in Docket No. PL19-4-000[13] into its method for determining the base return on equity (ROE) allowed for transmission-owning public utilities, including how the zone of reasonableness will be established (and thus, what the cap on the total ROE with incentive adders can be), any changes to incentive ROE policies—and in particular any new return-enhancing incentives—must be coordinated with changes to base ROE policies. The Commission's ROE NOI could well result in new approaches to establishing the zone of reasonableness. It is essential that rates paid by customers continue to be just and reasonable and reflective of the market price of the capital utilities need to develop transmission projects, especially given that transmission remains, for the most part, a monopoly service.[14]

Not surprisingly, a number of transmission owner commenters take the position that the Commission should abandon its longstanding requirement that the total ROE, including incentives, may not exceed the top of the zone of reasonableness.[15] These commenters, however, fail to explain how incentives with no upper bound at all can comply with the requirement of FPA section 219(c) that incentive rates "are subject to the requirements of sections 205 and 206

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13 *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, Notice of Inquiry, 166 FERC ¶ 61,207 (2019) (ROE NOI).

14 The Commission should also be circumspect about implementing new types of return-enhancing incentives given that transmission owners are generally receiving significantly higher base returns on equity from the Commission than from state commissions. *See, e.g., Coakley v. Bangor-Hydro Elec. Co*., Opinion No. 531-B, 150 FERC ¶ 61,165, P 85 (2015) (acknowledging that 10.57% ROE awarded by FERC exceeded 89% of state commission-awarded ROEs), *vacated by Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).

15 *See, e.g.*, Initial Comments of the Edison Electric Institute (EEI Comments) at 30-32; Initial Comments of the PJM Transmission Owners (PJM TOs Comments) at 30-31; Comments of ITC Holdings Corp. (ITC Comments) at 38-39; Comments of National Grid USA (National Grid Comments) at 48-49; Comments of Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. (Con Edison Comments) at 9-10.

that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential."

The transmission owner commenters that address this issue allege that the Commission's existing ROE policy limits the effectiveness of ROE incentives.[16] But they provide no evidence to back up their claim. No transmission owner commenter points to a single project that was not constructed because Commission policy limits the total ROE to the top of the zone of reasonableness, or to any project whose benefits would have been more extensive but for that limit.

The transmission owner commenters are equally silent regarding the second half of NOI Question 95, where the Commission asks what should be the appropriate upper limit or range that the total ROE cannot exceed. They provide no basis for an alternative upper limit and do not explain how the Commission could carry out its statutory mandate to ensure that transmission rates that include incentives remain just and reasonable while permitting total allowed ROEs to exceed the top of the Commission-determined zone of reasonableness.[17]

National Grid argues that "if a total ROE was within the statutory zone of reasonableness when an incentive ROE was first added, it would be inconsistent with Congressional intent in enacting Section 219 to later reduce the level of an incentive ROE adder that a utility can realize because the statutory zone of reasonableness changed in a later case."[18] National Grid provides no support for its claim regarding such "Congressional intent." Neither does it explain how a

16 *See, e.g.*, EEI Comments at 32 ("Limiting transmission incentives to the top end of the zone of reasonableness frustrates the objectives of section 219 by limiting the effectiveness of awarded incentives.").

17 *See Farmers Union*, 734 F.2d at 1504 ("While we agree that the statutory phrase sets down a flexible standard, an agency may not supersede well established judicial interpretation that structures administrative discretion under the statute.").

18 National Grid Comments at 48.

total allowed ROE in excess of the top of the zone of reasonableness can be found to be just and reasonable. Given that the Congress that enacted FPA section 219 was no doubt aware of the Supreme Court's venerable pronouncement 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,"[19] it is hardly likely that Congress intended that the total ROE allowed in rates should be unaffected by changes in markets and business conditions.

To summarize, the transmission owners have provided no evidence that removing the cap on total allowed ROE would benefit consumers by increasing reliability and reducing the costs of delivered power as specified in the statute. Neither have they explained how removing that cap would be consistent with the Commission's duty to ensure just and reasonable transmission rates. Accordingly, the Commission should continue to cap the total allowed ROE at the top of the zone of reasonableness, if not at a lower level, as explained in NRECA's initial comments (at 44).

B. The Commission Should Not Replace Its Current "Risks and Challenges" Approach with an "Expected Benefits" Approach.

A number of commenters urge the Commission to use a benefits-based approach rather than (or in addition to) the risks and challenges approach. For example, ITC argues that the Commission should abandon the "risks and challenges" standard and replace it with a focus on transmission facilities that have certain characteristics or anticipated benefits.[20] The American Wind Energy Association (AWEA) contends that incentives based only on risks and challenges fail to account for benefits derived from performance-based approaches and tend to neglect

[19] *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 693 (1923).

[20] ITC Comments at 13-14.

lower-risk transmission investments.[21] EEI urges that the Commission, "[r]ather than just asking applicants to demonstrate the risks and challenges of a project…also should allow applicants to demonstrate that their projects provide benefits to customers that would merit an incentive or specific rate treatment."[22]

As NRECA explained in its initial comments (at 14), the best way for the Commission to achieve the goals of FPA section 219 is to provide for incentives to facilitate construction of transmission projects that will benefit consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion—*and* which otherwise might not be able to be constructed due to high risks and challenges. This approach allows—indeed requires—public utilities to demonstrate the consumer benefits of proposed transmission projects. NRECA is *not* advocating for incentives to be granted when there is no demonstrated consumer benefit of the transmission project. To the contrary, if a project will result in no benefits to any consumers—whether by ensuring reliability, reducing congestion costs, or otherwise—it is unclear why that project's costs should be recovered in customer rates at all, let alone receive incentives. For this reason, NRECA's view, articulated in its initial comments (at 19) is that for a transmission project even to be eligible for an incentive, it should be the product of a coordinated, open and transparent planning process that complies with Order No. 890[23] standards. Such an eligibility

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21 Initial Comments of the American Wind Energy Association, Docket No. PL19-3-000 (June 26, 2019) (AWEA Comments) at 7-12.

22 EEI Comments at 25.

23 *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

requirement is the best way to ensure that the project will result in ratepayer benefits,[24] consistent with the requirements of FPA section 219 and Order No. 679.

As the Southern New England State Agencies explained, "[i]ncentive decisions should not turn on whether a transmission project is expected to produce 'benefits'…Rather, the question should be whether particular incentives are *needed* in order to induce the investment or action and *realize* the expected benefits. A benefits-based analysis skips over the crucial question."[25] If beneficial projects are not being built, that is something that must be addressed in the planning process, not by incentive rate treatments. Incentive rate treatments cannot substitute for, or make up for deficiencies in, the transmission planning process.

Comments advocating for a benefits-based approach over a risks and challenges based approach have several flaws.

<u>First</u>, while focusing on benefits, these commenters largely ignore the crucial correlative to benefits—costs. Costs must be considered along with benefits. Cost-effectiveness and the need for incentive rate treatment must be shown in order to ensure just and reasonable rates. This failure to acknowledge the significance of costs is perhaps most apparent in comments arguing in favor of incentives continuing even if the promised benefits are not realized, or if the benefits end up being less than projected, or estimates of costs understated. For example, Exelon Corporation (Exelon) argues:

> Revoking incentives that the Commission has already granted if a transmission project does not provide the expected benefits (or does so at increased cost) or conditioning incentives on the

[24] *See* Comments of the New England States Committee on Electricity at 12 ("project's expected benefits are established through the identification of the project need" by the RTO).

[25] Comments of Southern New England State Agencies (State Agencies Comments) at 24 (emphasis in original).

> realization of benefits would create regulatory uncertainty that would undermine the efficacy of the incentives.[[26]]

This theme of "regulatory uncertainty" is raised by a number of transmission owners in advocating for a benefits-based approach to incentives. While regulatory certainty is desirable, it cannot eclipse the Commission's statutory obligation to ensure just and reasonable rates.[27] As NRECA explained in its initial comments (at 25), if the expected benefits of project provided an incentive rate treatment do not accrue, the incentive should be revoked.[28] It is not just and reasonable to grant transmission owners certainty regarding receipt of incentives if transmission customers have no certainty regarding receipt of the benefits for which they are paying.

<u>Second</u>, commenters arguing that a risks-and-challenges approach be replaced by a benefits-based approach fail to grapple with the fact that mandatory transmission projects can, and frequently do, produce the statutorily defined consumer benefits *without* the need for incentive rates. One presumes there will always be a reliability benefit associated with a project that is planned to meet NERC mandatory reliability standards.[29] However, in the absence of any particular complication in constructing the project (*i.e.*, the project is particularly risky or involves substantial challenges), the mere fact that there will be benefits does not, itself, warrant incentives.

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[26] Comments of Exelon Corporation (Exelon Comments) at 20.

[27] *See* Section II.E, *infra*.

[28] *See also* Comments of Transmission Dependent Utility Systems at 21("Adoption of a policy revoking ROE-adder incentives where there are significant cost overruns would appropriately protect against arbitraging or low-balling cost estimates in the transmission planning processes."); Comments of Transmission Access Policy Study Group (TAPS Comments) at 41-42 (citations omitted) ("Failing to revoke incentives where the basis on which they were awarded no longer obtains would be inconsistent the Commission's approach to other grants, *e.g.*, market-based rates ("MBR"); standard of conduct waivers.").

[29] *See* Section II.C.2, *infra*.

Third, arguments that incentives based only on risks and challenges tend to neglect lower-risk transmission investments[30] ignore the core purpose of an incentive. The transmission incentives and the policies the Commission adopted in Order No. 679 are "intended to encourage transmission infrastructure investment."[31] And those incentives are required "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[32] Where transmission infrastructure investment needs no encouraging, there is no need for incentives. NRECA agrees that "[i]f a project does not face unusual risks and challenges, then the project likely will be built with or without an incentive. In that case, granting an ROE adder because of project benefits merely confiscates some of the benefits that consumers otherwise would enjoy…"[33] Lower risk investments are appropriately "neglected" because, by their very definition, they do not need incentives to come to fruition.

Fourth, arguments that the Commission should increase its flexibility by allowing for benefits to be considered in addition to risks and challenges[34] ignore that the Commission's incentive policies already expressly provide for sufficient flexibility. As the 2012 Incentives Policy Statement stated, the Commission "will continue to allow applicants the flexibility necessary to demonstrate why their project may merit an incentive ROE, and at what level, based

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[30] AWEA Comments at 7-12.

[31] Order No. 679 (summary).

[32] Order No. 679 at P 5 (quoting FPA section 219).

[33] State Agencies Comments at n.4.

[34] *See, e.g.*, Exelon Comments at 13 ("What Exelon is arguing for here is not a wholesale reworking of the Commission's existing framework for evaluating incentive applications; rather, we believe that the Commission should be more flexible in its implementation, expanding its evaluation to include the benefits that a transmission project provides and moving away from the more rigid risks and challenges framework that the Commission adopted in its 2012 Policy Statement.").

on those project's risks and challenges."[35] The 2012 Incentives Policy Statement went on to give examples of types of transmission projects that may warrant an incentive ROE based on risks and challenges not already accounted for in the applicant's base ROE or through risk-reducing incentives. These include projects that relieve chronic or severe grid congestion that has had demonstrated cost impacts on consumers, that unlock location constrained resources, or that apply new technologies to facilitate more efficient and reliable use of facilities.[36] Each of these examples is, in fact, a type of benefit that a project can provide. Additionally, the statutory definition of consumer benefits is codified in the Commission's implementing regulations.[37] Nothing in the Commission's existing incentive policies prohibits transmission owners from seeking incentives for certain project benefits or project characteristics on a case-by-case basis under FPA section 205.

In sum, the Commission is obligated to ensure that transmission rates remain just and reasonable. To accomplish this objective, the Commission should retain the risks and challenges approach adopted in the 2012 Incentives Policy Statement. As explained by Joint Commenters, the "'risks and challenges' component of the current incentives framework implements the Commission's 'nexus' requirement for project-specific incentives…. Incentives granted under FPA section 219 are not simply a 'bonus for good behavior,' and the nexus between incentives and investment is needed to ensure that the Commission's rules 'continue to meet the just and

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35 2012 Incentives Policy Statement at P 17.

36 *Id.* at P 21.

37 18 C.F.R. § 35.35(d) (An application "must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219….").

reasonable standard by achieving the proper balance between consumer and investor interests on the facts of a particular case.'"[38]

C. There Is No Need for New Incentives; Rather, Incentive Applications Should Be Addressed on a Case-by-Case Basis Under the Commission's Existing Framework.

A number of commenters argue that the Commission should be more flexible and should consider additional incentive rate treatments.[39] As discussed below, the Commission's incentives policies are already quite flexible and allow transmission owners the ability to seek a range of incentives under section 205 of the FPA for various purposes. It would be inappropriate, however, to enshrine the various perks that transmission owners want into the Commission's incentive regulations.

1. There Is No Need for a Separate Advanced Technology Incentive.

The Working for Advanced Transmission Technologies (WATT) Coalition seeks approval for pilot programs providing for shared-savings rate treatment for small projects using advanced technologies that produce quantified congestion benefits.[40] Such pilot projects may

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[38] Joint Initial Comments of The Aluminum Association, the American Chemistry Council, the American Forest and 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, 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 (Joint Commenters Comments) at 16 (citing generally 2012 Policy Statement at PP 6-7; Order No. 679 at P 26; and 16 U.S.C. § 824s(d)).

[39] *See, e.g.*, Motion To Intervene and Comments of Duke Energy Corporation (Duke Comments) at 10-14 (FERC should maintain flexibility in considering incentives including, for example, capitalization of certain expenses, a "storm hardening" incentive, and the ability to make single-issue filings to change a formula rate to forward looking one). (The last one seems to be a request by a single Duke operating company, Duke Energy Progress, to be able to achieve through a rulemaking the ability to make wholesale changes to its formula rate on file—clearly an unsupported basis for making substantial changes to Commission's long-standing prohibition against single-issue ratemaking.)

[40] WATT Coalition Initial Comments at 5.

hold promise of such consumer benefits, but the Commission should not approve a new incentive rate treatment for them in this proceeding. Consistent with the 2012 Incentives Policy Statement, such proposals should continue to be considered on a case-by-case basis in rate filings under FPA section 205. As the Commission explained in the 2012 Incentives Policy Statement, having distinct standards apply to advanced technologies contributes to confusion. There, the Commission emphasized that it would "consider transmission projects that apply advanced technologies as indicative of the types of projects facing risks and challenges that may warrant an incentive ROE"[41] and, accordingly, it would "consider deployment of advanced technologies as part of the overall nexus analysis when an incentive ROE is sought."[42] Sticking with this case-by-case process for these kinds of projects is the best way to ensure that regional planning requirements can be established; that the relevant costs and benefits can be identified and defined; and that the appropriate shared-savings rate treatment can be evaluated.

As stated in NRECA's initial comments (at 37), rural electric cooperatives welcome the deployment of advanced technologies that "increase the capacity and efficiency of existing transmission facilities and improve the operation of those facilities."[43] NRECA has every expectation that advanced technologies will be developed when there are good business reasons to do so and when their deployment is cost-effective. Incentives for use of new advanced technologies should continue to be available on a case-by case basis where they are needed to overcome risks and challenges associated with transmission investment that benefits consumers

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[41] 2012 Incentive Policy Statement at P 23.

[42] *Id*.

[43] FPA 219(b)(3), 16 U.S.C. § 824s(b)(3).

as specified in the statute, but not on a stand-alone basis. Innovative rate treatments to encourage these technologies can be considered under the existing 2012 Incentives Policy Statement.

2. The Commission Should Not Create a New Incentive of Rate Base Treatment for O&M Expenses Such as Vegetation Management, Cyber and Physical Security.

A number of transmission owners argue that the Commission should allow operating and maintenance (O&M) expenses related to activities, in particular vegetation management, cyber and physical security (supposedly going above and beyond NERC reliability standards) to be capitalized and put in rate base in order to earn a return.[44] The Commission should not adopt any such policy change as a follow up to the NOI. To do so would represent a radical change to long-standing Commission ratemaking policy and would go well beyond FPA section 219 incentive rate policy. FPA section 219(b)(4)(A) provides for "*recovery of* all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to" FPA section 215.[45] It does not, however, provide for capitalization of such costs or for a return to be earned on such costs.

As other commenters have explained, such a request would require substantial modification to the Commission's Uniform System of Accounts, which "has well-established rules for determining what costs must be expensed and what costs must be capitalized, as well as

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[44] *See, e.g.*, EEI Comments at 27 (FERC should grant favorable rate treatment such as "allowing projects that improve security or provide more flexible operations to be included in rate base as a regulatory asset," or allowing O&M costs such as vegetation management etc. to be capitalized); Initial Comments of WIRES (WIRES Comments) at 9-10 (Vegetation management and proactively addressing cyber and physical security should be directly promoted by treating them as capital expenditures); Comments of the American Electric Power Company, Inc. (AEP Comments) at 20-22 (noting that NERC reliability standards applicable to vegetation management do not apply to facilities that are below 200 kV; therefore, FERC should provide greater incentive to encourage state-of-the-art vegetation management practices by allowing TOs to book the costs that are currently categorized as O&M expenses as capital cost to be amortized and earn return); Exelon Comments at 32, 34-35 (same); National Grid Comments at 34.

[45] 16 U.S.C. § 824s(b)(4)(A), referring to 16 U.S.C. §824o (emphasis added).

clear rules regarding creation of regulatory assets."[46] FPA section 219(b)(4)(A) provides no basis for rewriting these rules. Moreover, as TAPs explains, "there is no reason to upend existing practice, especially for utilities with formula rates" – *i.e.*, most transmission owners – "that all but guarantee their O&M expenses will be promptly recovered."[47] As TAPS points out, treating O&M expenditures related to vegetation management and the like as capital expenses would result in future ratepayers paying for services received by current ratepayers, thus creating unlawful intergenerational inequities,[48] in violation of a fundamental principle of ratemaking that "costs should be borne by those who benefit from them."[49]

The projects that the transmission-owner interest commenters point to as needing this new incentive rate base treatment are things that the utilities should be doing anyway, *i.e.*, sufficient vegetation management, and investment in physical and cyber security. Physical and cyber-security requirements are set forth in NERC reliability standards approved by this Commission. There is no justification for providing an incentive rate treatment to transmission owners to comply with NERC reliability standards, as compliance is required by law.[50] The Commission would be neglecting its obligation to ensure that rates remain just and reasonable if it were to provide incentive adders—above the cost-of-service—for projects that transmission-owning public utilities are already undertaking to meet their legal obligations.

Nor is there any real risk of prudent expenditures to achieve such compliance not being accepted for recovery by the Commission. To NRECA's knowledge, commenters have not even

[46] TAPS Comments at 77.

[47] *Id*.

[48] *Id*. at 78.

[49] *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1100 (D.C. Cir. 1993). *See also MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009).

[50] FPA section 215(b).

alleged that transmission owners are facing difficulty in recovering such costs. As Joint Commenters discussed,[51] to the contrary, at the Commission's recent joint technical conference with the Department of Energy (DOE) on infrastructure security investment, American Electric Power's (AEP's) CEO stated that "typically we won't get disallowed a cost associated with resiliency and reliability of the grid and that's really probably one of our least risky investments we can make."[52] Chairman Chatterjee noted that the Commission has, in the past eighteen years, "been very accommodating in providing a number of mechanisms for utilities to recover the costs of their prudently incurred security expenditures,"[53] and Commissioner Glick observed that "cost recovery at the state or federal level really isn't a barrier to utilities doing what they need to do to protect . . . from physical or cyberattacks."[54]

To the extent commenters seek rate base treatment for expenses incurred in going above and beyond mandatory NERC reliability standards, there is no more basis for such incentive treatment than there is for capitalizing other variable expenses.[55] For one thing, as was pointed out, NERC requirements and RTO/ISO planning criteria "already reflect implicit judgments about the appropriate tradeoff between reliability and cost—arguably erring on the side of more reliability."[56] Given the absence of any evidence that transmission owners nationwide are failing to make adequate investments in reliability improvements or that reliability is at risk absent the

[51] Joint Commenters Comments at 46-47.

[52] Technical Conference Transcript, *Security Investments for Energy Infrastructure Tech. Conf.*, Docket No. AD19-12-000 (Apr. 26, 2019) at 78 (Nick Akins).

[53] *Id.*at 151 (Chairman Chatterjee).

[54] *Id.* at 187 (Commissioner Glick).

[55] If there is a disconnect between what the transmission owners believe is necessary for a reliable system and the reliability standards, perhaps the reliability standards should be reassessed, but transmission incentives should have no place in that discussion.

[56] State Agencies Comments at 26.

receipt of incentives, NRECA agrees that "a greater concern than any diminution in reliability that might occur absent these incentives is that offering them for 'incremental' improvements invites system gold-plating. This is particularly worrisome where the projects at issue are pursued outside of regional transmission planning, and are not subject to the checks and balances inherent in those processes."[57] Transmission still remains, for the most part, a monopoly service, and there is no justification for requiring captive customers to fund transmission owner expenditures in excess of legal requirements. In any event, regardless of the prudency of an "above-and-beyond" expense or the want of it, FPA section 219(b)(4)(A) provides no basis for effacing the longstanding distinction in the Commission's regulations and policy between capital between the rate treatment of capital costs and expenses.

3. The Commission Should Not Adopt a Transmission Grid Resilience Incentive at This Time.

Similarly, pleas by transmission owners for the Commission to adopt some form of transmission grid resilience incentive in this proceeding are unwarranted. AEP, for example, lays out a sweeping, detailed plan for a resilience incentive,[58] while Duke argues that in light of the weather-related costs it has incurred, "the Commission should make clear that its incentive policy will be implemented to support such initiatives to address resilience and maintenance, including storm hardening."[59] Commenters provide no evidence of recovery of resilience or maintenance expenditures being disallowed, however, and the likelihood of this happening seems very low.

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57 *Id*.

58 AEP Comments at 13-17.

59 Duke Comments at 11.

As NRECA discussed above, transmission owners should be taking all actions necessary to comply with mandatory reliability standards. There is, however, no standard definition of resilience, as the Commission recognized in the grid resilience docket: "It … is evident that there is currently no uniform definition of resilience used across the electric industry."[60] Indeed, the Commission initiated a new proceeding in Docket No. AD18-7-000 "to specifically evaluate the resilience of the bulk power system in the regions operated by regional transmission organizations (RTO) and independent system operators (ISO)….[and] direct[ed] each RTO and ISO to submit information to the Commission on certain resilience issues and concerns identified herein to enable us to examine holistically the resilience of the bulk power system."[61] That proceeding remains pending, and it would be premature for the Commission to create any generic transmission grid resilience incentives before even addressing the proposals and comments filed in Docket No. AD18-7-000 and "decid[ing] whether additional Commission action is warranted to address grid resilience."[62]

Accordingly, NRECA urges the Commission not to adopt any new incentives for transmission grid resilience in this proceeding. At this time, the limited record in this proceeding does not support the need for incentives to promote resilience and security where such investments are demonstrably needed. As with any transmission investment, nothing in the Commission's incentive policies prevents transmission owners from making a filing under FPA section 205 seeking incentive treatment if they believe such treatment is warranted. The Commission's incentive policies are sufficiently flexible to address such requests on a case-by-

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[60] *Grid Reliability and Resilience Pricing; Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,012, P 22 (2018) (*reh'g pending*).

[61] *Id*. at P 1.

[62] *Id*.

case. Anything more, however, would be inconsistent with the current state of the Commission's understanding of resilience issues in the nation.

D. The Transco Return Adder, to the Extent It Is Retained, Must Be Only for Wholly Independent Entities.

ITC asks the Commission to clarify that it will not reduce an adder for independence for a Transco affiliated with a market participant unless the Transco is operating in the same RTO as its affiliated market participants.[63] The Commission should deny this request. A key rationale of the Transco adder is an undivided focus on transmission business with no competing capital demands within the holding company. If anything, the Commission should reconsider the partial-independence adder it allowed recently.[64]

As NRECA explained in its initial comments (at 34-35), there is little, if any, evidence demonstrating that the Transco business model provides benefits to customers warranting high ROE adders in the first instance. The Transco business model provides significant benefits to Transco investors, and Transcos face *less* risk than vertically integrated utilities, since they have only one regulator and provide a single service largely insulated from competition. Assuming the Commission continues to offer any incentives for adoption of the Transco business model, such incentives should not be allowed for entities affiliated with vertically integrated utilities, even if the affiliation consists of so-called passive ownership, and even if the affiliate is in a different region. The Commission's rationale for the Transco incentive was that "[b]y eliminating competition for capital between generation and transmission functions and thereby maintaining a singular focus on transmission investment, the Transco model responds more rapidly and precisely to market signals indicating when and where transmission investment is

[63] ITC Comments at 30-33.

[64] *Consumers Energy Co. v. Int'l Transmission Co.*, 168 FERC ¶ 61,035 (2019).

needed."[65] A Transco affiliated with a vertically integrated utility does not eliminate competition for capital or maintain a singular focus on transmission investment, even if the affiliation is in a different RTO market, and thus should not be rewarded as if it did those things.

E. Transmission Owners' Simultaneous Requests for Regulatory Certainty and Flexibility When It Suits Their Needs Should Be Rejected.

1. The Commission Should Not Grant Transmission Projects Incentive Rates in Perpetuity or Automatically.

Many transmission owning commenters argue that the Commission should be flexible in creating numerous types of new return-enhancing incentive adders.[66] Others argue that regulatory certainty warrants the Commission's automatically granting certain types of incentives, rather than addressing them on a case-by-case basis.[67] Regulatory certainty is also cited as a reason why the Commission should never terminate a project's incentives under any circumstances.[68] Indeed, some of the same commenters arguing for the "need for regulatory certainty" in how the Commission implements its incentives are the same ones arguing for the need for flexibility.[69]

Regarding the need for more flexibility, as NRECA explains above in Section II.C, the Commission's existing incentives policies are already sufficiently flexible to allow for different types of incentives to be sought under section 205 of the FPA. As can be seen in Exelon's unsuccessful attempt to reconcile the inherent contradiction in seeking both regulatory flexibility

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65 Order No. 679 at P 224.

66 *See, e.g.*, Duke Comments at 10-14 (FERC should be flexible and consider different incentive rate treatments).

67 *See, e.g.*, EEI Comments at 11-17; Comments of Duquesne Light Company at 7-10.

68 *See* Section II.B, *supra* at 5-6; *see* Exelon Comments at 20; EEI Comments at 8, 26, 29-30; Duke Comments at 14-15 (regulatory certainty demands that once granted, incentives should remain for the duration of the life of the project); WIRES Comments at 11 ("WIRES does not recommend sunsetting incentives, reducing incentives over time due to changed circumstances, or injecting uncertainty into the utility planning process.").

69 *See, e.g.,* Duke Comments at 10-14 (flexibility) and at 14-15 (regulatory certainty); EEI Comments at 25-29 (flexibility) and at 29-30 (regulatory certainty).

and certainty,[70] too much flexibility does, in fact, lead to regulatory uncertainty, and only those with the deepest pockets (not co-ops and not consumers) can ultimately make it through in long, drawn-out litigation that such regulatory flexibility invites.

Turning next to regulatory certainty—this argument is cited by commenters who do not want the Commission to sunset a project's return-enhancing incentives.[71] As already noted, Congress gave the Commission the authority to establish incentives "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[72] If circumstances change such that a project for which incentives were awarded is no longer likely to provide the expected benefits to consumers, or is likely to provide only reduced benefits, the Commission should maintain the authority to eliminate or modify the incentives so that any incentives received by the developer remain proportional to the benefits received by consumers.

If a transmission owner knows up front that it is at risk of losing a return incentive because the benefits for which the project received the incentive did not accrue, that is not regulatory uncertainty. That risk is known up front. Additionally, Exelon frames the issue incorrectly, arguing that "an applicant should not be punished if its good faith estimates of benefits do not come to fruition given the difficulties in accurately estimating benefits, changes in project use from the use anticipated when the project was developed, or other changed

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[70] Exelon Comments at 8 ("At first consideration, flexibility may not seem to promote regulatory certainty…But in fact, flexibility will better support the development of beneficial transmission infrastructure by allowing the Commission to react to changes in the electric industry without continually revisiting and reworking its policies, providing greater regulatory certainty in the long term…").

[71] *See* n.68 *supra*.

[72] FPA section 219(a).

circumstances."[73] There is no moral judgement here. Again, incentives are not a bonus for good behavior. One could just as easily argue that consumers are being "punished" for paying high incentive rates for benefits for which they paid but did not receive. The Commission would not be "punishing" transmission owners by revoking benefits-based incentives for failing to make good on their promised benefits. It would simply be ensuring that the incentives remain just and reasonable. Incentives premised on benefits that do not materialize surely cannot be deemed just and reasonable.

Finally, NRECA thoroughly explained in its initial comments (at 16-18) why granting incentives automatically, without a case-by-case review, would inappropriately relieve the Commission of its statutory obligation to ensure that the total package of incentives, on top of the base ROE, will result in just and reasonable rates, terms, and conditions of service.[74]

2. If the Commission Considers Exelon's Proposal for "Timely and Fair Consideration of Rate Proposals" It Must Do So Equally for Section 206 Complaints.

Exelon argues that the Commission should reform its approach to rate proposals and goes on at length about the need for the Commission to timely and fairly consider proposed changes to rates.[75] This argument is made in the context of need for "regulatory certainty."[76] The Commission is bound by statute to act on section 205 rate applications, and in fact, it does so. Just because the Commission may set a rate application for hearing, rather than simply approving

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[73] Exelon Comments at 20.

[74] *See also* Joint Commenter Comments at 97 ("In considering project-specific incentives of any kind, the Commission should continue to require case-by-case evaluation of the risks, costs, and benefits associated with a project and the nexus between such factors and incentives sought for a particular project. This approach provides a meaningful opportunity to assess the purported project risks and determine whether such risks warrant the requested incentives. It also allows the Commission's incentive policy to conform to the FPA's just and reasonable rate requirements.").

[75] Exelon Comments at 6-7.

[76] *Id.; see* Section II.B at 6, *supra.*

it right away, does not mean it has not timely and fairly considered the rate proposal. In any event, there is always regulatory uncertainty. Transmission owners (absent a settlement agreement otherwise) can always file seeking to raise their rates at any time under FPA section 205, while interested parties and the Commission acting *sua sponte* can seek to decrease a transmission owner's rates under FPA section 206.

If anything, the Commission should reform its approach to section 206 complaints. Section 206(b) of the FPA provides that "[u]pon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible." This is required by the Regulatory Fairness Act,[77] which "was 'intended to add symmetry' between the Commission's treatment of section 205 rate-increase filings and section 206 complaints seeking rate decreases."[78]

NRECA recognizes this request is outside the scope of the NOI—but it is no more so than is Exelon's request, which should be rejected out of hand.

III. CONCLUSION

NRECA appreciates the opportunity to provide its input to the Commission on these important inquiries and respectfully requests that the Commission take the views it provided the Commission in these reply comments and in its initial comments into consideration as it fashions any proposed changes to its incentives and incentive policies.

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77 Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299 (1988)

78 *Golden Spread Elec. Coop. Inc. v. Southwestern Public Serv. Co.*, 151 FERC ¶ 61,126, P 21 (2015) (citing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W.V. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288 at 62,000 (1994) (additional internal citation omitted), *order on reh'g*, 68 FERC ¶ 61,207 (1994)).

Respectfully submitted,

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