UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE ORGANIZATION OF PJM STATES, INC.

On March 21, 2019, the Federal Energy Regulatory Commission ("FERC" or the "Commission") issued a Notice of Inquiry ("NOI")[1] seeking comments on the scope and implementation of its electric transmission incentives regulations and policy. In response, the Organization of PJM States, Inc. ("OPSI")[2] respectfully submits the following comments.[3]

I. BACKGROUND

Section 1241 of the Energy Policy Act of 2005,[4] codified as Section 219 of the Federal Power Act ("FPA"),[5] directed the Commission to "establish, by rule, incentive-based . . . rate treatments for the transmission of electric energy in interstate commerce."[6] The statute specified that the transmission incentives must be "for the purpose of benefiting customers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[7] In response, the Commission issued Order No. 679 which described a variety of incentives that would potentially be available and, among other things, established a requirement that each

[1] *Inquiry Regarding the Commission's Electric Transmission Incentives Policy,* 166 FERC ¶ 61,208 (2019)
[2] These comments were approved unanimously by the OPSI Board.
[3] Since OPSI is generally a PJM-focused organization, these comments are offered primarily as they pertain to the application of the Commission's transmission incentive rule within the PJM Interconnection, L.L.C. ("PJM") region.
[4] Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1261 *et seq.*, 119 Stat. 594 (2005).
[5] 16 U.S.C. 824s
[6] Section 219(a).
[7] Section 219(a).

applicant demonstrate a nexus between the incentive(s) sought and the risks and challenges of the investment being made.[8]

The Commission notes in the NOI that it has been thirteen years since it issued Order No. 679, and there have been many significant developments in how transmission is planned, developed, operated, and maintained during that time period.[9] Because of that, the Commission is now re-examining the scope and implementation of its transmission incentives policy and how it should evaluate future requests for transmission incentives. In particular, the Commission is considering whether the "risks and challenges" approach, first adopted in Order 679, remains the most effective means of complying with the requirements of Section 219

II. COMMENTS

A. The Incentive Must Benefit Consumers

OPSI recommends that the Commission retain its Order 679 risks and challenges framework in its process for evaluating incentive applications. In OPSI's view, however, the risk/challenge approach, by itself, does not achieve the transmission investment objective specified in Section 219 in the way Section 219 requires. Specifically, Section 219 contains two critical elements which limit incentive eligibility: (1) the incentivized project or action[10] must be for the purpose of "ensuring reliability or reducing the cost of delivered power by reducing transmission congestion"[11]; and (2) the result of granting an incentive must be "for the purpose of benefitting consumers."[12] While the objective of Section 219 was to enhance transmission

[8] *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).
[9] NOI, at P 2.
[10] A relevant action is, for example, joining a Transmission Organization, which is discussed in Section 219(c) and covered in Section II.B of these comments below.
[11] Section 219(a)
[12] Section 219(a)

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investment, that objective is subject to these critical limiting elements on incentive eligibility. In OPSI's view, the Commission's current incentive application review process does not give sufficient weight to the "benefiting consumers" element of Section 219.[13]

The Commission's current transmission incentives rule correctly requires an applicant for a project-specific incentive to show that its project will meet the threshold statutory requirement for ensuring reliability or reducing transmission congestion.[14] Presumably, the potential improved reliability or potential reduced transmission congestion that reduces the delivered cost of power are the sources of the "benefits" to which Section 219(a) refers. But, not all projects or actions that improve reliability or reduce transmission congestion will benefit consumers, particularly when taking cost into account. While consumer benefit is a statutory requirement for the granting of incentives under Section 219, the Commission does not currently employ any benefit metrics in its process for evaluating incentive requests and has no mechanism such as a benefit/cost test to ensure that incentives are granted only for projects or actions that benefit consumers.

The Commission previously considered this benefits issue in Order 679[15] and 679-A.[16] In Order 679-A, the Commission listed four reasons for rejecting requests that it include a benefit/cost test in its process for evaluating incentives requests. The four stated reasons can be summarized as:

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[13] OPSI notes that, in the Commission's Order 1000 proceeding, multiple parties (including the Illinois Commerce Commission and the Organization of MISO States) requested that the Commission reconsider its transmission incentive policy to incorporate benefit/cost measures therein. However, the Commission denied those requests at that time (2011) stating that they were "beyond the scope" of that proceeding. (Order 1000, at P 771). OPSI thanks the Commission for now putting this benefits issue into the scope of its March 21 NOI.

[14] Although Commission's reliability/transmission congestion threshold test is not sufficiently rigorous with respect to the Transco or RTO participation ROE adder incentives, as OPSI will explain in Section II.B of these comments.

[15] Order 679, at P 65.

[16] Order 679-A, at 35-40.

(1) The Commission interpreted Congress's approval of Section 219 the previous year as rejection of the Commission's traditional approach for setting transmission rates, of which benefit/cost assessment was a part;
(2) All rates must be just and reasonable under Section 205, including incentive rates;
(3) The courts have held that the Commission may consider non-cost factors in setting rates; and
(4) The Commission's nexus test will ensure that incentives are granted only where the incentives are tailored to address the demonstrable risks or challenges faced by the applicant.

In putting forth its first stated reason for not adopting a benefit/cost test within its initial transmission incentives rule, the Commission did not find that Congress was passing judgment <u>specifically</u> on the benefit/cost measures that the Commission employed prior to 2005 or benefit/cost measures generally. Instead, the Commission observed that Section 219 "was enacted to counteract a long decline in transmission investment"[17] and that Congress was urging the Commission to "use its full discretion under section 205 to 'promot[e] capital investment'."[18] The Commission concluded from those observations that Section 219 did not permit it to codify the then-current status quo in its new incentives rule.[19] OPSI does not dispute any of those Commission observations or the conclusion the Commission reached therefrom. But, those 2006 Commission observations about Congressional intent with respect to Section 219 did not, and do not, require or permit the Commission to ignore or give short-shrift to the requirement specifically stated in Order 219 that consumers be benefitted by the granting of an incentive. In addition, the passage of thirteen years and the current active state of transmission investment,

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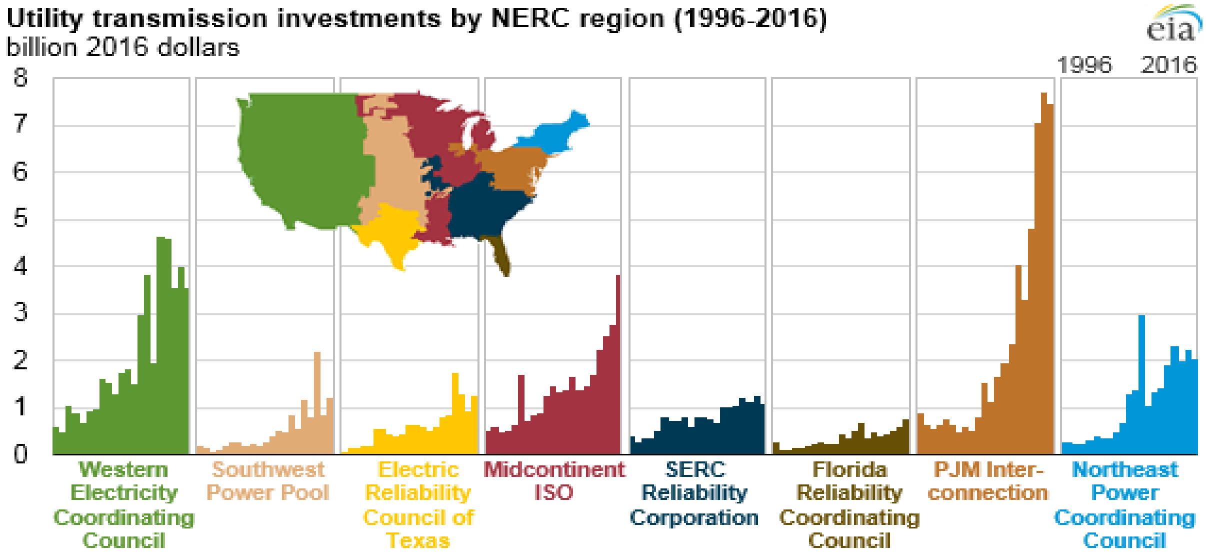
[17] Order 679-A, at 36.
[18] Order 679-A, at 36.
[19] Order 679-A, at 36.

especially in PJM,[20] give further weight to OPSI's benefit/cost recommendations at this time.



In its second stated reason for not adopting a benefit/cost test within its initial transmission incentives rule, the Commission seems to suggest that, because all rates must be just and reasonable under section 205, the Commission need not include provisions in its incentive application review process to assess justness and reasonableness of granting specific incentives.[21] Section 219 specifically notes that, "all rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of Sections 205 and 206 that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential."[22] But that fact indicates to OPSI that the Commission should employ benefit metrics or require a benefit/cost test to ensure that the incentives it grants pursuant to Section 219 are just and reasonable, rather than rejecting such a test. Approving an

[20] See chart from the U.S. Energy Information Administration (February 9. 2018).
[21] Order 679-A, at 38.
[22] Section 219(d).

incentive under Section 219 and then subsequently rejecting it under Section 205 would seem to put the statutes at conflict.

With respect to the Commission's third stated reason for not adopting a benefit/cost test within its initial transmission incentives rule, OPSI understands the Commission's reference to "non-cost factors" as noting that there may be non-quantifiable benefits that a strictly quantitative benefit/cost test may not capture. Five years after the Commission declined to adopt benefit cost measures in Order 679, the Commission directly took on the benefits issue in the context of Order 1000. In its Regional Cost Allocation Principle 1, the Commission directed that "[t]he cost of transmission facilities must be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits."[23] With respect to benefits, the Commission stated that benefits may include, "<u>maintaining reliability</u> and sharing reserves, production cost savings <u>and congestion relief</u>, and/or meeting Public Policy Requirements."[24] Since the Commission has determined in Order 1000 that the benefits of projects for maintaining reliability and projects for congestion relief (the two types of projects eligible for incentives under Section 219) can be incorporated into benefit/cost ratios, the Commission's Order 679-A concern regarding "non-cost factors," is now ripe for reconsideration.

The Commission's fourth stated reason for not adopting a benefit/cost test within its initial transmission incentives rule, was merely a note that the Commission's nexus test will ensure that incentives are granted only where the incentives are tailored to address the demonstrable risks or challenges faced by the applicant. While the Commission's nexus test may be useful both for identifying barriers that may cause a transmission project to not be

[23] Order 1000, at P 622.
[24] Order 1000, at P 622, emphasis added.

undertaken or completed absent an incentive and in in tailoring the incentive(s) to address those barriers, but application of the nexus test doesn't mean that the project will produce benefits for consumers as required by Section 219. On the other hand, benefit/cost analyses are specifically designed for the purpose of measuring benefits and comparing them to cost (including cost of the incentive, if any). To ensure the statutory requirement that incentives granted by the Commission must be "for the purpose of benefitting consumers", the current nexus test is not a proxy for, or substitute for, benefit metrics and benefit/cost ratios.

While a benefit/cost test should, arguably, have been part of the Commission's incentive review process from the beginning, OPSI is pleased that the Commission is now inquiring about how it might incorporate benefit metrics and benefit/cost tests in its transmission incentive evaluation process which currently uses a risk/challenge framework and a nexus test on a case-by-case basis to tailor granted incentives to the risks and challenges faced. The NOI posits that, "The Commission could instead evaluate incentive requests based on the transmission project's potential to achieve benefits related to reliability and reductions in the cost of delivered power by reducing transmission congestion."[25] But, because of the way the Commission uses the word "instead" in that statement, OPSI is concerned that the Commission perceives assessing consumer benefits in its evaluation of transmission incentive requests to be an alternative to its current risk/challenge framework and nexus test, rather than an addition to those current processes. To be clear, OPSI is proposing that the Commission employ benefit metrics and use benefit/cost analyses in addition to its current risks/challenges assessment, rather than instead of that current assessment process.

[25] NOI, at 13, emphasis added.

The Commission's risk/challenge test for evaluating transmission incentive requests helps identify transmission projects that, because of the risk/challenge barrier, might not be completed absent granting of an incentive. The risk/challenge assessment, even when paired with the nexus test, is not, as the Commission suggests, a proxy for the benefits expected to be produced by the incentive.[26] Any project assessment test can be improved, and the Commission's risk/challenge test has matured through case-by-case application over the thirteen years that the test has been employed. OPSI believes that, overall, the Commission's risk/challenge test has performed satisfactorily for the limited purpose for which it was designed, namely, helping to identify transmission projects that might not be undertaken or completed absent granting of an incentive. The reason why such a test is important is that it would be wasteful and unnecessary to grant an incentive for a project or action that would happen without the incentive. OPSI also believes that the Commission's "nexus" requirement, as refined in its 2012 Policy Statement does a reasonable job tailoring an incentive to the risk or challenge faced by a transmission project.

While identifying transmission projects that might not be undertaken or completed absent granting of an incentive (and tailoring the incentive to the risk/challenge that a project faces) is not an explicit requirement of Section 219, it is implicit in the transmission investment objective set out by Section 219. For that reason, OPSI recommends that the Commission retain its current risk/challenge framework and nexus test. On the other hand, Order 219 explicitly and unambiguously requires that the granting of an incentive must be "for the purpose of benefitting consumers."[27] Even if an incentive applicant satisfies the statutory requirement for ensuring reliability/reducing transmission congestion and the project is determined, pursuant to the

[26] NOI, at 12.
[27] Section 219(a).

risk/challenge framework, to be unlikely to be completed absent receipt of an incentive, and the incentive is tailored, using the nexus test, to the risks/challenges faced, that project does not necessarily warrant an incentive. Rather, the project must also benefit consumers. Specifically, the benefit of the project for the consumers who will be required to pay for it must be determined to exceed the cost of the project which those consumers bear, plus the additional cost of the incentive, if any.

To implement a benefit/cost test, the Commission will need to have methods for assessing benefits—typically referred to as benefit metrics. Fortunately, the nation's RTOs and other Order 1000 regional planning entities have considerable expertise in developing transmission project benefit metrics within the context of their Commission-required Order 1000 transmission planning functions. OPSI recommends that the Commission gather information from the RTOs and other Order 1000 regional planning entities, and, perhaps, other relevant entities, about how benefit metrics are currently used in transmission project evaluation processes. After that information is available, it may be helpful for the Commission to solicit comments on the details around how benefit metrics could be used in developing a benefit/cost test applicable to Section 219 transmission incentive requests.

B. Incentive for Joining a Transmission Organization or Being a Transco

1. Incentive for Joining a Transmission Organization

Subsection (c) of Section 219 authorizes the Commission to grant an incentive to a "transmitting utility or electric utility that joins a Transmission Organization." In contrast to Subsection 219(a) which is largely project-focused, Subsection 219(c) is aimed at incenting a broader and more general action by a utility, namely the action of joining a Transmission Organization. As with project-based incentives, OPSI avers that an incentive granted under Subsection 219(c) must also be shown to be "for the purpose of benefitting consumers by

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ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." Accordingly, as a threshold matter, an applicant for an incentive under Subsection 219(c) should be required to demonstrate that a result of its participation in the Transmission Organization will be either ensuring reliability or reducing transmission congestion in a way that will reduce the cost of delivered power. As with its evaluation recommendation for project-specific incentives, OPSI believes that the Commission can use a risk/challenge framework and nexus test to assess whether the incentive requested under Subsection 219(c) (joining a Transmission Organization) is needed to overcome a barrier or hindrance which would otherwise thwart the applicant from joining the Transmission Organization (and, thus, thwart the achievement of the reliability improvement or the congestion reduction). Similarly, as with project-based incentives, OPSI believes that the Commission should employ benefit metrics and use a benefit/cost test in its evaluation of incentive applications under Subsection 219(c) to ensure that the "benefitting consumers" requirement of Section 219 is satisfied (specifically that the reliability improvement or congestion reduction achieved through participation of the utility in the Transmission Organization benefits the consumers who bear those costs). An incentive should not be granted to an applicant under Subsection 219(c) if doing so does not benefit those consumers.

An incentive granted under Subsection 219(c) that is ongoing in nature, such as an adder to the utility's base ROE, should be discontinued on a showing that the ongoing cost of the incentive to consumers exceeds the ongoing benefit they receive. Similarly, if a utility would be reasonably likely to continue its participation in the Transmission Organization even if its previously granted incentive were to be discontinued, the ongoing costs to consumers of maintaining the incentive would arguably exceed the ongoing benefit of doing so. For example, if a state law requires utility participation in a Transmission Organization, the utility is not likely to discontinue its participation and the costs to consumers of any incentive for the utility to participate in the Transmission Organization would be wasteful.[28]

On December 21, 2018, OPSI President Michael Richard, on behalf of the OPSI Board of Directors sent a letter ("December Letter") to all five FERC Commissioners to express concern regarding "the ROE adder incentive for RTO participation."[29] The OPSI Board expressed its wish to "work[ing] with the Commission to ensure that ROE incentive policy achieves its intended goals and produces just and reasonable rates."[30]

OPSI notes here that ROE is not specifically mentioned in Section 219(c) regarding incentives for joining a Transmission Organization and that non-ROE incentives may be better tailored to the Section 219(c) goal of promoting participation in Transmission Organizations. In Q62, the Commission asks whether incentives other than ROE adders should be considered for utilities that join Transmission Organizations, and OPSI would support that path.[31] Non-ROE incentives may be particularly useful for inducing non-public utility (*e.g.*, co-op) participation in Transmission Organizations.

2. Incentive for Being a Transco

The Commission's current process for Transco incentives suffers from some of the same weaknesses as the Commission's current process for Transmission Organization participation incentives. Specifically, the requirements for demonstrating that a result of incenting the Transco structure will be either ensuring reliability or reducing transmission congestion in a way

[28] For instance, Virginia state law requires certain electric utilities in the Commonwealth to join a regional transmission entity, See, Va. Code §56-579.
[29] December Letter, at 1.
[30] December Letter, at 2.
[31] NOI, at P 38.

that will reduce the cost of delivered power are not clear and transparent. Nor is it clear that the Commission applies a risk/challenge test to assess whether the likelihood that achievement of the reliability improvement or the congestion reduction would occur absent granting of the Transco incentive. Also, the Commission does not currently employ benefit metrics or use a benefit/cost test in its evaluation of Transco incentive applications to ensure that the "benefitting consumers" requirement of Section 219 is satisfied. Finally, OPSI notes that, unlike Subsection 219(c), which specifically authorizes the Commission to grant an incentive to an electric utility that joins a Transmission Organization, Section 219 does not specifically authorize the Commission to approve Transco incentives.

C. Incentive Re-Evaluation

OPSI expects some other commenters in this proceeding to recommend that the Commission require periodic re-evaluation of some or all of the incentives it grants. OPSI is not necessarily opposed to such proposals, but enhanced reporting requirements may be an adequate substitute at this time as described below. OPSI is concerned that consumers not be required to continue to bear the costs of incentives that no longer serve the purpose of providing consumer benefits or the costs of continuing to incent utility actions which would occur even without the incentive. However, OPSI is also concerned that mandatory re-evaluation could be overly burdensome, and such administrative processes themselves contribute to consumer costs.

In the NOI, the Commission describes Form FERC-730 which requires transmission incentive recipients to provide limited information in annual reports.[32] These reporting requirements are not adequate, particularly if the Commission adopts OPSI's recommendation regarding benefit metrics and benefit cost measures. As described in the NOI, Form FERC-730

[32] NOI, at P 48.

requires incentive recipients to provide only general project cost data and does not include any reporting whatsoever regarding benefits. Also, Form FERC-730 appears designed for project reporting, rather than for company reporting by Transco incentive recipients or recipients of incentives to join Transmission Organizations. The Commission needs to collect data to ensure that each of the incentives it grants continues to provide benefits exceeding costs.

For this reason, OPSI recommends that the Commission enhance its reporting requirements for incentive recipients,[33] to gather information which will shed light on whether a previously granted incentive should be modified or discontinued. The benefit/cost data in the Commission's annual reporting requirement should mirror the benefit/cost data required in the incentive application review process recommended by OPSI in these Comments. Robust reporting requirements, in conjunction with current FPA Section 206 complaint rights, may adequately address the concerns of parties seeking periodic re-evaluation of incentives previously granted.

III. CONCLUSION

In its December 21, 2018 Letter, the OPSI Board encouraged the Commission to initiate a notice of inquiry to begin the process of re-examining its transmission incentive policy."[34]OPSI appreciates the Commission's NOI and offers these comments for the Commission's consideration. OPSI encourages the Commission to add a benefit/cost test to its current incentive application evaluation process to ensure that the statutory requirement for consumer benefits is satisfied. OPSI also encourages the Commission to enhance its reporting requirements on incentive recipients so that sufficient information will be available for

[33] OPSI does not support the Commission's idea (Q 99) for imposing additional reporting requirements on entities not receiving incentives as a means for assessing the effectiveness of the incentives granted to recipients.

complainants to satisfy the *prima facie* threshold required for Section 206 complaints. Additionally, OPSI is concerned that previously granted ROE adders for participation in a Transmission Organization may now constitute an unjust and unreasonable burden on consumers.

Respectfully Submitted,

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