UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS ON NOTICE OF INQUIRY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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Over the past 13 years, Ohio residential electric consumers, along with consumers across the nation, have paid hundreds of millions of dollars in higher rates to purportedly encourage utilities to build new transmission lines and related facilities. But "significant developments in how transmission is planned, developed, operated, and maintained"[1] have eliminated the need for customers to fund transmission incentives to encourage new investment by the utilities. Consumers should not be required to continue paying incentives to transmission utilities for projects that are either already required or economically feasible. Requiring consumers to continue to pay transmission owners a premium for investment in transmission projects that those owners are either legally obligated to construct or are already financially motivated to develop under existing market forces and rules, would constitute bad public policy. Additionally, consumers should not be required to continue paying higher rates to encourage utility membership in a Regional Transmission Organization ("RTO") or Independent System Operators ("ISO").

[1] *Inquiry Regarding the Commission's Electric Transmission Incentives Policy*, Notice of Inquiry 84 Fed. Reg. 11759 (March 28, 2019), 166 FERC ¶ 61,208 at P 2 (2019) ("NOI").

The Office of the Ohio Consumers' Counsel ("OCC") supports the timely inquiry by the Federal Energy Regulatory Commission ("FERC") into the scope and implementation of its electric transmission incentive regulations and policies. OCC represents the interests of Ohio residential consumers that receive electric service from investor-owned utilities that participate in PJM's wholesale markets and pay FERC-approved transmission rates. Ohio residential consumers would be directly and adversely affected if FERC's transmission incentives policy continues (as adopted in Order No. 679 and modified by FERC's Policy Statement in 2012[2]).

I. EXECUTIVE SUMMARY

FERC issued a Notice of Inquiry ("NOI") in this docket on March 21, 2019[3] seeking comment on the scope and implementation of its current electric transmission incentives policy, codified in section 219 of the Federal Power Act,[4] and in Part 35 of FERC's regulations.[5] In its Notice, FERC also questioned whether additional incentives are needed to safeguard compliance with its FPA section 219 obligations.[6] FPA section 219, passed by Congress in 2005, required FERC to develop a rule that would "promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce,

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[2] *Promoting Transmission Investment Through Pricing Reform*, Policy Statement, 141 FERC ¶ 61,129 (2012) (2012 Policy Statement").

[3] NOI at P 13-14.

[4] 16 U.S.C § 824s.

[5] 18 C.F.R. § 35.35.

[6] NOI at P 13.

regardless of the ownership of the facilities."[7] While the law remains the same, significant changes in the regulatory landscape since 2006 have eliminated the need to incentivize new transmission projects.

Consequently, consumers are overpaying for transmission service to provide utilities with incentives that are not needed to encourage investment in the electric transmission system. Adding new incentives would only exacerbate these customer overpayments, contrary to the mandate in FPA section 219 that any incentives must result in just, reasonable and not unduly discriminatory or preferential transmission rates, under FPA sections 205 and 206.[8] Adequate investment is occurring today, and will continue to occur into the foreseeable future, without new or continuing existing transmission incentives.

II. CONSUMER-FUNDED TRANSMISSION INCENTIVES ARE NO LONGER NEEDED TO ENCOURAGE INVESTMENT IN TRANSMISSION FACILITIES [NOI AT ¶13-14].

In 2006, FERC issued Order No. 679 finding that transmission project incentives were necessary to encourage the construction of new transmission infrastructure.[9] But changes in the electric transmission regulatory landscape warrant an overhaul of FERC's current transmission incentives policy. FERC should end these policies that are no longer needed to encourage new investment. Consumers should not pay higher rates to transmission owners for projects that are required by statute or regulatory mandate or are

[7] 16 U.S.C. § 824s(b)(1).

[8] *Id.*; *see also* 16 U.S.C. § 824d and 824e.

[9] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43294 (July 31, 2006); FERC Stats & Regs. ¶ 31,222-A (2006) ("Order No. 679"), *order on reh'g,* Order No. 679-A, 72 Fed. Reg. 1152 (January 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2007) ("Order No. 679-A").

economically feasible without additional incentives. It would be bad policy, and unjust and unreasonable, for FERC to force consumers to pay transmission owners a premium for transmission projects that are already required or are economically feasible. These so-called incentives are not needed to ensure the resilience, reliability, or economic efficiency of the transmission grid for customers.

In Order No. 679, FERC found that investment by the industry in electric transmission infrastructure had declined significantly between 1975 and 2005, with investment in 2003 still lagging behind 1975 levels in real dollars.[10] FERC expressed concern that this lack of investment had cost consumers $29 to $135 billion annually in service interruptions and hundreds of millions of dollars in annual congestion costs.[11]

Congress reacted to the then-declining state of the electric transmission system by passing section 1241 of the Energy Policy Act of 2005,[12] codified at section 219 of the FPA. That provision required FERC to implement a rule that would promote investment in new electric transmission infrastructure.

In response, FERC adopted Order No. 679, embarking on a major overhaul of its transmission incentives policies, and codifying rules that would allow transmission owners to seek a multitude of transmission incentives for needed new projects. Such incentives included those that reduced risks and challenges for such investment.[13] The policy also allowed transmission owners to request ROE (profit) incentive adders for participation in RTOs and ISOs, participation in Transcos, and for additional risks and

[10] Order No. 679 at P 10.

[11] *Id.*

[12] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 315 and 1283 (2005).

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

challenges associated with non-routine projects.[14] Thereafter, FERC clarified in the 2012 Policy Statement, that transmission owners should first seek incentives that reduce risks and challenges of a project before seeking ROE incentive adders.[15]

Since the adoption of Order No. 679 in 2006, the level of investment in electric transmission infrastructure has increased dramatically. The Energy Information Administration ("EIA") reports that FERC-jurisdictional utilities spent $21 billion in capital additions in 2016 alone.[16] EIA reported that "[s]pending on infrastructure to deliver power to homes and businesses has increased steadily over the past ten years as utilities build, upgrade, and replace station equipment, poles, fixtures, and overhead lines and devices."[17] Over that ten-year period, investment in transmission infrastructure increased from approximately $8 billion per year to more than $21 billion per year in 2016, with a total investment between 2010 and 2016 of almost $115 billion and an additional $62 billion in planned investment through 2019.[18]

The United States Department of Energy reported more than 2,500 miles of new transmission line under construction at the beginning of 2017, with an additional 10,000 circuit miles of line planned to be in service by 2020.[19] This dramatic increase in the level of investment in transmission infrastructure is more due to "developments in how

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[14] *Id.* at PP 221, 326.

[15] 2012 Policy Statement at P 1.

[16] *Utilities Continue to Increase Spending on Transmission Infrastructure* at 8-9(February 9, 2018), available at https://www.eia.gov/todayinenergy/detail.php?id=34892.

[17] *Id.*

[18] *Id.* at 8, 11.

[19] *Annual U.S. Transmission Data Review,* U.S. Department of Energy at 8-9 (March 2018), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjtmbXmk9jiAhUttlkKHeapDAsQFjAAegQIAhAC&url=https%3A%2F%2Fwww.energy.gov%2Fsites%2Fprod%2Ffiles%2F2018%2F03%2Ff49%2F2018%2520Transmission%2520Data%2520Review%2520FINAL.pdf&usg=AOvVaw0u-Lsjum9b3r-2AEicow-i

transmission is planned, developed, operated, and maintained"[20] than the transmission incentives program, especially considering the significant emphasis placed in regional transmission planning processes on new construction to resolve reliability criteria violations and congestion concerns. This significant increase in investment and regulatory certainty, along with the reduced risk of investment due to implementation of formula rates by many transmission owners, support a finding from FERC that transmission incentives are no longer needed.

Further, the courts have long-required that FERC mitigate the need for rate increases designed to facilitate policy goals by limiting such increases to a level no higher than needed to obtain the objectives.[21] The time has come for FERC to recognize that the "significant developments in how transmission is planned, developed, operated, and maintained"[22] provide sufficient incentive for investment in needed new projects without policies that artificially and needlessly increase rates. FERC should terminate its current transmission incentives policy.

III. FERC'S CURRENT RETURN ON EQUITY, TRANSMISSION PLANNING, AND FORMULA RATE POLICIES PROVIDE SUFFICIENT INCENTIVES FOR INVESTMENT IN NEW TRANSMISSION [NOI AT ¶15, QUESTIONS 1-3].

Many of the financial risks faced by any transmission project are already considered, and accommodated, by FERC's existing policies for determining the just and

[20] NOI at P 2.

[21] *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, or the ownership by pipeline companies of their own producing facilities, it must see to it that the increase is in fact needed, and no more than is needed for that purpose."), *see also City of Charlottesville v. FERC*, 661 F.2d 945, 950, 953-54 (D.C. Cir. 1981).

[22] NOI at P 2.

reasonable authorized Return on Equity ("ROE"). OCC agrees with FERC's comment in the 2012 Policy Statement that the currently authorized ROEs already compensate investors in transmission projects for a wide range of risks inherent in the electric transmission industry.[23] To the extent that a transmission utility experiences financial or operating risks higher than the average for utilities with comparable risk, FERC has adequate authority under its current ROE policies to reflect that higher risk by awarding that utility an ROE set at the upper end of the range of reasonable returns for the comparable group. In fact, FERC is currently exploring in a Notice of Inquiry pending in Docket No. PL19-4-000 whether prevailing market conditions require additional upward risk adjustments in its existing approach to setting authorized returns.[24] FERC should take no action to grant additional ROE incentive adders until after it has completed that NOI and any potential rulemaking initiated in response to that process in order to ensure that any additional ROE incentive adders result in an authorized ROE that remains within a zone of reasonableness.

In the 2012 Policy Statement, FERC provided guidance to the industry that it expects applicants for transmission rate incentives to take all reasonable steps to mitigate the risks of a project. FERC's guidance included steps to request incentives designed to reduce the risk of a project before seeking an incentive ROE adder.[25] FERC has since rejected some requests for transmission rate incentives based on ROE adders where the

[23] *Id.* at P 11.

[24] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, Notice of Inquiry, Docket No. PL19-4-000, 84 Fed. Reg. 11,769 (March 28, 2019), 166 FERC ¶ 61,207 (March 21, 2019).

[25] 2012 Policy Statement at P 4.

applicant failed to satisfy the 2012 Policy Statement criteria.[26] There is no evidence that simply providing returns on equity higher than those authorized as just and reasonable for investment in the utility would encourage investment in a specific new transmission project.

FERC should terminate existing incentives, especially those aimed at simply increasing the level of return authorized for specific projects. Incentives that simply increase the authorized return on investment in new transmission facilities would do little to address any risks and challenges faced by such projects, such as the risk of lengthy delays that may exist in multi-state permitting processes for regional or inter-regional projects, or the risk of abandonment due to the changing needs of the grid.

The advent of more rigorous and transparent regional and inter-regional transmission planning processes has ensured that needed new transmission projects will be identified and constructed. These RTO/ISO processes have resulted in billions in needed new investment in the region. Statutory and regulatory obligations to ensure that the transmission grid is adequate to satisfy customer needs, including load growth, and for compliance with mandatory reliability, physical and cyber-security standards, likewise ensure needed investment in new transmission facilities. Moreover, FERC's transmission formula rate policies safeguard timely recovery of any such investment costs. These requirements, in combination with FERC's generous ROE policies and the fact that transmission is a monopoly service, already encourage investment in most needed new transmission infrastructure.

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[26] *See, e.g., Midcontinent Independent Transmission System, Ameren Service Co.,* 162 FERC 61,09 (2018), reh'g granted in part and denied in part, 165 FERC 61,083 (2018) finding that the applicant "failed to identify specific risks and challenges warranting the ROE Incentive" for one project).

While OCC agrees it is critical that utilities maintain and upgrade their existing transmission systems to avoid reliability criteria violations and serve new customers, these obligations are part and parcel of the utility's statutory obligation to provide adequate and reliable service to customers. Providing incentives to do what the state and federal statutes and regulations already require is unnecessary, unwarranted, and does not comport with the FPA section 205 and 206 requirements for just and reasonable transmission rates. FERC's primary obligation is to provide consumers a "complete, permanent, and effective bond of protection from excessive rates and charges."[27]

A. If FERC Determines That Transmission Incentives Should Continue, Such Incentives Should Be Subject to Transparent and Objective Cost-Benefit Criteria [NOI at ¶16, Questions 4-11].

FERC is obligated under the FPA to protect the interest of the consuming public in the "orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[28] While changes in the industry over the past 13 years has made transmission incentives unnecessary, if FERC nonetheless determines that transmission incentives are needed to safeguard delivery of adequate supplies of electricity to consumers, that goal must be attained in a manner that minimizes costs and provides demonstrable benefits to those consumers. If FERC continues to grant transmission incentives, it should adopt a requirement that each transmission owner and each transmission provider implement a transparent and objective means of evaluating the costs and benefits of the transmission project and demonstrating by concrete evidence how the requested incentive(s) are lawful. In other words, there must be tangible and

[27] *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959).

[28] *Nat'l Assoc. for the Advancement of Colored People v. Federal Power Comm'n*, 425 U.S. 662, 669-70 (1976).

concrete evidence that the incentive(s) promote(s) reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities for the customers that pay for such incentive(s), and that provide incremental benefits to consumers. FERC policy should not incentivize transmission owners to build facilities that provide no incremental benefits for customers. Requiring consumers to pay incentives for unnecessary facilities would only increase the unjust and unreasonable rate effects of such action.

Further, to the extent FERC decides to retain any type of transmission incentives, it should require RTOs/ISOs and transmission owners to work with electric distribution utilities, state regulatory commissions, state consumer advocates, and other interested stakeholders to implement transparent, clearly-defined and objective cost-benefit criteria for the award of such incentives. Cost-benefit tests should focus on benefits that can be objectively measured, such as mitigation of reliability criteria violation concerns, significant reduction in congestion costs, or access to new *and less expensive* sources of power supplies. These criteria are likely more easily developed in RTO/ISO regions given the independent governance structure of such entities. However, the development of agreed-upon criteria in non-RTO regions is not impossible. All transmission owners today have access to software capable of modeling power flows over transmission lines to determine the extent to which an upgrade may provide congestion relief or access to lower cost power supplied. Stakeholder consensus on an objective test would reduce litigation and expense concerning the results of any such analyses and applications for transmission incentives.

FERC also should implement a requirement that cost benefit analysis be re-evaluated within one year of completion of construction to determine the on-going net benefits if any, and the effects of any cost-overruns on the results of a cost-benefit analysis. Cost-overruns are a fact of life in today's markets. Significant cost-overruns could wipe out any net benefits of a transmission project for consumers, especially where the cost-benefit analysis demonstrated a small net benefit to those consumers. To the extent the re-evaluation indicates that customer net benefits have been significantly eroded or eliminated, FERC should commit to a policy of initiating a proceeding directing the utility to show cause why the transmission incentives should not be terminated. A re-evaluation policy would also ensure that the initial project cost estimates are reasonable and are not estimated too low just to win a competitive solicitation in an open window regional transmission planning process.

At a minimum, as FERC recognized in the 2012 Policy Statement, a different approach would be to limit the incentive to the cost estimate for the project submitted with the application for the transmission incentive. That would safeguard that the impact of any incentive is not exacerbated by any significant cost overruns ultimately charged to consumers If the ultimate objective of transmission incentives is to benefit consumers by the addition of cost-efficient, new investment in transmission facilities that but for the grant of an incentive would not be built, there must be a follow-up finding that consumers are receiving those benefits. Otherwise, there would no longer be any justification for allowing the transmission owner to continue to reap the benefits of ineffective transmission incentives.

IV. FERC SHOULD ELIMINATE THE RTO MEMBERSHIP INCENTIVE AND TRANSCO ADDERS [NOI AT ¶37-38, QUESTIONS 57 – 66].

Order No. 679 authorized ROE incentive adders to encourage participation in RTOs and ISOs. At that time, RTOs and ISOs were still in the early stages of development. FERC sought by this incentive to expand participation in existing regional entities, as well as potentially encourage the development of new RTOs/ISOs. Although FERC initially adopted a case-by-case approach for authorizing ROE adders for RTO/ISO participation, the grant of such adders soon became ubiquitous.[29] To OCC's knowledge, FERC has granted every request for a 50 basis-point ROE adder for participation in an RTO/ISO.

Today, these RTOs/ISOs are well-established, mature entities managing the transmission systems owned by more than 160 transmission utilities across vast portions of the nation.[30] The likelihood that new RTOs will be developed is low – every transmission utility that perceived a benefit to establishing an RTO/ISO venture has already done so, or already has joined an established RTO/ISO. That is, the OCC questions why the 50 basis-point adder would continue to apply to any new transmission projects when the transmission provider is already a current member of an RTO or ISO.

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[29] *See, e.g.*, *Midcontinent Independent System Operator, Inc., Pioneer Transmission, LLC.*, 164 FERC 61,155 at PP 33-34 ("as set forth in Order No. 679, a public utility is entitled to the RTO Participation Adder if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization and that its membership is ongoing.").

[30] The websites and transmission owner agreements for the relevant RTOs and ISOs indicate that there are 35 transmission owners in PJM, 51 in MISO, more than 20 in SPP, 31 in ISO New England, 8 in the NY ISO, 17 in the California ISO. These entities in turn serve consumers in all or part of more than half the states in the nation.

Moreover, the reasons for participation by these entities are varied, but many focus on the significant savings in power supply procurement and reduced congestion costs made available by existing RTO/ISO markets.[31] In none of these cases did the availability of a 50 basis-point ROE adder for RTO participation appear to be a significant factor. There is also no need for the membership incentive where RTO participation has been required by state regulatory authorities.

Although OCC seriously questions whether the 50 basis-point ROE adder for RTO/ISO membership has ever been needed to encourage that membership, it is evident from the maturity of RTO/ISO markets that there remains little, if any need, for this incentive today. Quite simply, the ROE adder for RTO/ISO membership has outlived its usefulness. Any benefit associated with this incentive today is one-sided, with utilities continuing to receive millions in additional funds to engage in an activity that is in its best interest anyway. Further, the ROE adder for RTO/ISO membership no longer meets the judicial mandate in *City of Detroit* that increases in rates for policy objectives must be no more than what is needed to achieve that objective. FERC should terminate the ROE adder for RTO/ISO membership.

V. FERC SHOULD ADOPT A SUNSET DATE FOR ALL TRANSMISSION INCENTIVES [NOI AT ¶44, QUESTIONS 83 - 89].

FERC should immediately eliminate transmission incentives. There is little evidence that incentives in the form of ROE adders are needed to encourage participation

[31] *See, e.g., PJM Interconnection, LLC, Duke Energy Ohio, Inc, Duke Energy Kentucky, Inc.*, 139 FERC ¶ 61,068 at P 35 (2012) ("The net benefit (after Transition Costs and Legacy MTEP Costs are subtracted) of the move is projected to be $301 million through 2036."); see also PJM Interconnection, LLC, Ohio Valley Electric Corporation, 162 FERC ¶ 61,098 at P 26 (2018) "(OVEC 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.").

in RTOs/ISOs or Transcos, or to construct transmission projects already deemed needed for reliability or reduced congestion in transmission provider regional and inter-regional transmission planning processes. Continuing to provide incentives through increased rates for such programs violates the statutory mandate for just and reasonable rates and the long-held judicial mandate in *City of Detroit* that rate adders be limited to no more than is necessary to achieve the policy objective.

VI. AUTOMATIC TRANSMISSION INCENTIVES WOULD VIOLATE LONG-HELD POLICY REQUIRING A DEMONSTRATED NEED FOR THE INCENTIVES [NOI AT ¶45, QUESTIONS 90 - 92].

FERC should not adopt an automatic mechanism for granting transmission incentives. All requests for proposed transmission project incentives should be reviewed on a case-by-case basis. Automatic approvals violate section 219 of the FPA. That statute explicitly requires FERC to implement a transmission incentive policy for the express "purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[32] A policy of automatically granting certain types of transmission incentives would forego any FERC evaluation of the need for the incentive, the potential benefits to be derived from the incentive, or whether the applicant has met the required criteria. It also would pose impossible barriers to the ability of transmission customers and FERC to evaluate transmission incentive requests to ensure that resulting rates remain just and reasonable, in compliance with the statutory requirements of FPA sections 205 and 206. Moreover, automatic grant of transmission incentives would require FERC to avoid its obligation under *City of Detroit* to ensure that any rate increase designed to encourage specific policy goals be no

[32] 16 U.S.C. § 824s(a).

more than needed to achieve those objectives. Finally, there is no evidence that the current case-specific approach to evaluating transmission incentive requests has resulted in administrative inefficiencies, unduly protracted litigation, or excessive litigation expense for utilities.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the Office of the Ohio Consumers' Counsel requests that FERC protect consumers from bearing the cost of incentives that are no longer needed to encourage investment in new electric transmission infrastructure. The Ohio Consumers' Counsel requests that FERC revise its transmission incentive policy to eliminate all transmission incentives and ROE incentive adders.

Systemic changes in the industry, including changes in the regional and inter-regional transmission planning processes, the wide-spread use of formula rates for cost recovery, and the generous returns granted for investment in these monopoly facilities all provide utilities ample incentives to invest in transmission infrastructure. FERC should safeguard consumers by ensuring that transmission rates remain just and reasonable by eliminating unwarranted transmission incentives.

Respectfully submitted,

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