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
TRANSMISSION DEPENDENT UTILITY SYSTEMS

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COMMENTS OF TRANSMISSION DEPENDENT UTILITY SYSTEMS

Pursuant to the Federal Energy Regulatory Commission's ("Commission" or "FERC") Notice of Inquiry ("NOI") issued on March 21, 2019, in the above-captioned docket,[1] the Transmission Dependent Utility Systems ("TDU Systems") respectfully submit their comments addressing the Commission's inquiries on the scope and implementation of its electric transmission incentives regulations and policies.

I. INTRODUCTION

The TDU Systems participating in these comments consist of the following rural electric Generation and Transmission ("G&T") cooperatives: Central Electric Power Cooperative, Inc., Golden Spread Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., North Carolina Electric Membership Corporation, PowerSouth Energy Cooperative and Seminole Electric Cooperative, Inc. Through their member distribution cooperatives and other wholesale customers, these G&T cooperatives serve approximately 6.5 million residential customers and businesses in eight states. All of the TDU Systems are, first and foremost, load-serving entities ("LSEs"), and they and their distribution cooperative members were formed to provide reliable electric power supply and transmission services to their member-owners at the lowest reasonable cost.

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

While some of the TDU Systems own substantial transmission facilities, they all rely on the transmission systems of their neighboring investor-owned public utility transmission owners regulated by the Commission to move their power supplies to their member distribution cooperatives' loads. Indeed, several of the TDU Systems have loads embedded in the transmission systems of more than one transmission owner. Among the TDU Systems are some cooperatives located wholly or partly within regions with organized markets – specifically, the Southwest Power Pool, Inc. ("SPP"), PJM Interconnection, L.L.C. ("PJM") and the Electric Reliability Council of Texas ("ERCOT") – as well as some located wholly outside of regional transmission operator ("RTO")/independent system operator ("ISO") operated markets. TDU Systems are directly affected by the Commission's transmission incentive policies and participated actively in the rulemaking docket that led to Order No. 679[2] and Commission proceedings relating to individual transmission incentive proposals within their respective regions. TDU Systems also participated actively in the rulemaking proceedings in which the Commission reformed local, regional and interregional transmission planning processes under Order Nos. 890[3] and 1000.[4] TDU Systems filed comments in response to the inquiries that led to

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2 *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). *See* Transmission Dependent Utility Systems' Comments on Notice of Proposed Rulemaking on Transmission Pricing and Incentives, Docket No. RM06-4-000 (Jan. 11, 2006) ("TDU Systems 2006 Incentives Comments"); Request for Rehearing of the Transmission Dependent Utility Systems, Docket No. RM06-4-001 (Aug. 21, 2006); Request for Rehearing of the Transmission Dependent Utility Systems, Docket No. RM06-4-002 (Jan. 22, 2007).

3 *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, *order on reh'g*, Order No. 890-A (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) ("Order No. 890").

4 *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) ("Order No. 1000").

the Commission's 2012 Incentives Policy Statement,[5] advocating that the Commission align transmission cost recovery through formula rates with transmission planning obligations adopted in Order Nos. 890 and 1000.

II. COMMENTS

Throughout the NOI, the Commission asks a number of questions related to its existing incentives, which include rate of return on equity ("ROE")-adder incentives to compensate for risks and challenges of a specific transmission project not capable of mitigation through risk-reducing incentives;[6] for forming a transmission-only company; and for joining an ISO or RTO.[7] The NOI seeks comment on a number of incentive objectives and approaches, while dancing around the issue of ROE adders.[8] TDU Systems are members of and generally support the comments of the National Rural Electric Cooperative Association ("NRECA") on transmission incentives being filed in this docket on this date, but believe that the Commission should not only refrain from implementing new ROE adders, but should modify its policy to eliminate existing ROE incentive adders. These comments supplement and should be read in conjunction with NRECA's broader set of comments.

A. The Commission Should Reform Its Incentive Policy by Eliminating, or at the Very Least, Minimizing, the Use of ROE-Adder Incentives.

TDU Systems continue to oppose the Commission's policy of authorizing basis point adders to a transmission owner's authorized ROE as a means of encouraging investment in new

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5 *Promoting Transmission Investment Through Pricing Reform,* 141 FERC ¶ 61,129 (2012) ("2012 Incentives Policy Statement"). *See also* Comments of the Transmission Dependent Utility Systems on Notice of Inquiry, Docket No. RM11-26-000 (Sept. 12, 2011).

6 *See* 2012 Incentives Policy Statement at PP 11-16 (discussing risk-reducing incentives).

7 *See* NOI at P 7. With the its 2012 Incentives Policy Statement (at P 23), the Commission eliminated the advanced technology ROE adder, but indicated it would consider such an adder only as part of a "risks and challenges" adder." NOI at P 9, n. 19.

8 *See, e.g.,* NOI at P 20.

transmission facilities.[9] Under this policy, the Commission has authorized the addition of anywhere from 50 to 200 basis points to a public utility's ROE to encourage such investment.[10] However, there has been no systematic study evaluating the effect of these incentives on transmission investment, and thus there is no evidence demonstrating that ROE-adder incentives are needed to get new transmission built. To the contrary, ROE adders do not directly address the fundamental risks and challenges inhibiting transmission investment, such as local siting, environmental or health concerns. The grant of additional basis points to a utility's ROE is unlikely to overcome such risks and challenges, and instead would both needlessly increase the overall cost of an already expensive and challenging project and hinder true competition among transmission entities to compete for such projects. For the reasons discussed below, TDU Systems urge the Commission to reform its incentive policy to minimize, if not eliminate altogether, the use of costly ROE adders and in any case, not to adopt new types of ROE-adder incentives. ROE adders are unnecessary, unlikely to result in incremental customer benefits, and unrelated to risks and challenges posed by transmission investment today.

1. ROE-Adder Incentives Are Not Necessary To Encourage Investment in New Transmission.

The Commission notes that "[i]t has been nearly 13 years since the Commission promulgated Order No. 679 and nearly seven years since the Commission issued a policy statement to provide additional guidance regarding its evaluation of applications for transmission incentives under FPA section 219," and that "[i]n that time, there have been a number of

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[9] *See* TDU Systems 2006 Incentives Comments at 24-27.

[10] *See, e.g.*, *Virginia Electric and Power Co.*, 124 FERC ¶ 61,207 (2008) ("*VEPCO ROE-Adder Incentives Order*"), *reh'g denied*, 139 FERC ¶ 61,143 (2012) (approving ROE-adder incentives in the amount of 150 basis points for four projects and of 125 basis points for seven projects); *Pacific Gas and Electric Co.*, 141 FERC ¶ 61,168, at PP 24, 26 (2012) (summarily accepting 200-basis point adder for PG&E's share of the Path 15 upgrade project).

significant developments in how transmission is planned, developed, operated and maintained."[11] Among these were the issuance of Order No. 890, which required public utility transmission providers, including RTOs and ISOs, to implement coordinated, open and transparent regional and sub-regional transmission planning processes.[12] Additionally, the Commission issued Order No. 1000 which expanded these obligations to require public utility transmission providers to participate in regional transmission planning processes that produce a regional transmission plan and that have both a regional and interregional cost allocation method and meet certain specific interregional coordination planning requirements.[13] In the absence of any genuine analysis, it is at least as likely that these reforms have influenced the level of transmission investment as have the Commission's incentive policies.

Another significant change since Order No. 679 was adopted is the fact that most transmission owners now recover their costs through formula rates. These transmission formula rates provide for annual updates of rates and typically allow recovery of projected capital additions over the coming rate year and true-ups of estimated to actual costs once the rate year is complete. Some even allow recovery of costs on a fully-projected test-year basis, with later true-up of those projections, with interest, to actual costs incurred. These mechanisms ensure that the Commission-approved base ROE is earned and eliminate regulatory lag issues associated with stated rate designs and state procedural requirements. As the Commission itself recognized, formula transmission rates reduce risk, as they "can provide the certainty of recovery that is conducive to large transmission expansion programs."[14] The certainty of timely and complete

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[11] NOI at P 2.

[12] Order No. 890 at PP 437-551.

[13] Order No. 1000 at PP 144-65, 558-65, 578-84.

[14] Order No. 679 at P 386.

cost recovery inherent in formula rates itself serves as a significant incentive for investment in transmission infrastructure, and again, in the absence of any concrete study, it is just as likely that increases in transmission investment over the past decade could be attributed to a shift to formula rates, at least in part.

There has been, unfortunately, no meaningful attempt to study the Commission's incentive policies. The Commission declined to implement a reporting requirement in Order No. 679 that would have facilitated evaluation of any correlation between transmission investment and ROE adders. The only reporting requirement implemented was that directing transmission owners to submit FERC Form 730,[15] in which public utilities that receive incentives for certain types of transmission projects are to report annually on "projections and related information that detail the level of transmission investment."[16] The form does not require "a quantitative measure of the consumer benefits that result from transmission infrastructure investments,"[17] nor does it require a demonstration that but for the incentive, the project would not have been built.

The Commission should not downplay the important role the Order No. 890 and 1000 transmission planning process improvements and formula rates have played in encouraging investment in needed new transmission infrastructure. Many of the transmission projects for which transmission owners have sought ROE adders in RTO/ISO regions are projects that stemmed from these regional planning processes. In the absence of any explicit evidence linking significant new investment to the ROE-adder incentives, and in keeping with the U.S. Court of

[15] Order No. 679-A at P 117.

[16] *Id.*

[17] *Id.* at P 119.

Appeals for the D.C. Circuit's ruling in *City of Detroit*[18] requiring that increases in transmission rates be limited to a level no more than is needed to achieve the policy objectives, the Commission should discontinue, or minimize the use of ROE-adder incentives in its transmission incentives policy.

2. To the Extent the Commission Allows ROE Adders, It Should Do So Only on a Case-by-Case Basis [NOI Questions 90-97].

In no event should the Commission embark on a policy that would provide automatic grants of ROE adders. Such a policy 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."[19] This requirement imposes an obligation on the Commission to ensure that the end result of any increase in rates stemming from an ROE adder remains just and reasonable.

In keeping with this mandate, the Commission in Order No. 679 required that an ROE adder must produce a result that falls within the authorized zone of reasonableness.[20] This requirement has been perpetuated in individual cases in which entities have sought ROE incentives on a project by project basis.[21] The Commission must retain this policy if it continues to allow ROE-adder incentives. The only practical means available for making such a

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[18] *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955) ("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"); *see also City of Charlottesville v. FERC*, 661 F.2d 945, 950, 953-54 (D.C. Cir. 1981).

[19] 16 U.S.C. § 824s (d).

[20] Order No. 679 at P 93 ("the approved ROE, including the impact of an incentive," must be within the zone of reasonableness).

[21] *See, e.g., 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)).

determination is to address the awarding of ROE adders on a case-by-case basis. Automatic grant of ROE-adder incentives for any purpose would not provide an opportunity for Commission review of the overall effect of the adders on the utility's overall authorized return. Such review is necessary to ensure that the overall return remains within the zone of reasonableness determined for that entity in its last rate proceeding. A determination of whether the end result of allowing an ROE adder is consistent with the FPA sections 205 and 206 requirements for just, reasonable, and not unduly discriminatory or preferential rates necessarily depends on utility-specific data. The utility-specific information needed to make these determinations can only be obtained and evaluated on a case-by-case basis.

Moreover, if the Commission continues to allow the use of ROE-adder incentives, it should reconsider its decision in Order No. 679 rejecting calls for the ROE incentive basis points to be added to the overall rate of return rather than the cost of equity.[22] Basing return adders on overall returns would avoid the perverse incentive for the transmission owner to use a capital structure biased toward an overly thick equity ratio. At a minimum, the Commission should set a cap on the equity component that is eligible for incentives (*e.g.*, 50%). Thus, for example, if a utility's capital structure were 60% equity and 40% debt, the incentive could be applied to the equity portion up to a cap of 50%. By avoiding the additional costs associated with an overly-rich equity component of the capital structure, such a policy would lower the rate increase charged to customers because of the premium granted through the ROE adders, consistent with the D.C. Circuit's mandate in *City of Detroit* to limit the incentive to no more than is needed to attain the policy objectives.

[22] Order No. 679 at P 95.

3. ROE-Adder Incentives Should Be Used Sparingly, if at all, and Only For Extraordinary Risks.

To the extent the Commission decides to continue to authorize the use of ROE-adder incentives, such adders should be used sparingly, and only to address extraordinary risks that are not addressed in the base ROE. It is axiomatic that "the return to the equity owner should be commensurate with the return on investments in other enterprises having corresponding risks."[23] The Supreme Court has also required that the return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[24] For almost 30 years, the Commission has used the Discounted Cash Flow ("DCF") model to develop a range of returns earned on investments in companies with corresponding risks for purposes of determining the ROE for regulated entities.[25] Most risks encountered in a transmission project are routine financial and business risks inherently accounted for in the ROE calculated using the Commission's DCF approach to determining the authorized return on equity. Such routine risks include the risk of cost overruns, and the risk of construction delays due to the need to acquire siting, land use and environmental permits.

A good example of why ROE adders are not always appropriate, even when projects can include advancements such as smart grid technology or "hardened resilient design," is the cumulative effect that incentives can have, seen in the Commission's recent action in *United Illuminating Co.*[26] In that proceeding, the applicant proposed a 50-basis point ROE added for

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[23] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *see also Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692-693 (1923); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).

[24] *Hope*, 320 U.S. at 603.

[25] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, Notice of Inquiry, 166 FERC ¶ 61,207, at P 4 (2019) ("ROE NOI").

[26] *United Illuminating Co.*, 167 FERC ¶ 61,126 (2019) ("*United Illuminating*").

risks and challenges associated with a project in ISO New England Inc. Multiple risk-reducing transmission incentives were proposed in addition to ROE-adder incentives. The Commission rejected the adder portion of the incentive request, citing its 2012 Incentives Policy Statement,[27] finding that the project did not face "risks and challenges either not already accounted for in United Illuminating's base ROE or addressed through risk-reducing incentives."[28]

In determining the ROE for a particular company, the Commission determines a zone of reasonableness for the proxy group of comparable risk companies, and decides where within that zone of returns the utility's ROE should be set based on the level of financial and operating risks faced by that utility. The DCF model reflects investor expectations based on actual market data.[29] This process allows the Commission to set an ROE for a utility with lower than average risk below the median or mid-point of the zone, and to set an ROE for a utility with a higher than average risk above the median or mid-point.

Regardless of whichever method(s) the Commission determines to use on a going-forward basis in the ROE NOI, the Commission should reaffirm its commitment not to award any ROE adders to compensate investors for the risks already encompassed within the utility's authorized ROE.[30] Investors today are well aware that transmission projects above a certain capacity size must go through a state certification proceeding, and must obtain a number of state and federal environmental permits. These investors also are well aware of the potential

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27 *Id.* at P 43.

28 *Id.* at P 62.

29 ROE NOI at P 5.

30 *See, e.g.,* 2012 Incentives Policy Statement at P 11 ("The resulting base ROE authorized by the Commission is designed to account for many of the risks associated with transmission investment and to support that investment."); *see also* Order No. 679 at P 94 (noting that an incentive-based ROE is appropriate where "traditional policies are not sufficient to encourage new investment.").

opposition to such projects on the basis of local aesthetics, environmental and health concerns, and the fact that many such projects must be constructed through mountainous or wetlands terrain. These everyday risks are already taken into consideration by the market dynamics reflected in the DCF analysis. Adding a premium to the ROE for investment in such projects is neither necessary nor consistent with the D.C. Circuit's mandate in *City of Detroit* to limit any rate increase intended to encourage a particular policy goal to no more than is necessary to accomplish that objective.[31] To the extent the risks of a particular project are already recognized in the utility's authorized ROE, allowing an additional premium would not comport with the Court's mandate.

As the Commission explained in the 2012 Incentives Policy Statement, under its Order No. 679-A incentive policy, "[a]pplicants 'must provide sufficient explanation and support to allow the Commission to evaluate each element of the package and the interrelationship of all elements of the package. If some of the incentives would reduce the risks of the project, that fact will be taken into account in any request for an enhanced ROE.'"[32] Risk-reducing incentives such as recovery of construction work in progress ("CWIP") in rate base, recovery of prudently-incurred project abandonment costs and the like[33] encourage investment by providing up-front certainty regarding cost recovery and improving cash flow for on-going construction programs. To the extent the Commission continues to authorize ROE-adder incentives, it should reaffirm its commitment to the 2012 Incentives Policy Statement's requirement[34] that a utility first

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[31] *City of Detroit*, 230 F.2d 810 at 817.

[32] 2012 Incentives Policy Statement at P 10 (quoting Order No. 679-A at P 27).

[33] *See* Order No. 679 at PP 28-29, 115, 131, 146, 163 and 175.

[34] 2012 Incentives Policy Statement at P 11.

demonstrate that it has used all appropriate risk-reducing incentives to mitigate risk over and above that inherently covered in the transmission owner's authorized ROE.[35]

Any risks remaining that are not mitigated or addressed by a transmission owner's authorized ROE or by risk-reducing incentives should have to be extraordinary, *i.e.*, well beyond the routine risks discussed above encountered in every transmission project, in order to be eligible for an ROE adder. Examples of such extraordinary risks might include those inherent in construction of a transmission project anticipated to run through multiple states, anticipated to cross extraordinarily challenging terrain, or that involves some type of challenging technological problem that must be solved. Routine projects constructed as part of a transmission owner's local transmission planning process to serve new load, to maintain reliability, or to improve transmission security in accordance with North American Electric Reliability Corporation ("NERC") standards, should not be considered extraordinary risk projects. TDU Systems raise this concern because prior to the issuance of the 2012 Incentives Policy Statement, the Commission had provided, under its Order No. 679 policy, ROE-adder incentives for projects designed to expand capacity to address local load growth needs – a routine driver of many transmission projects today.[36] If the Commission decides to continue to authorize ROE-adder incentives, it should limit the use of such adders to projects that pose truly extraordinary risks and challenges that cannot be mitigated using other incentives. The extraordinary risk posed

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[35] *See United Illuminating Co.* at P 64 (addressing assertion that "the ROE Incentive Adder will address risks and challenges arising from the Pequonnock Project's elevated construction, site control, relocation of transmission lines, and project financing" and finding that United Illuminating "advanced similar arguments to support both the CWIP and Abandoned Plant Incentives that it is seeking. Indeed, United Illuminating's proposed solution to elevate the project by using 'a combination of additional fill, concrete, stone and higher retaining walls' is a conventional design, and does not evince risks and challenges that are either not already accounted for in United Illuminating's base ROE or addressed through risk-reducing incentives.") (footnote omitted).

[36] *See e.g., VEPCO ROE-Adder Incentives Order*, 124 FERC ¶ 61,207, at PP 78, 85 (granting 125-basis point adders for projects designed to accommodate the utility's retail load growth).

must be tangible, discernable and supported by concrete evidence. Concerns based on speculation should not be sufficient to warrant the grant of an ROE adder.

4. ROE-Adder Incentives Must Also Provide Demonstrable Customer Benefits [NOI Questions 98-105].

FPA section 219 requires that any transmission incentives implemented by the Commission must benefit consumers "by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[37] In other words, demonstrated consumer benefits in the form of mitigated transmission constraints, reduced construction costs, increased transfer capacity or increased access to lower-priced power supplies or more economic dispatch must be the ultimate objective sought in an transmission incentives application. In order to ensure that the grant of a specific ROE adder for a specific project satisfies this statutory criterion, the Commission must require the applicant for such incentives to demonstrate that there will be concrete benefits for customers. RTOs and ISOs routinely conduct studies in their regional and inter-regional transmission planning processes that could be used to demonstrate such benefits, *e.g.*, studies that model simulated power flows across the system under scenarios premised on construction of the project and failure to construct the project. Transmission owners in non-RTO/ISO regions have access to similar software. Applicants should be required to demonstrate in any application for an ROE-adder incentive that the project will eliminate or reduce constraints and congestion costs in a quantifiable way. Similar modeling studies could also be used to demonstrate increased transfer capability, the effects of more economic dispatch, and access to less expensive sources of supply. Study results and all relevant modeling inputs should

[37] 16 U.S.C. § 824s (a).

be provided to customers.[38] The Commission should not allow any transmission owner to rely on an undocumented claim of benefits to justify a request for an ROE adder.

5. The Commission Should Require a Demonstration that "But For" the Grant of the ROE-Adder Incentive, the Needed Transmission Project Would Not Be Built.

To ensure that any ROE-adder incentive is needed, but is no more than what is needed, to ensure construction of needed new transmission infrastructure, the Commission should require an applicant for such incentives to demonstrate that "but for" the grant of the adder, the needed project would not be constructed. The Commission has considered this factor when authorizing ROE adders in the past. For example, the D.C. Circuit upheld the Commission's approval of a 200-basis point ROE adder for transmission projects seeking to increase capacity on the then-notoriously congested Path 15 corridor in California based in part on evidence that no party would have invested in the new infrastructure absent the ROE adder, and in part on the concrete benefits to consumers in the form of elimination of significant congestion on that segment of the California transmission grid.[39]

The Commission should move beyond an *ad hoc* consideration of a "but for" test in determining whether an ROE-adder incentive is just and reasonable, and should adopt instead a mandate for such a test. Imposing a "but for" eligibility requirement for an ROE-adder incentive would establish a nexus between the project and the need for the incentive, and would comport

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[38] *See* Order No. 890 at P 471 (requiring "transmission providers to disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans"). *See also Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043, at PP 236-37 (requiring sharing of base case data subject to confidentiality protections) (2018), *order on reh'g*, Order No. 845-A, 166 FERC ¶ 61,137 (2019) (*reh'g pending*).

[39] *Pub. Util. Comm'n of the State f California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) ("Although it was well-known that Path 15 was constrained and although this suggested a ready market if new transmission lines were built, no party stepped forward to construct upgrades. Only after WAPA issued its request for proposals did it find participants for the project, and then only if incentives were offered.")

with the D.C. Circuit's mandate in *City of Detroit* and ensure that any increase in rates is no more than is required to ensure the needed investment.

6. The Commission Should Require that Any Transmission Project Awarded an ROE-Adder Incentive Be the Product of an Open and Transparent Transmission Planning Process.

Conditioning the grant of ROE-adder incentives on selection of a transmission project in an Order No. 890-compliant or Order No. 1000-compliant transmission planning process would better ensure that tangible customer benefits are received in exchange for the ROE premium paid to investors. In Order No. 679, the Commission implemented a rebuttable presumption that a proposed transmission project seeking transmission rate incentives would satisfy the nexus requirement if that project resulted from a "fair and open regional planning process that considers and evaluates projects for reliability and/or congestion…."[40] That is a good starting point. For any project to be eligible for ROE-adder incentives, the project must be the product of an open and transparent planning process in which LSEs have had adequate opportunity to provide input.[41] If the project did not result from such a planning process, the project should not be eligible for incentives, period. Such a requirement is essential to ensure that any project receiving incentives has been rigorously vetted during the planning process as to the project's need, benefits and estimated costs.

In addition, the Commission should not authorize ROE adders for any project not selected in a regional or inter-regional transmission planning process. Many projects are local in nature, and are designed to address a transmission owner's local transmission planning needs,

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[40] Order No. 679 at P 58.

[41] For that matter, TDU Systems believe the award of *any* incentives, including risk-reducing ones, should be conditioned on those projects having been the product of an open and transparent planning process in which LSEs have had an adequate opportunity to participate.

such as routine load growth. PJM's Supplemental Projects—which are deemed not necessary for PJM regional reliability, operational performance or economic criteria—are an example of the types of projects that are less likely to pose the extraordinary risks that would warrant an ROE adder. Such projects are defined in the PJM Tariff to exclude upgrades needed to resolve PJM system reliability, operational performance or economic criteria.[42] These local planning process projects have become a growing concern in PJM (and elsewhere) because the magnitude of such projects are beginning to rival those needed to resolve regional reliability concerns in terms of total costs to customers.[43] According to a PJM manual, PJM's only oversight for such projects is to perform "a 'do no harm study' to evaluate whether a proposed Supplemental Project will adversely impact the reliability of the Transmission System as represented in the planning models used in all other PJM reliability planning studies" prior to integrating a Supplemental Project into the Regional Transmission Expansion Plan ("RTEP") base case.[44] Another related concern is the advent of state limitations on the ability of non-incumbent entities to even compete to build such local projects in a manner that would produce lower costs to consumers.

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[42] *See, e.g*, Amended and Restated Operating Agreement of PJM Interconnection, LLC, the definitions section, defining "Supplemental Projects" as "a transmission expansion or enhancement that is not required for compliance with the following PJM criteria: system reliability, operational performance or economic criteria, pursuant to a determination by the Office of the Interconnection and is not a state public policy project pursuant to Operating Agreement, Schedule 6, section 1.5.9(a)(ii). Any system upgrades required to maintain the reliability of the system that are driven by a Supplemental Project are considered part of that Supplemental Project and are the responsibility of the entity sponsoring that Supplemental Project." *See also* FPA section 217(b)(4), 16 U.S.C. § 824q(b)(4) (requiring the Commission to exercise its authority "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, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.").

[43] As of October 4, 2018, there were $ 16.4 billion of Supplemental Projects that were active or in service, and another $3.389 under construction, compared to $26.1 billion of Baseline projects that were active or in service, with only another $2.7 billion in construction. https://www.pjm.com/planning.aspx.

[44] PJM Manual 14B, PJM Regional Transmission Planning Process at 19 (Revision 44, Effective Date: February 21,2019).

The adverse rate effect of the costs of these projects should not be exacerbated by the grant of ROE-adder incentives to transmission owners.

7. No ROE Adders Should Be Granted Where Expansion Is Required by State or Federal Law or by State or Federal Regulatory Obligations, or for Projects Already in the Planning Phase.

For the same reasons discussed in the preceding section, the Commission should not allow ROE adders that compensate for risk for any transmission project that is required to be constructed by state or federal law, or where states have implemented right of first refusal laws which preempt the FERC Order No. 1000 competitive transmission process. Since the implementation of FERC Order No. 1000, several states, such as Minnesota and Texas, have enacted legislation that restricts the development of transmission projects through the competitive process. This essentially results in incumbent transmission owners having an exclusive right to build transmission in their service territories, which may lead to increased transmission costs to consumers and essentially eliminate competition. There is pending federal ligation challenging the constitutionality of these laws under the dormant Commerce Clause of the United States Constitution.[45]

Additionally, the Commission should not allow ROE-adder incentives for transmission projects needed to satisfy NERC mandatory reliability, physical or cyber security standards. Such projects are part of a transmission owner's routine obligation to provide adequate and reliable service to customers. For example, the Commission has long rejected ROE adders for projects where the transmission owner had been directed to increase the transfer capability of a line in order to mitigate the utility's market power.[46]

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[45] *LSP Transmission Holdings, LLC v.* Lang, 329 F. Supp. 3d 695 (D. Minn. 2018); *NextEra Energy Capital Holdings Inc. et. al. v. Paxton, et. al*, Civil No. 1:19-cv---626 (W. Texas 2019).

[46] *Westar Energy, Inc.*, 122 FERC ¶ 61,268, at PP 49-52 (2008).

The same principle should apply to projects proposed in state Integrated Resource Plans for local load growth or reliability needs. The fact that these projects have already been included in state transmission expansion plans serves as evidence that the transmission owners have already committed to construction. Additional incentives are not needed. Additionally, projects required to be constructed as part of an RTO/ISO transmission planning process should not be eligible for ROE adders. For example, PJM has authority under both its Tariff and the Consolidated Transmission Owners Agreement to require construction of a project needed for reliability, and to direct a particular transmission owner to construct the project.[47] Incentives are not needed in this situation. Failure to construct a needed project would subject the transmission owner to penalties and other sanctions for failure to comply with mandatory obligations. There should be no premium placed on the transmission owner's performance of its duty to construct, or discharge of its commitment to construct on its own volition by signing the RTO's transmission owners' agreement.

Nor should a transmission owner be eligible for an ROE adder for any project already in the planning phase, or already completed or under construction. The fact that these projects are already in the planning phase, already completed, or already under construction is strong evidence that the additional ROE basis points were not needed as an incentive for construction.

The Commission has long recognized that incentives should be prospective, denying transmission rate incentives for projects that have already been completed or are near

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[47] *See, e.g.*, PJM Open Access Transmission Tariff, Schedule 12 (authorizing PJM to designate one or more transmission owners to construct required reliability upgrades to the transmission system through the RTEP); *see also* PJM Consolidated Transmission Owners Agreement, Section 4.2.1 (obligating participating transmission owners "designated as the appropriate entities to construct and own or finance enhancements or expansions applicable to the PJM Region specified in the Regional Transmission Expansion Plan or required to expand or modify Transmission Facilities pursuant to the PJM Tariff" to "construct and own or finance such facilities or enter into appropriate contracts to fulfill such obligations.").

completion.[48] As discussed above, providing incentives for doing what the transmission owner is already obligated to do, or has already committed to doing, would provide more than is needed to achieve the policy objective of encouraging the investment in violation of *City of Detroit*.

8. The Commission Should Limit Incentives to That Portion of the Transmission Project that Poses the Extraordinary Risk.

Many transmission projects comprise distinct segments – not all of which may pose extraordinary risks that merit the grant of an incentive. For example, if a transmission expansion project consists of several interconnected segments that will cover a 300-mile span and that will cross four states, it is possible that only one portion of the overall project will be built in a state or a geographic area that poses the extraordinary risk. Only that portion of the larger project that runs through the state or geographic area posing the extraordinary risk should receive incentives. Otherwise, consumers may be required to pay a premium on total project costs when the vast majority of the project does not require an incentive for construction. This is particularly true of ROE adders, which should be granted only when risk-reducing incentives will not suffice.

In order to determine the portion of the project eligible for an incentive, the Commission should require applicants to include in the transmission rate incentive application information that will delineate the portion of the project that poses the extraordinary risk, and the portion of the cost estimate related to that portion of the project. This analysis could be undertaken on a percentage of the overall project cost, miles of line, percentage of MW capacity, or other appropriate basis that would provide the necessary information.

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[48] *Midcontinent Transmission Sys. Operator, Inc., Ameren Service Co.*, 162 FERC ¶ 61,099 (2018), *order on reh'g*, 165 FERC ¶ 61,083, at P 13 (2018) (finding that the applicant "failed to identify specific risks and challenges warranting the ROE Incentive," for one project, "given that the component is substantially complete."); *see also New England Power Pool*, 97 FERC ¶ 61,093 at 61,480 (2001).

9. The Commission Should Protect Customers from Costs in Excess of the Estimates Provided with the Application for the Adder.

Cost overruns on transmission expansion projects today are quite common. An April 2019 study completed by The Brattle Group reports that "[o]n average, these cost escalations ranged from 18% average cost escalations for the reported project types in MISO and SPP to 41% in CAISO and 70% in ISO-NE."[49] Under existing RTO/ISO transmission expansion planning processes, a specific project is often selected from among a series of proposals for resolving a particular reliability criteria violation concern or a congestion cost concern because it is the most cost-effective solution to the problem to be remedied. Indeed, Order No. 1000 requires "public utility transmission providers to participate in a regional transmission planning process that evaluates transmission alternatives at the regional level that may resolve the transmission planning region's needs more efficiently and cost-effectively than alternatives identified by individual public utility transmission providers in their local transmission planning processes."[50] If, however, a project is selected as the most cost-effective solution based on a low-cost estimate, but the cost of that project later increases significantly, a legitimate question arises as to whether that project was, in fact, a cost-effective solution and whether it should continue to receive ROE adders. Substantial cost overruns are likely to significantly erode any cost benefits for transmission customers that were projected when the project was selected in the regional transmission planning process.

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[49] The Brattle Group, *Cost Savings Offered by Competition in Electric Transmission, Experience to Date and the Potential for Additional Customer Value*, prepared for LSP Transmission Holdings, LLC (April 2019), at 52 ("Brattle Group Cost Savings Report"), available at https://brattlefiles.blob.core.windows.net/files/15987_brattle_competitive_transmission_report_final_with_data_tables_04-09-2019.pdf. The report explains, that "[t]he high average cost escalation in ISO-NE is due primarily to the cost escalations on three major projects—the Southwest Connecticut, Greater Springfield, and the Rhode Island Reliability Projects- each of which was completed at more than twice the initial cost estimate." *Id.*

[50] Order No. 1000 at P 6.

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. For example, a transmission project developer might propose an expansion project to remedy a transmission congestion cost concern at an estimated cost of $10 million in order to be selected as the most cost-effective solution in the transmission planning process, while other proposals come in at twice or three times that cost estimate. If the selected project then experiences "unexpected" cost increases, resulting in a final cost that exceeds other proposals that were submitted in the planning process, customers will have lost access to a more realistic, cost-effective solution to the problem.

To protect consumers against excessive rates, the Commission must have a remedy for any such arbitrage. The Commission could implement a toolkit of options to remedy such a problem depending on the facts of any particular case, including implementing a show cause proceeding to terminate the incentive or to terminate the incentive with a requirement for refunds. Another option would be to limit the incentive to the original cost estimate submitted in the transmission planning process or in the application for the rate incentive. This would not be an unrealistic condition, as evidenced by RTOs where competitive processes have been implemented in which non-incumbents have proposed various competitive cost proposals. For example, the winning applicant in one of MISO's transmission project solicitations, Republic Transmission,[51] committed to capping upfront project costs and to capping other elements of annual transmission revenue requirement costs as well—specifically, ROE at 9.8% (inclusive of

[51] Republic Transmission is a wholly owned subsidiary of LS Power Associates, L.P. and its subsidiaries and affiliates, and its proposal included as a Proposal Participant Big Rivers Electric Corporation.

incentives) and capital structure at no more than 45% equity for the life of the project.[52] The remedy selected should depend on the facts and circumstances of the case.

In order to obtain the information needed to apprise the Commission of the actual cost of a project in comparison to the estimate, the Commission should require any transmission owner receiving an ROE-adder incentive to submit an annual report during construction providing the original cost estimate submitted in the transmission planning process, the amounts spent to date, the portion of the project constructed to date, an updated estimate of the final cost, and an explanation for any discrepancy. The Brattle Group report corroborates the need for such a reporting requirement, emphasizing that "[t]he absence of cost-tracking mechanisms in some of the ISO/RTOs, such as CAISO and NYISO, makes it very challenging to observe, document, and monitor project cost changes as projects progress through the development phases."[53]

10. The Commission Should Limit the Duration of Any ROE-Adder Incentives Authorized and Should Revisit Adders upon Changed Circumstances [NOI Questions 83-89].

The Commission should revise its current transmission rate incentives policy by limiting the duration of any ROE-adder incentives granted to no longer than five years, except in highly exigent circumstances, with the applicant bearing the burden of demonstrating such exigency. Interested parties (and the Commission acting *sua sponte*) should have the opportunity to seek to terminate ROE adders prior to the five-year period upon a change in circumstances.[54]

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[52] *Republic Transmission, LLC*, 161 FERC ¶ 61,036, at PP 30-33 (2017).

[53] Brattle Group Cost Savings Report at 53.

[54] *See, e.g.*, *Consumers Energy Co. et al. v. International Transmission Co. et al.*, Order on Complaint, 165 FERC ¶ 61,021, at PP 68, 73 (2018) (*reh'g pending*) (finding that merger transaction reduced the ITC Companies' independence and, accordingly, reducing the independent Transco adder).

The NOI seeks comment on whether certain types of incentives should automatically terminate after some period of years.[55] Although TDU Systems strongly encourage the Commission to prohibit incentives in the form of ROE adders, if the Commission decides nonetheless to allow such incentives, it should impose a default five-year sunset date on any such authorization. Transmission assets are long-lived assets, with service lives extending out 40 years or longer. To the extent the Commission believes that an ROE adder incentive is warranted *prior* to construction of a project to overcome some extraordinary risk that cannot be appropriately mitigated by one of the risk reducing incentives, the usefulness of that ROE adder as a tool to encourage investment in the project deteriorates over time the longer the asset remains in rate base. Accordingly, TDU Systems recommend that such ROE-adder incentives be limited to a five-year period, which should be sufficient to encourage investment in the needed transmission facilities.[56]

The Commission also inquires as to whether authorization for incentives should be revisited if there is a material modification to the project or a significant change in the expected benefits of the project for transmission customers.[57] TDU Systems strongly support reconsideration where there has been a material modification to the project, a substantial cost overrun, or where the expected project benefits have dwindled significantly below the original estimate. Congress intended in passing FPA section 219 that customers would benefit from any incentives awarded for transmission infrastructure investment – either in the form of reduced

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55 NOI at P 44 and Questions 83-84.

56 This could be accomplished by a condition that the recipient eliminate the adder in its first transmission formula rate annual update submitted after the expiration of the five-year sunset period, or on a requirement for submission in the nature of a compliance filing to eliminate the incentive in cases where the transmission owner uses stated transmission rates for cost recovery.

57 NOI at P 44 and Questions 85-89.

transmission congestion costs or in greater access to less expensive sources of power supplies. If those anticipated benefits are eroded by significant changes in the project or other circumstances after the incentives are awarded, the justification for the incentives will have eroded as well. Reconsideration of the continued need for the incentive under such circumstances would also provide the added benefit of encouraging accurate estimates of project costs and benefits in the transmission planning process and the application for the incentive. In order to be able to implement its transmission incentives policy effectively, it is critical that the Commission have timely access to the information needed to evaluate ongoing project development and benefits. Thus, it is imperative that if the Commission decides to allow ROE-adder incentives, it must also impose a reporting obligation on the recipient of the ROE adders. That reporting requirement should direct transmission owners receiving ROE-adder incentives to provide annual reports that include updated information regarding project scope, cost estimate, reduced congestion costs, estimates of savings due to increased access to less expensive sources of power supplies or more economic power dispatch.

The Commission asks in the NOI if it should adopt metrics in measuring the effectiveness of incentives.[58] TDU Systems urge the Commission to develop specific metrics, with input from interested participants in the industry. While TDU Systems' focus in these comments is on RTO-adder incentives, the need for metrics is particularly important as well for the abandoned plant incentive. The Commission asks if it should require additional data if a transmission project is abandoned such as the reason the plant failed.[59] TDU Systems urge the Commission to require reporting of information sufficient for it to make a proper decision on whether any

[58] NOI at P 48, Questions 98-105.

[59] NOI Question 102.

incentives were needed and whether there may be a need for investment to be returned to customers (*i.e.*, clawed back) in a scenario where the reasons for abandoned were inadequate.

Unless the Commission requires reporting of this information on a regular basis, it will be impossible to evaluate the effectiveness of any ROE-adder incentives in obtaining concrete and measurable benefits for customers. If the intended benefits are eroded, then the justification for the incentive has disappeared, and it becomes harder to ensure compliance with the D.C. Circuit Court of Appeals mandate in *City of Detroit* to limit any incentives to an amount no more than is needed to achieve the intended policy goals.[60] Upon review of these annual reports, the Commission could use its existing statutory authority under FPA section 206 to issue show cause orders against any transmission owner receiving an ROE-adder incentive for a particular project, if necessary, to demonstrate that receipt of the incentive remains reasonable, or to show cause why the incentive should not be terminated.

B. The Commission Should Eliminate the RTO-Participation Incentive Adder, or, at a Minimum, Modify Its Policies in Several Respects To Ensure that Transmission Rates Remain Just and Reasonable.

1. The Commission Should Eliminate the RTO-Participation Incentive Adder [NOI Question 61].

TDU Systems believe that the Commission should eliminate the 50-basis point ROE adder that is routinely provided to transmission-owning members of RTOs and ISOs, or, as the Commission refers to it here, as the "RTO-participation incentive." While it is certainly welcomed by those entities, there is no evidence that the 50-basis point ROE adder that the Commission routinely grants to public utilities that join RTOs is needed to encourage such participation in RTOs, nor any evidence that elimination of the RTO-participation incentive ROE

[60] *City of Detroit*, 230 F.2d 810 at 817.

adder would result in an exodus of transmission owners from RTOs. Public utility transmission owners that have perceived benefits for their shareholders from RTO participation have long since joined such entities because of those benefits. Indeed, many public utility transmission owners were already members of RTOs when the Commission adopted its policy for awarding a 50-basis point ROE adder for RTO participation in Order No. 679, and simply inherited the adder when the Commission's policy changed. And while some transmission owners have joined RTOs since the Commission adopted its RTO-participation ROE adder policy in Order No. 679, there is no evidence that it was the 50-basis point adder that led them to join. To the contrary, there is evidence that transmission owning utilities join RTOs because of the substantial benefits that RTO membership provides.[61] Additionally, many of the objectives that the Commission was trying to achieve with the RTO-participation incentive ROE adder have been achieved through the maturation of the RTOs, as well as by the Commission's adoption of its reforms in Order Nos. 890 and 1000, aimed at, among other things, reducing congestion and encouraging greater investment in transmission infrastructure.[62]

It is important to recognize that nothing in the statute required the Commission to create ROE adders as the incentive for RTO participation. There are plenty of other types of incentives available to transmission owners that join RTOs. In addition to the array of risk-reducing

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[61] *See, e.g., PJM Interconnection, LLC, Ohio Valley Electric Corp.*, 162 FERC ¶ 61,098, at P 26 (2018) (Ohio Valley Electric Corporation "further asserts that the Commission has found that there are numerous benefits to Regional Transmission Organization membership including, but not limited to: increased efficiency through regional transmission planning; reduced transaction costs; improved grid reliability; and improved market operations, including improved congestion management."). *See also In the Matter of Application of East Kentucky Power Cooperative to Transfer Functional Control of Certain Transmission Facilities to PJM Interconnection, LLC*, Kentucky PSC, Case No. 2012-00169, Dec. 20, 2012 Order at 15-16 (Charles River Associates studies showed a net expected economic benefit of joining PJM, based on a ten-year present value, of approximately $132 million. This figure included $40 million in trade benefits; $137 million in capacity benefits; and $56 million in avoided point-to-point transmission charges; less $48 million in administrative costs and $53 million in transmission costs).

[62] *See* Order No. 890 at PP 52-62; Order No. 1000 at P 2.

incentives available, transmission owners are, for example, able to obtain relief from the requirement to purchase energy and capacity from Qualifying Facilities.[63] . There are a number of other types of incentives that could just as likely encourage RTO participation and would better target the incentive to the intended benefit of participation in a regional market, *i.e.*, expanding access to cheaper or more economically-dispatched sources of supply.

If, however, the Commission does not eliminate the RTO-participation incentive adder, then TDU Systems recommend that the Commission revise it in several key ways, discussed below.

2. Any RTO-Participation Incentive Adder Should Be Limited in Duration [NOI Question 64].

If it is not eliminated, at a minimum, the RTO-participation incentive ROE adder should not be permanent. If the purpose of the RTO-participation incentive ROE adder is indeed to encourage membership in an RTO, then that purpose can be accomplished by providing an incentive to new members. However, neither the statute nor logic requires that the RTO-participation incentive be permanent. Section 219 of the Federal Power Act required the Commission to establish by rule incentive-based rate treatments,[64] and specified what the rule needed to accomplish.[65] With respect to the RTO-participation incentive, FPA section 219 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."[66] In Order No. 679, the Commission's rule implementing FPA

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63 *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078 (2006), *order on reh'g*, 119 FERC ¶ 61,305 (2007).

64 16 U.S.C. § 824s (a).

65 16 U.S.C. § 824s (b).

66 16 U.S.C. § 824s(c) (emphasis added).

section 219, the Commission interpreted this language as applying to "public utilities ***that join and/or continue to be a member*** of an ISO, RTO, or other Commission-approved Transmission Organization."[67]

There is an obvious distinction between the level of incentive needed to encourage a public utility to join a transmission organization versus that necessary to remain in one. As a general 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 an RTO,[68] and do not need an ROE adder to remain. Indeed, the RTOs have exit fees for transmission-owning utilities that seek to depart.[69] To the extent the Commission declines to eliminate the incentive for existing members, an appropriate method of taking this distinction into account would be to phase down the level of the adder as years pass. TDU Systems suggest that the current 50-point adder could gradually be phased out over a five-year period. The phase-down would be based on the total number of years that the utility is a member of ***any*** transmission organization, such that a utility that exits one transmission organization and joins another would only be eligible for the level of incentive it would have received by remaining in the former. This would eliminate the Commission's concern about "perverse incentives" to switch organizations.[70]

As former Commissioner Kelliher explained:

> The purported purpose behind the 50 basis point adder is to provide an incentive for transmission owners to join an RTO.

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67 Order No. 679 at P 326 (emphasis added).

68 While TDU Systems are aware of several utilities that have switched RTOs, cases of utilities leaving RTOs altogether are rare (Lousiville Gas and Electric Co., cited in n. 69, *infra*, being one exception of which TDU Systems are aware).

69 *Louisville Gas and Electric Co., et al.*, 114 FERC ¶ 61,282, at PP 57-60 (2006) (addressing exit fee).

70 *See* Order No. 679 at P 331.

> However, under the proposal, the 50 basis point adder would be given not only to new PJM members, but also to transmission owners who were already members of PJM when this policy was announced. I fail to see how granting a 50 basis point adder to existing members of PJM, some of whom joined over fifty years ago, accomplishes the goal of creating an incentive for new members to join. Self-evidently, a 50 basis point adder is not necessary to entice existing members of PJM to join, since they already are members. Nor do I see any nexus between providing an incentive to longstanding members of PJM and the goal of providing an incentive for non-members to join an RTO. Instead, this strikes me as merely providing a windfall to existing members of PJM, many of whom decided long ago to sign up as members.[71]

Having a perpetual RTO-participation adder serves no useful purpose.

3. Any RTO-Participation Adder Should Be Conditioned on Continued Voluntary Participation in the RTO, With Negative Ramifications for Leaving the RTO.

The Commission should expressly condition the grant of any RTO-participation incentive adders upon continued voluntary participation in the RTO.[72] If a transmission owning entity withdraws from an RTO for which it obtained an ROE adder for joining, the Commission should immediately issue an order eliminating such ROE adders. Additionally, if a transmission owning utility leaves an RTO within the first ten years of participation, there should be some ramifications beyond the loss of the ROE adder. The Commission should consider accepting applications for RTO-participation incentive adders subject to refund, so that the transmission owning utility would need to refund its customers the amounts collected if the utility leaves the RTO within a set number of years. Alternatively, the Commission should consider imposing a

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[71] *Allegheny Power System Operating Companies, et al.*, 111 FERC ¶ 61,308 (2005) (Kelliher, Commissioner, *dissenting in part*).

[72] *See, e.g., American Transmission Co. LLC, et al.*, 105 FERC ¶ 61,388, at P 31 (2003) ("incentive rates for independent operation of facilities and investment in new transmission are just and reasonable only as long as the transmission owner remains a member of an approved RTO. Should ATC leave the Midwest ISO, the justification for the incentive rates would no longer apply and at that time, ATC must revert back to rates that do not contain such incentives.").

negative 50 basis-point penalty on those transmission owners that seek to withdraw from an RTO within the first ten years of participation. Those transmission owners participating in RTOs recover from consumers significant integration costs in anticipation of purported long-term savings to consumers. Should those savings fail to fully materialize due to early withdrawal of the transmission owner from the RTO, the Commission should consider imposing a reduction in authorized rate of return for a period comparable to the time the transmission owner participated in the RTO to recognize the costs paid by consumers to fund its participation.

4. The Commission Should End Its Practice of Rubberstamping RTO-Participation Incentive Adders.

The Commission should reform its approach to the RTO-participation incentive adder. In Order No. 679, the Commission expressly declined to adopt a generic adder for transmission organization participation and instead explained that it would "consider specific incentives on a case-by-case basis."[73] Despite its stated intention not to adopt a generic approach to granting transmission organization incentives, the Commission has drifted in that direction since the issuance of Order No. 679, routinely granting 50-basis point adders and rejecting case-specific protests. The Commission has denied case-specific protests to 50-basis point RTO adders on the basis that such arguments are inconsistent with the policy of Order Nos. 679 and 679-A and that the 50-basis point incentive adder has been approved for similar utilities.[74] By invoking Order No. 679's policy adopting RTO participation adders generally as a reason for rejecting case-specific protests to the 50-basis point ROE adder, the Commission has effectively precluded

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[73] Order No. 679 at P 326.

[74] *See, e.g., Pepco Holdings, Inc.*, 121 FERC ¶ 61,169, at P 16 (2007) (granting a 50-basis point adder, rejecting protest, and noting that level of adder "is the same as that approved for similar utilities"); *Virginia Electric and Power Co.*, 123 FERC ¶ 61,098, at P 54 (2008) ("*VEPCO 2008 RTO -Participation Adder Order*") (same). *See also Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 971-972 (9th Cir. 2018)) ("*CPUC*") ("Since 2007, PG&E has regularly invoked Order 679 in its tariff filings to request 50 basis-point incentive adders for its ongoing participation in the Cal-ISO and FERC has summarily granted those requests.")

customers from making the very case-specific objections that Order No. 679 expressly contemplated.

This practice must be stopped. As the U.S. Court of Appeals for the Ninth Circuit found recently, "[t]o satisfy Order 679's case-by-case analysis requirement and to avoid creating a generic adder, FERC needed to inquire into PG&E's specific circumstances."[75] Because the Commission did not conduct any such analysis, "FERC created a generic adder in violation of"[76] Order No. 679. The Commission must now reform its approach so that it implements the RTO-participation incentive adder as the Commission indicated it would in Order No. 679—on a case-by-case basis, addressing the individual circumstances of each particular utility.

5. While Other Incentives May Be Appropriate To Encourage RTO Participation, None Should Be Awarded Automatically [NOI Question 62].

TDU Systems fully support utilities that join RTOs/ISOs being ***eligible*** for receipt of incentives other than ROE adders; however, the automatic provision of any such incentives would be inappropriate. Providing any incentives automatically would deprive customers, state regulators and other interested stakeholders of the opportunity to comment on the appropriateness of such incentives. Moreover, it would short circuit the Commission's statutory obligation to ensure that the specific incentive is just and reasonable given the circumstances, and that the cumulative incentives that the particular public utility transmission owner is receiving remain just and reasonable.

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[75] *CPUC*, 878 F.3d at 979.

[76] *Id*. at 973.

6. The Level for an ROE Adder Should Be Determined on a Case-by-Case Basis, Not To Exceed 50 Basis Points [NOI Questions 63, 65].

If the Commission nonetheless determines to provide ROE adders for RTO/ISO participation, the appropriate level for such an ROE adder should be no more than the 50 basis points routinely granted by the Commission. However, to the extent that the 50 basis point adder causes a public utility's ROE to exceed the top of the zone of reasonableness, the adder must be reduced to ensure the rate remains just and reasonable. Additionally, the Commission must examine the cumulative impact of incentives, and under no circumstances should the Commission permit the total ROE to exceed the top of the zone of reasonableness.[77]

In response to NOI Question 65, TDU Systems believe that it would be appropriate for the RTO-participation adder to be awarded on a project-specific basis. This would allow for Commission evaluation of the specific factors warranting the grant or rejection of the adder for each transmission owner, which would comport with the D.C. Circuit's ruling limiting incentives to no more than is needed to obtain the policy objective.[78]

7. Voluntary Participation in RTOs/ISOs Must Be a Prerequisite for any RTO-Participation Incentive [NOI Question 66].

The Commission implies with the wording of NOI Question No. 66 that voluntary participation in an RTO is, in fact, a requirement for the RTO-participation incentive ("should voluntary participation ***remain*** a requirement"). While it is true that Order No. 679 articulated it as such, in practice, however, the Commission has not adhered to this principle. TDU Systems urge the Commission to take the opportunity to make the voluntariness of participation in the RTO truly a requirement of any RTO-participation adder.

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[77] *See* Section II.A.2, *supra.*

[78] *City of Detroit, supra* n. 18.

As just one example, in 2008, the Commission approved a 50-basis point ROE "incentive" adder for Virginia Electric and Power Company ("VEPCO")'s continued participation in PJM.[79] Protestors, including the Staff of the Virginia State Corporation Commission, pointed out to the Commission that VEPCO's membership in PJM was "not voluntary; rather it was required by the Virginia Electric Utility Restructuring Act and the [Virginia State Corporation Commission] order approving VEPCO's integration into PJM."[80] Nonetheless, the Commission approved VEPCO's proposal to increase its ROE by 50 basis points "for continued participation in PJM" as just and reasonable and not unduly discriminatory.[81] The Commission's rationale was as follows:

> Section 219 of the FPA specifically provides that the Commission shall provide for incentives to each transmitting utility that joins an RTO. . . . As we stated in Order No. 679-A, we will authorize incentive-based rate treatment for public utilities that continue to be a member of an RTO. This decision to provide incentives for RTO participation is based on the policy of encouraging utilities to join and remain in an RTO. Accordingly, we reject requests that VEPCO not be rewarded for its continued membership in PJM. In addition, we also deny the relief requested by the parties as this argument is a collateral attack on Order No. 679-A.[[82]]

In light of orders such as this, the Commission cannot claim that it has been making voluntary participation in RTOs a requirement of the RTO-incentive adder. However, it is time that the Commission change course and make voluntary participation mandatory for receipt of

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79 *See VEPCO RTO-Participation Adder Order, supra* n. 74.

80 *Id*. at P 53 (citing Va. Code § 56-577). The Virginia State Corporation Commission ("VSCC") explained that since 1999, Virginia law has required each transmission owning electric utility in the Commonwealth to join or establish a regional transmission entity, and that the VSCC approved VEPCO's integration into PJM pursuant to such state law by VSCC Order on November 10, 2004. Motion To Intervene and Comments of the Staff of the Virginia State Corporation Commission, Docket No. ER08-92-000, at 4-5 (Nov. 15, 2007) (citing Va. Code §§ 56-577, 56-579, and VSCC Case No. PUE-2000-0055).

81 *VEPCO RTO-Participation Adder Order*, 123 FERC ¶ 61,098, at P 54.

82 *Id*. (footnote omitted).

any RTO-participation incentive adder. That means that where participation in the RTO is mandatory, the utility should not be eligible for the adder.

As the Commission recognizes, some courts do not buy the notion that an "incentive" is appropriate where it is not incentivizing future behavior.[83] The Ninth Circuit recently found that the Commission's grant of an RTO participation incentive adder to Pacific Gas and Electric Co. was arbitrary and capricious in its application of Order Nos. 679 and 679-A because the Commission failed to provide a reasoned explanation for granting the incentive in light of the Commission's longstanding policy that incentives should only be granted to induce future behavior.[84] Similarly, the Commission has in the past allowed ROE adders for RTO participation where such participation was required as part of conditions imposed in merger orders.[85] This practice must stop.

TDU Systems urge the Commission not to grant RTO-participation incentive ROE adders for public utilities that are not joining or remaining in the RTO voluntarily, and to terminate any adders granted to public utilities that did not join or remain in an RTO on a voluntary basis.

III. CONCLUSION

TDU Systems appreciate the opportunity to provide feedback to the Commission on these important issues and respectfully request that the Commission take their views into consideration as it fashions any reforms to its incentive policies.

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83 NOI at P 38 (citing *CPUC*, 879 F.3d at 974-75, 977).

84 *See id.*

85 *See, e.g., American Electric Power Co. and South West Corp.*, 90 FERC ¶ 61,036 (2000) (requiring company to join an RTO as a condition of merger); *CP&L Holdings Inc.*, 92 FERC ¶ 61,023 (2000) (relying on applicants' commitments to join RTOs in approving merger).

Respectfully submitted,

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