UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Initial Comments of the
New Jersey Board of Public Utilities and
The New Jersey Division of Rate Counsel

The New Jersey Board of Public Utilities ("NJBPU" or "Board") and the New Jersey Division of Rate Counsel ("NJRC") (collectively the "NJ Parties") provide these comments to the Federal Energy Regulatory Commission ("the FERC" or "Commission") in response to its March 21, 2019 Notice of Inquiry ("NOI")[1] in the above-captioned docket regarding the *Commission's Electric Transmission Incentives Policy.*

I. BACKGROUND

Congress passed the Energy Policy Act of 2005 ("EPAct'05") to address certain trends and conditions within the electric industry, "particularly[,] spiking electricity prices, supply shortfalls, and bottlenecks."[2] To bolster investment in the construction of new power lines and transmission facilities, the EPAct'05 issued specific mandates to the FERC. The FERC's directives were codified as a new Section 219 of the Federal Power Act ("FPA"). Section 219 required the Commission to promulgate rules to establish transmission incentives "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered

[1] Inquiry Regarding the Commission's Electric Transmission Incentives Policy, 166 FERC ¶ 61,208, Docket No. PL19-3 (Mar. 21, 2019) ("2019 Transmission Incentives NOI").
[2] *Energy Policy Act of 2005: Summary and Analysis of Enacted Provisions*, CONGRESSIONAL RESEARCH SERVICE at CRS-93 (Mar. 8, 2016), https://www.everycrsreport.com/files/20060308_RL33302_5deb6e20eda4faa299d9f2b5ca6cdacf9c60c0b5.pdf.

power by reducing transmission congestion."[3] In the new Section 219, Congress explicitly required that all rates approved under the new FERC rules be "just and reasonable and not unduly discriminatory or preferential."[4]

Pursuant to the mandates of EPAct'05, on November 18, 2005, the FERC issued a Notice of Proposed Rulemaking ("NOPR")[5] seeking comments on amending its regulations to establish incentive-based rate treatments for transmission investment. The NJBPU submitted comments in response to the NOPR, advising the Commission "to be cautious in its use of financial incentives for transmission development."[6] The NJBPU also encouraged the FERC to consider demand-side measures as an alternative to the proposed new transmission lines or upgrades before approving the added financial incentives.[7] The NJRC, through the National Association of State Utility Consumer Advocates ("NASUCA"), also filed comments stating that the proposed incentives would result in significant costs to ratepayers that would offset any potential benefits.[8] NASUCA also reminded the Commission that utilities already have an obligation to provide service in an efficient manner and charge only just and reasonable rates.[9] Finally, NASUCA expressed concern that the incentives did not include any performance accountability.[10]

Following the NOPR, the FERC issued a Final Rule, Order No. 679 on July 20, 2006.[11] In considering the comments on applying a conditional showing that "the facilities would not

[3] 16 U.S.C. § 824s.
[4] 16 U.S.C. §824s(d).
[5] *Promoting Transmission Investment through Pricing Reform*, Notice of Proposed Rulemaking, Docket No. RM06-4 (Nov. 18, 2005).
[6] *Promoting Transmission Investment through Pricing Reform*, Rulemaking Comment of the New Jersey Board of Public Utilities at 3, Docket No. RM06-4 (Jan. 11, 2006).
[7] *Id.* at 5.
[8] *Promoting Transmission Investment through Pricing Reform*, Rulemaking Comment of the National Association of State Utility Consumer Advocates at 8-9, Docket No. RM06-4 (Jan. 11, 2006).
[9] *Id.* at 9-10.
[10] *Id.* at 17.
[11] Promoting Transmission Investment through Pricing Reform, 116 FERC ¶ 61,057 (July 20, 2006) ("Order 679").

have been built absent the incentives,"[12] the Commission determined that it would "factor those considerations into an analysis of the proposed incentive,"[13] but would not "require applicants to satisfy the requirements proposed."[14] The Commission concluded: "[t]his notwithstanding, we do require applicants to show some nexus between the incentives being requested and the investment being made, i.e., to demonstrate that the incentives are rationally related to the investments being proposed."[15]

Through Order No. 679, the Commission granted all jurisdictional public utilities complete recovery for construction work and pre-operation costs. Inviting investment, the FERC's policies allowed investors to obtain full recovery of costs pertaining to abandoned facilities. The Commission offered investors a generous return on equity which could then be boosted by an adder for participating in a transmission organization. The utilities were also permitted to recover prudently incurred costs for compliance with reliability standards. Further incentives included: (1) hypothetical capital structures, (2) accelerated depreciation, (3) deferred income taxes, (4) deferred cost recovery for utilities with rate freezes, (5) single-issue ratemaking, and (6) adjustments to book-value of sales/purchases. The FERC also allowed incentives for use of advanced technology in new transmission projects. To obtain the incentives, the Commission required the applicants to: (a) satisfy the requirements of Section 219 by demonstrating that the facilities ensure reliability or reduce the cost of power by reducing congestion, and (b) demonstrate a nexus between the incentive(s) requested and the benefits provided by the project.[16]

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[12] *Id.* at P 46.
[13] *Id.* at P 48.
[14] *Id.*
[15] *Id.*
[16] *Id.* at PP 6, 26.

In 2011, the Commission revisited the "scope and implementation of its transmission incentives regulations and policies" in Order No. 679.[17] The Commission noted that the "electric industry has experienced significant changes" since the issuance of Order 679 in 2006.[18] The FERC issued the NOI to ensure that its "incentives regulations and policies are encouraging the development of transmission infrastructure in a manner consistent with the FPA Sections 219, 205 and 206."[19] The Commission "believe[d] that there remains a need for additional transmission investment to ensure the reliable operation of the grid and reduce the cost of delivered power by reducing transmission congestion."[20]

The NJ Parties filed joint comments with an *ad hoc* coalition of state public utility commissions, state consumer advocates, public power systems, rural electric cooperatives, and end users.[21] Supplementing this filing, the NJBPU also submitted individual comments on September 12, 2011 that again emphasized the need for the FERC to consider alternatives to its incentive-based rate treatments for transmission.[22] In this filing, the NJBPU encouraged the Commission to consider incentives for supply-side alternatives as a complement to its transmission incentive policies.[23] The NJBPU noted that the congestion in urban areas of New Jersey was due to a lack of adequate generation and that New Jersey "recognized that the development of a new supply of generation is key to maintaining reliable service in the State."[24] Furthermore, the NJBPU advocated that "transmission only incentives, especially when so freely

[17] Promoting Transmission Investment Through Pricing Reform, 135 FERC ¶ 61,146 at P 1 (May 19, 2011).
[18] *Id.* at P 2 n.5.
[19] *Id.* at P 2.
[20] *Id.* at P 10.
[21] *Promoting Transmission Investment Through Pricing Reform*, Joint Comments of the American Forest & Paper Association, et al., Docket No. RM11-26 (Sept 12, 2011) ("Ad Hoc Coalition Comments").
[22] *Promoting Transmission Investment Through Pricing Reform*, Comments of the New Jersey Board of Public Utilities at 2-6, Docket No. RM11-26 (Sept. 12, 2011).
[23] *Id.* at 3.
[24] *Id.* at 5.

provided, give economic advantage to transmission solutions over possible non-transmission solutions to reliability needs."[25] The Board also noted that since Order 679, the FERC's more than 75 applications for transmission incentives, with a total estimated cost of $50 billion, were granted an average return on equity adder of "130 basis points, which amounted to approximately $650 million each year."[26]

During the past decade, on at least six occasions, the NJ Parties have challenged incentives for specific projects, arguing that the returns earned by the utilities were sufficient and the additional incentives were excessive and unnecessary.[27] On December 21, 2018, the Organization of PJM States, Inc. ("OPSI") sent a letter encouraging the Commission to open an NOI to not only review the "policy around the application of new incentive requests, but also the ability of existing incentives to achieve desired outcomes."[28] OPSI raised particular concern with the "overly generous" RTO participation adder, questioning whether it is needed given the drastic change in the RTO landscape since 2006. Consistent with NJBPU's long-standing

[25] *Id.* at 6.
[26] *Id.* at 2.
[27] *See* Public Service Electric and Gas Company Request for Incentive Rate Treatment for Four Baseline Transmission Projects, New Jersey Board of Public Utilities Notice of Intervention, Protest and Request for Evidentiary Hearings, Docket No. ER11-1985 (Nov. 22, 2010) (arguing PSE&G failed to meet the requirements for incentive rate treatment); Public Service Electric and Gas Company, New Jersey Board of Public Utilities Protest, Docket No. ER10-159 (Nov. 23, 2010) (arguing PSE&G failed to meet the requirements for incentive rate treatment); Public Service Electric and Gas Company Request for Incentive Rate Treatment for Five Baseline Transmission Projects, New Jersey Board of Public Utilities Motion to Intervene, Protest and Request for Evidentiary Hearings, Docket No. ER11-3352 (May 5, 2011) (arguing PSE&G failed to meet the requirements for incentive rate treatment, that CWIP was unnecessary and that no new technologies were being implemented); Public Service Electric and Gas Company Request for Incentive Rate Treatment for the Northeast Grid Reliability Transmission Project, New Jersey Board of Public Utilities Motion to Intervene, Protest and Request for Evidentiary Hearings, Docket No. ER12-296 (Nov. 21, 2011) (arguing baseline projects should not qualify for incentives, and that the utility failed to show that the risks and challenges of the proposed project were not routine or that the project reduced transmission related congestion costs); Potomac Electric Power Company, et al., New Jersey Board of Public utilities Motion to Intervene and Protest, Docket No. ER13-607 (Jan. 11, 2013) (arguing abandonment costs are unwarranted and improperly shifted risk on ratepayers); and Public Service Electric and Gas Company, Motion for Leave to Submit Answer and Answer of the New Jersey Board of Public Utilities, Docket No. ER14-1608 (May 5, 2014) (arguing the project was consistent with routine business practices and addressed basic transmission reliability and safety concerns and utility's current ROE of 11.68% was sufficient to cover any risk, making CWIP unnecessary).
[28] Letter from Michael Richard, OPSI President, to the FERC (Dec. 21, 2018), *available at* https://opsi.us/wp-content/uploads/2019/03/FERC-Letter-Transmission-ROE-Incentive-Policy-Leter-12.21.18.pdf.

position, OPSI noted that such adders "may also be an unintended disincentive to development of non-transmission alternative solutions for reliability and congestion concerns."[29] The other incentives provided by the Commission, such as formula rates, abandoned plant recovery and construction work in progress recovery, already reduce the risk to Transmission Owners ("TOs") and therefore the need for the RTO participation adder simply does not exist. OPSI concluded that "the granting of ROE incentives on top of the base ROE for any company or project should reflect specific goals and risks and be truly merited."[30]

On March 21, 2019, the FERC issued this NOI on its incentive policies for electric transmission, which marks the third occasion that the Commission is considering transmission incentives since 2005.[31] Again citing significant changes, the FERC notes that "the landscape for . . . transmission infrastructure has changed considerably."[32] The Commission poses over 100 questions on a wide variety of issues that can be categorized as: (1) consideration of the overall approach to evaluating incentives, (2) objectives of the transmission incentives, (3) assessment and (4) implementation of the incentive policies, and, (5) evaluation of the effectiveness of incentives. The NJ Parties submit the following comments in reply to the Commission's NOI.

II. COMMENTS

To consider the significant changes in the transmission landscape, the Commission requests comments in the NOI on many aspects of its transmission incentives policies initiated in 2006. Private capital is cheap and rates are at historic lows. The NJ Parties provide comments on specific incentive policies as well as the overall impact of the Commission's incentive

[29] *Id.* at 1.
[30] *Id.*
[31] 2019 Transmission Incentives NOI, *supra* note 1.
[32] *Id.* at P 13.

policies over time. Transmission growth has occurred to such an extent that transmission infrastructure no longer faces the underinvestment conditions which concerned Congress in 2006. Many factors, such as a steady increase in generation capacity, a steady decrease in peak load and a significant decrease in forced outages, point to improved grid conditions in PJM. Accordingly, the Commission should revise its incentive policies now to relieve ratepayers from further excessive transmission costs. The NJ Parties also recommend that the Commission provide an appropriate ROE as the exclusive financial incentive since earning an authorized ROE is already an incentive for investors. Furthermore, a breakout of the types of transmission projects confirms that investment decisions by TOs are not necessarily driven by incentives. Indeed, RTOs are no longer a novel concept, and equity markets would likely punish an investor-owned utility that sought to leave an existing RTO. To reflect this changed reality, the NJ Parties encourage the Commission to implement a cost-benefit analysis requirement for transmission project proposals and to eliminate the RTO participation adder. Alternatively, if the Commission chooses to retain the adder, the Commission should discontinue the practice of granting standard 50 basis points, establish a sunset period, and reserve the adder for TOs who actually join a newly forming Transmission Organization.

A. State of Transmission in 2006 vs. 2019

In the March 21, 2019 NOI regarding transmission incentives, the FERC states that "the landscape for planning, developing, operating and maintaining transmission infrastructure has changed considerably."[33] In the 2015 *National Electric Transmission Congestion Study,* the Department of Energy ("DOE") notes that the "policy context for building new transmission has changed significantly in the intervening years, and the rate of new transmission construction has

[33] *Id.*

risen noticeably."[34] The NJ Parties agree with the DOE that the transmission infrastructure no longer faces the underinvestment conditions that served as the basis for the Commission's extremely generous incentive policies.

In Order 679, issued on July 2006, the Commission found that investment in transmission was "below the 1975 level in real dollars."[35] The DOE confirmed there was inadequate transmission in the electric industry and noted the difficulty in obtaining financing for major transmission lines in 2006.[36] The Commission established its incentive policies to address this downward trend and affirmed in Order No. 679 that investment-based ROEs are "the most direct and effective means of attracting needed capital to improve the nation's transmission infrastructure."[37] Based on the extent of the incentives summarized above, the Commission went through a substantial effort to promote investment in transmission. This effort resulted in significant growth in transmission facilities since 2006. The DOE explained that "[f]ollowing a period of slow growth between years 2000-2005, transmission construction increased steadily from 2006-2010."[38] The DOE continued, "planned shareholder-owned utility transmission investment in 2012 was 70% higher than the investment dollars spent in 2006."[39] As Figure 1 below shows, the PJM region has seen extensive growth in transmission. While the DOE points to a 70% increase of transmission investment in the nation in 2012, the PJM region experienced a 118% growth in transmission in 2012 compared to 2006. In other words, ratepayers in the

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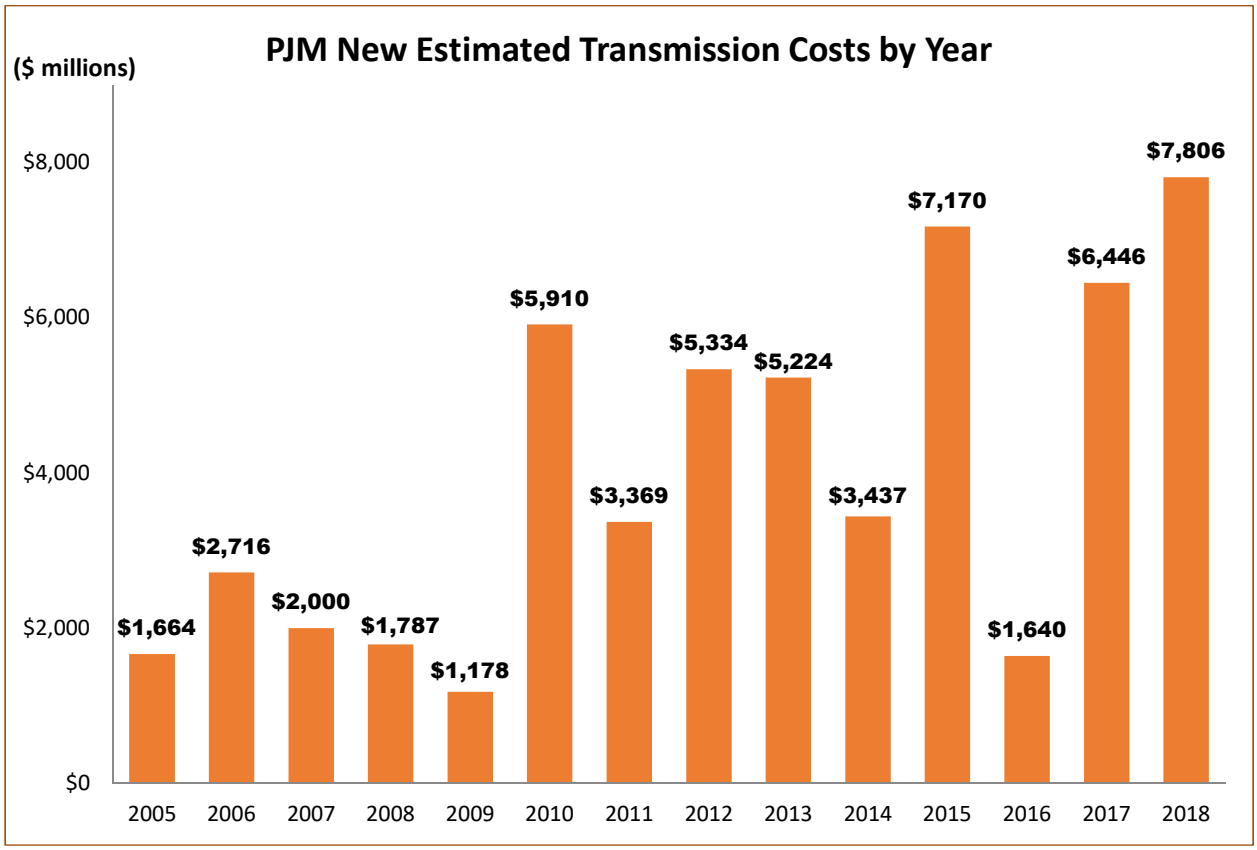
[34] National Electric Transmission Congestion Study, U.S. DEPT. OF ENERGY at 28 (Sept. 2015), https://www.energy.gov/sites/prod/files/2015/09/f26/2015%20National%20Electric%20Transmission%20Congestion%20Study_0.pdf.
[35] Order 679 at P 10.
[36] *Regulatory Incentives for Electricity Transmission – Issues and Cost Concerns*, CONGRESSIONAL RESEARCH SERVICE (Oct. 28, 2011), https://www.everycrsreport.com/files/20111028_R42068_8131831f3d01c6e115a989238a3f2fc2377fd55a.pdf.
[37] Order 679 at P 86.
[38] National Electric Transmission Congestion Study, U.S. DEPT. OF ENERGY at 28 (Sept. 2015), https://www.energy.gov/sites/prod/files/2015/09/f26/2015%20National%20Electric%20Transmission%20Congestion%20Study_0.pdf.
[39] *Id.*

Figure 1[40]



PJM region alone have paid an estimated $55.6 billion in transmission investment from 2005 to 2018. Significantly, a large portion of this growth is through supplemental projects, mostly built without the FERC's suite of incentives and little to no PJM review.[41] This level of growth certainly speaks to an achievement of the FERC's 2006 objective to incent robust investment in transmission. The DOE also affirms that one of the contributing factors to the higher rate of

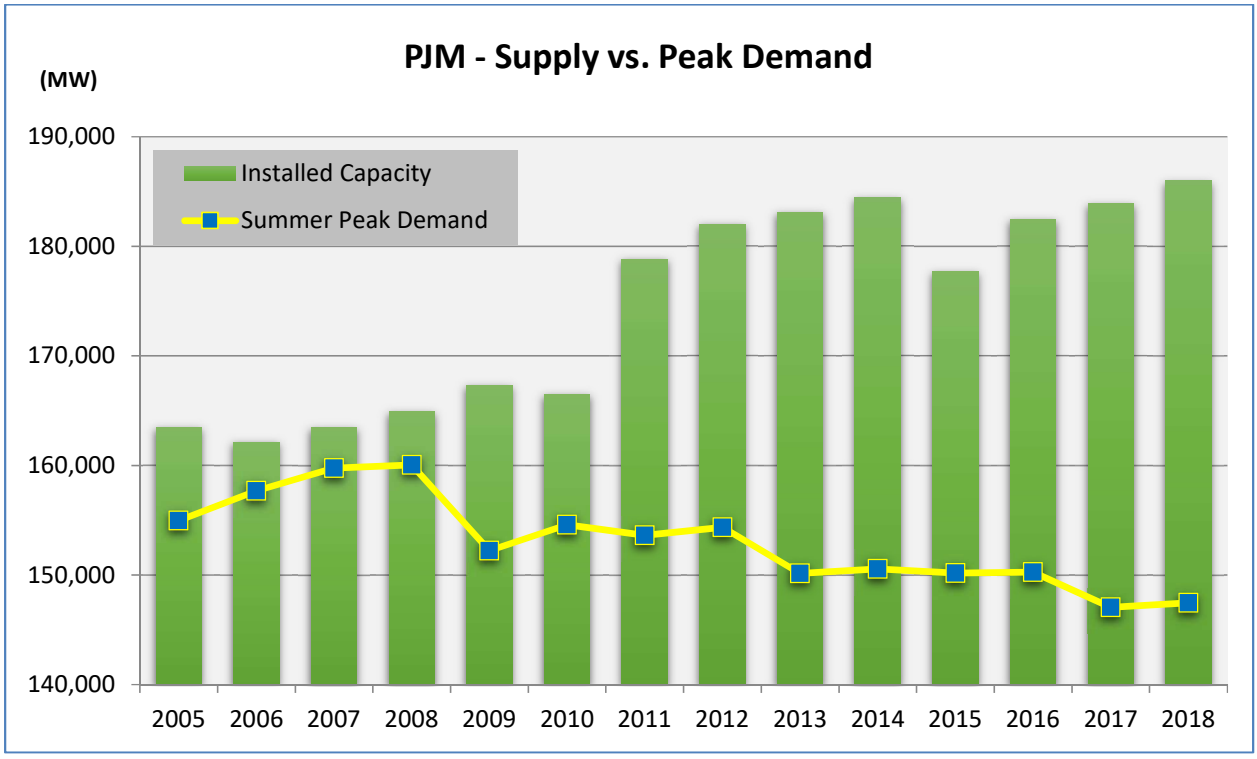
[40] Figure 1 created using data from PJM Interconnection L.L.C., *PJM Update to ISAC* at 7 (Jan. 28, 2019). Significantly, these figures include both baseline and supplemental projects.

[41] PSE&G has built the vast majority of supplemental projects in New Jersey without incentives. Indeed, slightly over half of PSE&G's transmission projects were supplemental projects.

development is the FERC's awarding higher levels of return on investment to many regulated projects for new transmission construction under Order 679.[42]

Thirteen years later, the PJM region further shows in Figure 2 below many signs of improved transmission conditions since 2005, such as peak demand far below generation capacity and improved forced outage rates. PJM has experienced consistent decreases in peak

Figure 2[43]



demand accompanied by a substantial and steady increase in generation capacity. At the same time as this significant transmission growth occurred, it is critical to note that during the economic recession of 2008-2009, electricity demand was reduced significantly and that

[42] National Electric Transmission Congestion Study, U.S. DEPT. OF ENERGY at 29 (Sept. 2015), https://www.energy.gov/sites/prod/files/2015/09/f26/2015%20National%20Electric%20Transmission%20Congestion%20Study_0.pdf.

[43] Figure 2 created using data from PJM Interconnection L.L.C., *PJM Load Forecast Report – January 2019* at Table F-1 (2019), https://www.pjm.com/-/media/library/reports-notices/load-forecast/2019-load-report.ashx?la=en.

"demand growth has still been lower than its historical trend."[44] This trend is visible across the PJM region as well, as shown in Figure 2. Peak summer demand in PJM has decreased nearly 7% since 2006, while the installed generation capacity has increased by almost 15% compared to 2006. As of 2018, PJM's capacity exceeds its peak demand by more than 26%. These statistics contradict the Commission's optimistic outlook on electric demand, which it relied on in 2006 when establishing generous incentive policies. For example, in 2006, the Commission stated that it "expected 50 percent growth in consumer demand for electricity over the next two decades."[45] However, actual demand has been the exact opposite and continues to be at a steady decrease, while capacity continues to steadily increase, pointing to robust conditions in the market.

The significant decrease in forced outage rates within PJM also points towards an improved and more efficient electric grid. In analyzing major events such as the Polar Vortex in 2014, PJM experienced forced outage rates of 22% of its total capacity, or 40,200 MW.[46] In comparison, the forced outages decreased to 12.1% of PJM's total capacity during the 2018 winter peak.[47] Figure 3 below shows the further decrease in forced outage rates in 2019. During the January 30 and January 31, 2019 cold snap, PJM faced forced outages of 8.6% and 10.6% percent of the total PJM capacity.[48]

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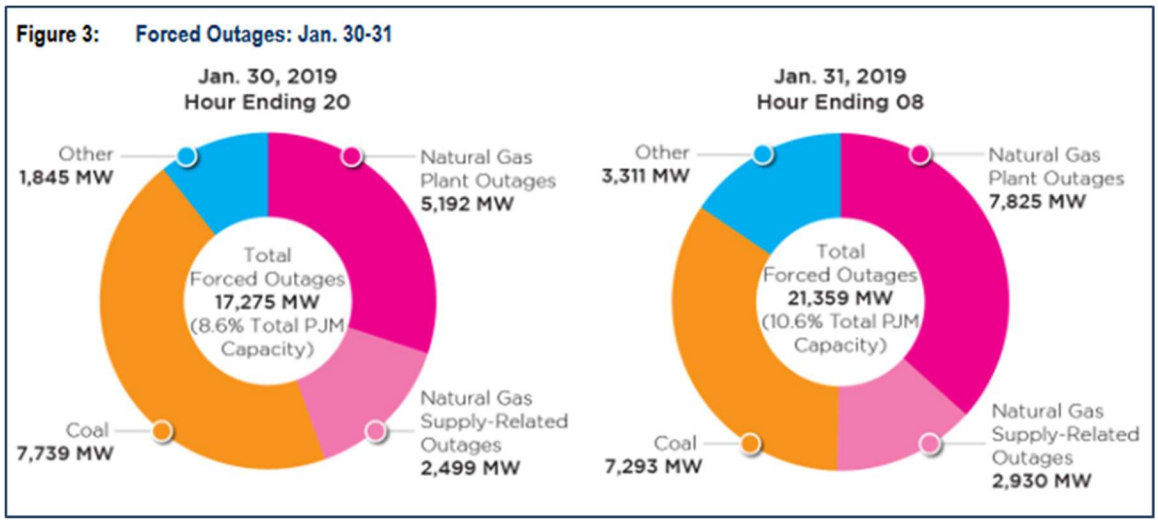
[44] National Electric Transmission Congestion Study, U.S. DEPT. OF ENERGY at xv (Sept. 2015), https://www.energy.gov/sites/prod/files/2015/09/f26/2015%20National%20Electric%20Transmission%20Congestion%20Study_0.pdf.
[45] Order 679 at P 10.
[46] *Cold Weather Operations Summary – January 28 – 31, 2019*, PJM OPERATING COMMITTEE at 4 (Feb. 5, 2019), https://www.pjm.com/-/media/committees-groups/committees/oc/20190205/20190205-oc-cold-weather-ops-january-28-31-info-only.ashx.
[47] *Id.*
[48] *Id.*

Figure 3[49]



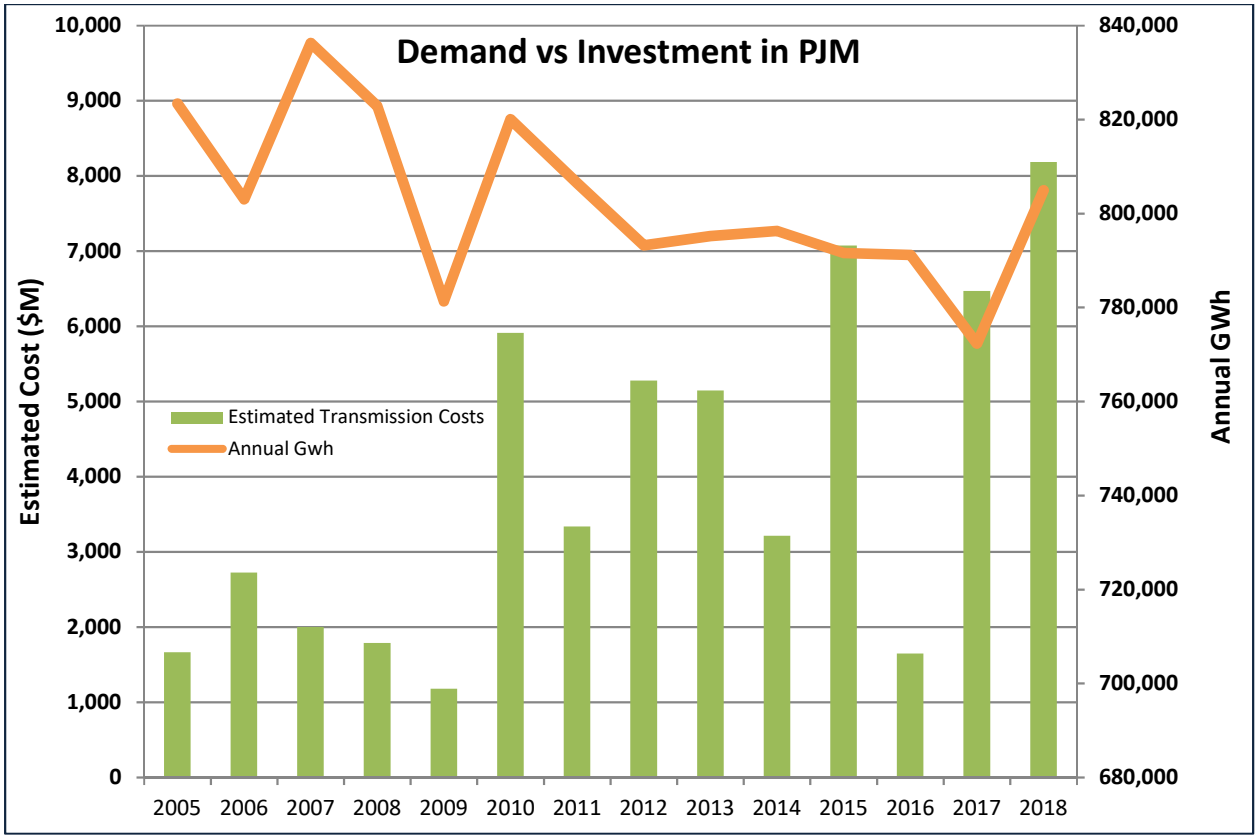
The transmission landscape has changed dramatically. Previously, the Commission sought to prevent events such as the major grid blackout in 2003 and a lag in transmission needed to meet expected demand. To do so, the Commission issued its generous incentive policies. However, since 2006, a steady increase in generation capacity and a steady decrease in peak load, paired with a significant decrease in forced outages, speak to an industry outlook that is far healthier and more robust compared to the pre-EPAct'05 market. Provided that the transmission growth has far exceeded the demand growth for electricity, as evidenced in Figure 4 below, it can be concluded that the FERC has successfully met Congress's mandate in Section 219. In light of this success, it is appropriate for the Commission to revisit its incentive policies to ensure that the incentives remain appropriate. Indeed, excessive incentives result in unjust and unreasonable rates in violation of the law.[50] This achievement for transmission growth should also mark a point for the Commission to consider revising its incentive policies to manage and control any

[49] *Cold Weather Operations Summary – January 28 – 31, 2019*, PJM OPERATING COMMITTEE at 4 (Feb. 5, 2019), https://www.pjm.com/-/media/committees-groups/committees/oc/20190205/20190205-oc-cold-weather-ops-january-28-31-info-only.ashx.

[50] 16 U.S.C. §824s(d).

unnecessary future growth in transmission in the interest of alleviating ratepayers from excessive transmission costs.

Figure 4[51]

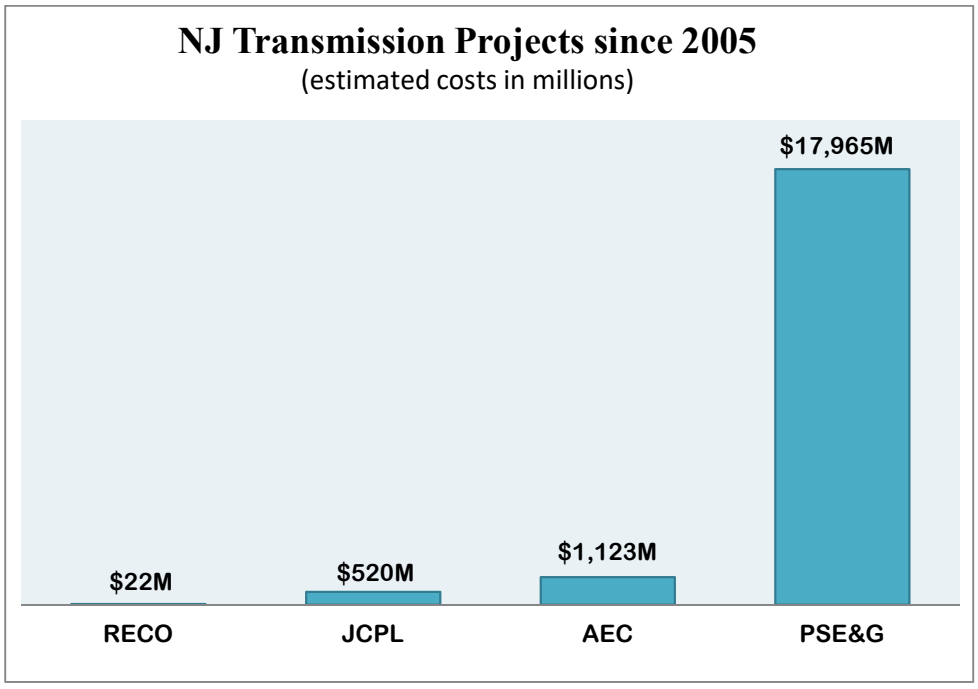


[51] Figure 4 created using data from PJM Interconnection L.L.C., *PJM Update to ISAC* at 6 (Apr. 29, 2019).

B. Transmission Projects within New Jersey

Similar to the nation-wide and region-wide trend of increased transmission investment, New Jersey has experienced a substantial transmission increase since 2005. Figure 5 below shows the estimated amount of transmission project costs by each TO in New Jersey. It is important to emphasize that New Jersey ratepayers have been burdened with approximately $19.63 billion in transmission investment since 2005.[52] Essentially, more than 35% of PJM's total $55.6 billion in transmission investment since 2005 has occurred in New Jersey. These growth percentages are staggering and the NJ Parties have frequently voiced concerns over the significant rise in transmission investment in numerous instances. Moreover, the State's concerns over the

Figure 5[53]



[52] Total dollar amount calculated by adding each TO's estimated costs.

[53] Figure 5 created using data from PJM Interconnection L.L.C., *PJM Update to ISAC* at 14 (Jan. 28, 2019). The Transmission Owners in New Jersey are: Rockland Electric Company ("RECO"); Jersey Central Power and Light Company ("JCP&L"); Atlantic City Electric Company ("AEC"); and Public Service Electric and Gas Company ("PSE&G").

increasing transmission burden have been raised in the New Jersey Energy Master Plans since 2008.[54] The Board has the responsibility of ensuring that electric public utility projects are necessary for safe, adequate and proper service and that the rates paid by ratepayers are just and reasonable. NJRC has the obligation to advocate for the ratepayers. Therefore, the NJ Parties appreciate the Commission's willingness to review its policies and implement necessary revisions in the public interest.

C. An Enhanced ROE is an Incentive

The EPAct'05 intended to promote electric transmission investment for the purpose of relieving congestion and capacity constraints and to ensure future reliability and resilience of the country's grid. The Commission's overall incentive policies have produced a significant increase in investment since 2006, as seen in the data above and acknowledged by the DOE.[55] The Commission is specifically mandated to provide an ROE sufficient to attract new investment in transmission facilities.[56] The current robust state of the market indicates that the FERC has exceeded its overall obligation to increase transmission investment and that continuing incentives at their current level would be unreasonably beneficial to the utilities at the expense of ratepayers/consumers and in violation of the EPAct'05.[57] In considering its future policy regarding incentives, the Commission can fulfill its obligations and comply with the goal of the EPAct'05, by providing an appropriate ROE as the only financial incentive, which is sufficient for investment.

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[54] Draft 2019 New Jersey Energy Master Plan: Policy Vision to 2050 (June 10, 2019), https://nj.gov/emp/pdf/Draft%202019%20EMP%20Final.pdf; New Jersey Energy Master Plan (Oct. 2008), https://www.state.nj.us/emp/docs/pdf/081022_emp.pdf.

[55] National Electric Transmission Congestion Study, U.S. DEPT. OF ENERGY at 29 (Sept. 2015), https://www.energy.gov/sites/prod/files/2015/09/f26/2015%20National%20Electric%20Transmission%20Congestion%20Study_0.pdf.

[56] 16 U.S.C. § 824s(b)(3).

[57] 16 U.S.C. §824s(d).

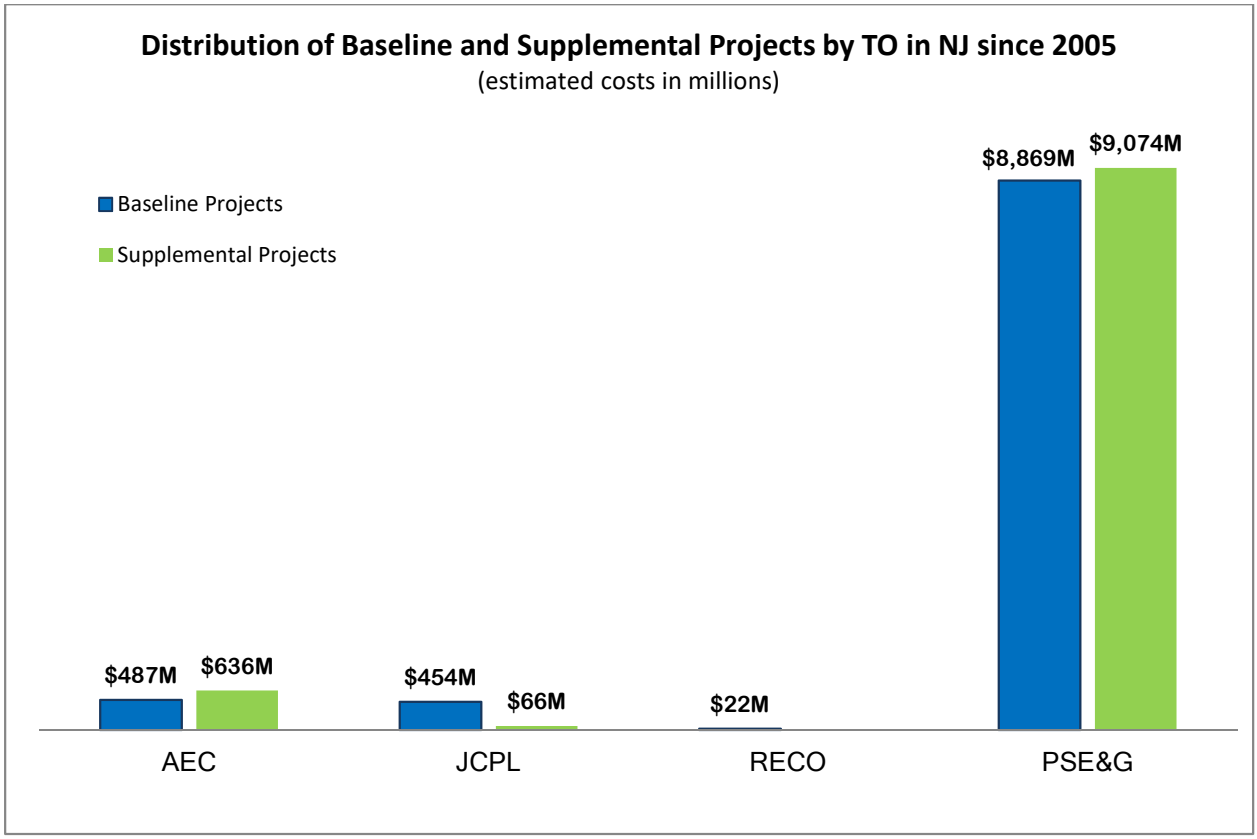
The FPA is a public interest statute that requires the FERC to ensure that rates are "just and reasonable."[58] In Order No. 679, the Commission noted that some "commenters . . . are concerned with the extent to which incentives may increase rates to consumers."[59] In 2006, the Commission found those concerns to be "premature."[60] Since that time, transmission costs have become excessive. As noted above, PJM has had approximately $55.6 billion in transmission projects from 2005 to 2018, with 35%, or $19.63 billion of that transmission investment in New Jersey. The NJ Parties have repeatedly raised concerns about excessive transmission costs borne by consumers.[61] Thus, the NJ Parties encourage the FERC to revise its current incentives policy, which has encouraged transmission growth at an unjust and unreasonable cost to ratepayers/consumers. The Commission should limit its incentive strategy to simply provide an ROE sufficient to attract capital, as also encouraged by the unanimous OPSI letter in 2018.[62] If the FERC chooses to incent further, it must be truly merited.

In 2006, the Commission adopted several rebuttable presumptions that would qualify a project for transmission incentives, the first of which relates specifically to regional planning.[63] The Commission noted it "will rebuttably presume that transmission projects that result from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission satisfy the requirements of this Rule."[64] The PJM Regional Transmission Expansion Planning ("RTEP") process includes reliability-related projects, projects proposed by the electric public utilities themselves as

[58] 16 U.S.C. § 824d(a).
[59] Order 679 at P 20.
[60] *Id.*
[61] The NJ BPU has raised these concerns in various other dockets including: Ad Hoc Coalition Comments; Transmission Development Technical Conference, Post-Technical Conference Comments of the Indicated State Commissions at 1, Docket No. AD16-18 (Oct. 3, 2016); as well as in the Letter from Michael Richard, *supra* note 28.
[62] *Id.*
[63] Order 679 at PP 57-58.
[64] *Id.* at PP 58.

necessary for reliability (known as Form 715 Criteria Projects), as well as non-criteria based upgrades known as Supplemental Projects. Supplemental projects are not subject to PJM's approval, nor are they usually subject to competition. With the understanding that the Commission's rebuttable presumption allows incentives for reliability projects (i.e. baseline projects) and not for supplemental projects, it is important to analyze the distribution of projects for both categories. Specific to New Jersey, Figure 6 below shows the distribution of baseline and supplemental projects for TOs since 2005. Noting particularly one TO, PSE&G, it is evident that incentives were not necessarily the driver for the company's transmission investment

Figure 6[65]



[65] Figure 6 created using data from PJM Interconnection L.L.C., *PJM Update to ISAC* at 14 (Jan. 28, 2019). The Transmission Owners in New Jersey are: Rockland Electric Company (RECO); Jersey Central Power and Light Company (JCP&L); Atlantic City Electric Company (AEC); and Public Service Electric and Gas Company (PSE&G).

decisions. Rather, more transmission investment occurred in the supplemental project category that is not awarded incentives. PSEG has had $8.87 billion in baseline projects and $9.07 billion in supplemental projects. Similarly, AEC, another NJ TO, has allocated more to supplemental projects without incentives: $487 million in baseline and $636 million in supplemental projects. If the Commission's incentives were truly required, supplemental projects would be a fraction of the baseline projects. The facts raise the question as to what extent transmission incentives are truly necessary to prompt transmission investment. The data above shows that the utilities do not need additional incentives to build significant amounts of transmission.

D. Lack of Data and Metrics

The Commission declined to apply a "but for" test or a cost-benefit analysis requirement when issuing Order No. 679 in 2006.[66] At that time, the Commission reasoned that establishing detailed criteria "would limit the flexibility of the Rule or improperly pre-judge which projects are acceptable for incentives."[67] Instead the Commission decided to require each applicant to justify the incentives it requests, on a "case-by-case basis."[68] The NJ Parties support the Commission maintaining its practice of reviewing incentive requests on a case-by-case basis and maintains that the FERC should not grant any incentives on an automatic basis. However, the NJ Parties do not agree with the Commission's decision to reject requiring a cost-benefit analysis for the incentive requests under consideration. The NJ Parties maintain that the FERC's decision effectively eliminated the possibility of measuring the effectiveness of whether the incentive rate policies produced the intended benefits of increased reliability and/or reduced congestion.

[66] Order 679 at P 48; Ad Hoc Coalition Comments at 16-18.
[67] Order 679 at P 43.
[68] *Id.*

In a 2011 response to the Commission's NOI, the NJ Parties cautioned the Commission that its decision to reject requiring a "but for" test and a cost benefit analysis, would "make any effort to measure the efficiency" of the policy after the fact nearly impossible given the insuperable "obstacle of isolating the variables that have produced the types of benefits recognized in the FPA Section 219 – improved reliability and lower delivered power costs resulting from reduced congestion."[69] The Commission rejected New Jersey's concerns and continued to allow incentives without a "but for" test or cost benefit analysis requirement. In the 13 years since the FERC issued the incentive policies, significant incentives have been provided. New Jersey alone has paid over $19 billion for transmission investment since 2005. The NJ Parties now ask that the Commission provide supporting data showing whether the substantial transmission growth since the issuance of its incentive policies actually resulted in equitable benefits to consumers or whether these incentives were actually needed to support the significant growth in transmission. If such information is available and maintained by the RTOs, the Commission should require a compliance filing from the RTOs to provide the data to the FERC.

The robust transmission growth without supporting data obfuscates the rates forced on the ratepayers and raises the specter that the investor community is over-recovering, without corresponding changes in behavior. This is especially true in today's macro-economic climate where traditional investment opportunities are yielding record low rates of return. The substantial growth without supporting data further indicates that the rate incentives paid by ratepayers may have been discriminatory, unjust, or unreasonable. Absent supporting data, the Commission cannot engage in the "reasonable balancing" "of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-

[69] Ad Hoc Coalition Comments at 18.

exploitative rates."[70] The high transmission costs currently faced by ratepayers requires the Commission's analysis of whether its policy choices "still add up to a reasonable result."[71]

Failing to factor costs into policy making, runs counter to the Commission's obligations to ratepayers under the FPA. The Supreme Court stated in *Michigan v. EPA* that factoring in costs is anything but "irrelevant" in policy making.[72] Specifically, the Court held that "the Agency must consider cost . . . before deciding whether regulation is appropriate and necessary."[73] The Commission now has thirteen years of experience with its currently active incentive policies with no cost benefit analysis. If the Commission chooses to continue offering abundant incentives, the staggering growth must be backed by data that depicts equitable benefits, including cost as a factor of the analysis. The Commission cannot proceed under the same strategy, without proving the effectiveness of its policies for the ratepayers. All policies must entail metrics in place in order to quantify achievements and effectiveness. Indeed, the Commission recognizes the very function of utility regulation as the ability to strike the correct balance between investor and ratepayer interests.[74] The NJ Parties maintain that striking the correct balance goes beyond "permitting investors recovery of some construction costs on a current basis while also protecting consumers against full rate recovery before a particular facility is placed into service."[75] The correct balance will require the Commission to include a more prudent cost review in light of the substantial transmission growth and implement a cost-

[70] The "end result" standard of *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944), means that, in reviewing orders of this Commission, "[C]ourts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates. Moreover, an order cannot be justified simply by a showing that each of the choices underlying it was reasonable; those choices must still add up to a reasonable result." *Jersey Central Power & Light Co. v. FERC*, 810 F. 2d 1168, 1177-78 (D. C. Cir. 1987).
[71] *JCP&L v. FERC*, 810 F.2d at 1178.
[72] *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015).
[73] *Id.* at 2711.
[74] Order 679 at P 21.
[75] *Id.* at P 22.

benefit analysis for future projects receiving incentive rate treatment. In addition, the FERC should establish guidance for how a cost-benefit analysis should be conducted.

E. RTO Participation Adder

The NJ Parties have voiced concerns regarding the RTO participation adder on many occasions.[76] In 2011, the NJ Parties and joint-commenters urged the FERC to reassess its policies regarding the RTO participation adder.[77] Despite contemplating a case by case review in Order 679 of "what size adder is appropriate for incentivizing RTO membership, the Commission in fact has applied a standard practice of granting an automatic 50 basis point adder"[78] for joining an RTO and then remaining a member. The comments further note that "the incentives to induce RTO membership are qualitatively different from incentives to encourage *continued* membership. In the latter case, there is no justification for continuing the full 50 basis point adder years after a utility has joined an RTO and it has effectively committed to participation."[79]

Furthermore, the FERC's 50 basis point adder was recently challenged and remanded back to the Commission in a 2018 Ninth Circuit Order. In referring to the RTO membership adder, the Order states that "when Order 679 is read in accordance with its plain language and evident purpose, it is clear that the FERC has created a generic adder in violation of its provisions."[80] Although this matter specifically challenges "incentive adders for remaining in a transmission organization when a utility is not free to leave,"[81] the Order still speaks to the issue

[76] *Supra* note 27.
[77] Ad Hoc Coalition Comments.
[78] Ad Hoc Coalition Comments at 15.
[79] *Id.*
[80] *Cal. PUC v. FERC*, 879 F.3d 966, 979 (9th Cir. 2018).
[81] *Id.* at 979-80.

of creating a generic adder, which is true in the FERC's application of a standard 50 basis points adder.

In Order 679, the Commission notes its interpretation of the statute that:

> eligibility for this incentive flows to an entity that 'joins' a Transmission Organization and is not tied to when the entity joined. It would be unduly discriminatory for the Commission to consider the benefits of membership in determining the appropriate ROE for new members but not for similarly situated entities that are already members.[82]

It is this type of broad interpretation that drives stakeholders to refer to the RTO adder as "FERC Candy."[83] In 2016, the NJBPU and other state commissions, urged the FERC to "end the practice of awarding ROE adders for RTO membership."[84] The NJBPU asserted that the "RTO membership offers a multitude of benefits to transmission developers such that the ROE adder is not necessary to incent their membership."[85] For example, "RTOs take on the burden of approving/rejecting requests for transmission service on the facilities; RTO control room operators monitor the facilities and protect them from overloads that would lead to damage; and RTOs collect transmission billings from local distribution companies and other transmission users and pass the money along to the transmission owners."[86] OPSI has also deemed this adder

[82] Order 679 P 331.

[83] This aligns with Commissioner Glick's comments during the March 21, 2019 FERC Open Meeting. Commissioner Glick stated that he is particularly interested in "seeing some of the comments submitted on our incentive policy. As everyone knows, Section 219 of the Federal Power Act authorizes the Commission to grant transmission owners certain incentives. But it is not clear to me that, in some cases, that the incentives that we are handing out are actually incenting anything." He added that if "we are going to design the right approach, we need to be reasonably certain the incentives are necessary or whether the investments in question would occur anyway. In other words, we shouldn't be handing out what some people refer to as the FERC candy, without actually achieving something beneficial in return." Paul Ciampoli, *FERC Seeks Comment on Transmission Incentives, ROEs*, AMERICAN PUBLIC POWER ASSOCIATION (Mar. 21, 2019), https://www.publicpower.org/periodical/article/ferc-seeks-comment-transmission-incentives-roes.

[84] *Transmission Development Technical Conference*, Post-Technical Conference Comments of the Indicated State Commissions at 6, Docket No. AD16-18 (Oct. 3, 2016).

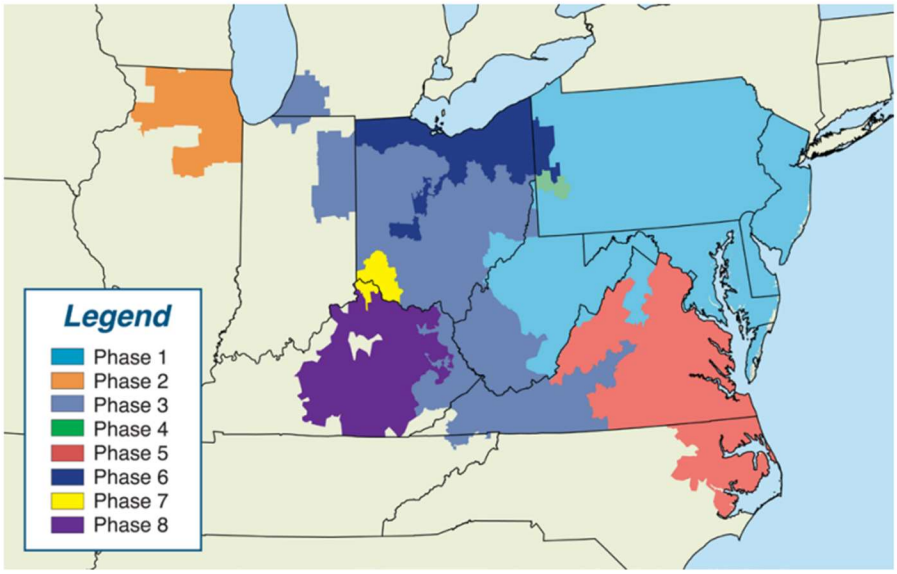
[85] *Id.* at 6-7.

[86] *Id.* at 7 n.17.

to be overly generous" and claimed it does not "change or incent the intended behavior on the part of the transmission owners, resulting in excessive costs to customers."[87]

Several of the region's major utilities, including PSEG, formed a power pool in 1927, which expanded over time to become the PJM RTO. Figure 7 below shows the various control zones that have integrated into PJM over time. Sixteen control zones and their respective transmission owners were already integrated into PJM prior to the Commission's Order 679 in 2006 (i.e. Phase 1 through 4). In comparison, following the availability of the RTO participation adder and correlating to Phase 5 through 8, only 4 new control zones with their respective transmission utilities have joined PJM from 2006 through 2017. In analyzing this growth, it is

Figure 7[88] PJM Integration Phases



doubtful that the Commission's RTO Participation Adder exclusively induced membership by the TOs. The data does not support the argument that the FERC's granting the RTO participation adder has had the intended impact. Since PJM has been in existence for more than

[87] Supra note 28.
[88] 2017 PJM State of the Market Report – Volume 2, Appendix A: PJM Geography, MONITORING ANALYTICS, LLC, http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2017/2017-som-pjm-volume2-appendix.pdf.

90 years and many TOs were already members, it is unclear what the Commission's RTO participation adder fundamentally incents. Accordingly, the Commission should strongly consider eliminating the RTO participation sweetener or, at the very least, create an expeditious sunset period lasting 5 to 7 years from the joining date and reserve the adder for transmission owners who actually join a newly forming Transmission Organization. In this case, the Commission's adder would indeed be properly effective in incenting a transmission owner to join and remain a member of the RTO.

F. Previous Positions of the NJ Parties

The NJ Parties reaffirm the following previous positions.[89] First, the NJ Parties have encouraged the Commission to consider demand side and supply side alternatives, and continues to strongly recommend that the FERC consider alternatives to transmission investment. This coincides with OPSI's recommendation for the Commission to consider the way certain adders may have the effect of an unintended disincentive to development of non-transmission alternative solutions for reliability and congestion concerns. Second, the NJ Parties maintain that project-specific incentives, such as CWIP, abandonment costs recovery, and advanced technology, should be reserved for projects that truly face non-routine risks and challenges and deploy actual new technology. Furthermore, if changes occur with the project after incentives are approved, the incumbent must refile a new application for incentive rate treatment. Finally, the Commission must account for risk-reducing benefits provided by formula rates and cost recovery for CWIP and abandonment in the calculation of the ROE.

[89] *Supra* note 27.

III. Conclusions

The New Jersey Board of Public Utilities and the New Jersey Division of Rate Counsel respectfully request that the Commission accept these Comments.

Respectfully submitted,

NEW JERSEY BOARD OF PUBLIC UTILITIES

By: */s/ Cynthia L. M. Holland*
Cynthia L. M. Holland
New Jersey Board of Public Utilities
44 South Clinton Ave.
Trenton, NJ 08609
(609) 292-1629
cynthia.holland@bpu.nj.gov

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: */s/ Peter Van Brunt*
Peter Van Brunt
Alex Moreau
Deputy Attorneys General
Department of Law and Public Safety
Division of Law
P.O. Box 45029
Newark, NJ 07101
(973) 648-3762
alex.moreau@law.njoag.gov
peter.vanbrunt@law.njoag.gov

Attorneys for the New Jersey Board of Public Utilities

NEW JERSEY DIVISION OF RATE COUNSEL

By: */s/ Stefanie A. Brand*
Stefanie A. Brand, Director
New Jersey Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625-0003
Tel: (609) 984-1460
sbrand@rpa.nj.gov
blipman@rpa.nj.gov
fthomas@rpa.nj.gov
hogden@rpa.nj.gov

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Newark, New Jersey

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of June, 2019, I have caused the foregoing document to be served upon each party designated on the official service list compiled by the Secretary in this proceeding, by email.

/s/ Peter Van Brunt

Peter Van Brunt

Deputy Attorney General
New Jersey Office of the Attorney General
Department of Law & Public Safety
Division of Law
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
(973) 648-3441
peter.vanbrunt@law.njoag.gov