

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Electric Transmission Incentives Policy) Docket No. RM20-10-000
Under Section 219 of the Federal Power Act)

COMMENTS OF WIRES

Pursuant to the Supplemental Notice of Proposed Rulemaking (“Supplemental NOPR”) issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on April 15, 2021 in the above-captioned proceeding,¹ WIRES, on behalf of its members, hereby submits the following comments.

I. INTRODUCTION

WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and consumer and environmental benefits through development of electric transmission infrastructure.² Since its inception, WIRES has focused on supporting investment in needed and beneficial transmission infrastructure – investments that Congress and the Commission have recognized are critical to establish a resilient, reliable, cost-effective, modern, and clean bulk power system.³ For that reason, WIRES opposes the Supplemental NOPR and respectfully urges the Commission to maintain the existing RTO-participation incentive.

¹ *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Supplemental Notice of Proposed Rulemaking, 175 FERC ¶ 61,035 (2021).

² For more information about WIRES, please visit www.wiresgroup.com.

³ This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

II. BACKGROUND

This proposed rulemaking involves the incentive under section 219 of the Federal Power Act (“FPA”) that the Commission currently provides to transmitting utilities for Regional Transmission Organization (“RTO”) participation. In the Energy Policy Act of 2005 (“EPAct 2005”), Congress directed the Commission to issue a rule that established incentives “for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”⁴ Although most of the incentives in section 219 focus on transmission infrastructure investment, Congress also instructed the Commission to “provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”⁵

A unanimous Commission responded by issuing Order No. 679.⁶ This order allows utilities that join and remain in RTOs to receive a 50-basis-point return on equity (“ROE”) incentive. During the rulemaking process, some commenters specifically argued that the incentive should only apply to new members, not existing ones, because “incentives should incite or spur a desired future action, and thus it makes no sense to provide incentives . . . for past behavior.”⁷ The Commission disagreed:

[E]ntities that have already joined, and that remain members of, an RTO, ISO, or other Commission-approved Transmission Organization, are eligible to receive this incentive. *The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact that continuing membership is generally voluntary. Our interpretation of the statute is that eligibility for this incentive flows to an entity that ‘joins’ a Transmission Organization and is not tied to when the entity joined. As some commentators note, to do otherwise could create perverse incentives for an entity to actually leave*

⁴ 16 U.S.C. § 824s(a).

⁵ *Id.* at § 824s(c).

⁶ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006), *order on reh’g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh’g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007).

⁷ *Id.* at P 315.

Transmission Organizations and then join another one. It would also 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.⁸

On rehearing, the Commission affirmed its decision in Orders No. 679-A⁹ and 679-B.¹⁰ The Commission also codified the policy in sections 35.35(b)(2) and 35.35(e) of its regulations.¹¹ As a result, ever since the issuance of Order No. 679, for the past 15 years the RTO-participation incentive has enjoyed the benefit of regulatory certainty. The Commission has consistently applied its policy, and transmitting utilities have relied upon that policy in choosing to join or remain in an RTO and in making large capital investments. Not coincidentally, RTO membership has increased over time, as have the considerable benefits provided by RTOs for consumers, which are often described as the RTO “value proposition.”

On March 20, 2020, the Commission issued a Notice of Proposed Rulemaking on *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*.¹² Among other things, the NOPR proposed significant enhancements to the RTO-participation incentive. Under existing policy, the incentive is not fixed and is evaluated on a case-by-case basis, though applicants have uniformly requested a 50-basis-point incentive, which the Commission has granted without modification.¹³ In the NOPR, the Commission proposed doubling the incentive for RTO participation to 100-basis-points, which an applicant could receive regardless of whether its participation was voluntary.¹⁴

⁸ *Id.* at P 331 (emphasis added).

⁹ Order No. 679-A, 117 FERC ¶ 61,345.

¹⁰ Order No. 679-B, 119 FERC ¶ 61,062.

¹¹ 18 C.F.R. §§ 35.35(b)(2) & 35.35(e).

¹² *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Proposed Rulemaking, 170 FERC ¶ 61,204 (2020) (“NOPR”).

¹³ *Id.* at P 92.

¹⁴ *Id.* at PP 97-98.

The Commission justified the increase by noting that the RTO incentive furthers the stated purpose of section 219, which is “to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”¹⁵ The Commission found that the incentive had encouraged the formation of and participation in RTOs, which, in turn, had resulted in significant benefits to consumers, including total annual benefits and savings to customers in PJM of between \$3.2 billion and \$4 billion, \$2.2 billion in annual benefits in SPP with a benefit-to-cost ratio of 14-to-1, and between \$3.2 billion and \$3.9 billion in MISO.¹⁶ The Commission identified a wide range of benefits, which had increased over time:

These benefits include access to large competitive markets, optimization of the transmission system, regional transmission planning that supports more efficient or cost-effective transmission development to meet regional transmission needs, reduction of the costs of carrying reserves through reserve sharing, and increased access to an expanded set of diverse resources. All of these attributes reduce the cost of delivered power by facilitating broader and more robust access to more sources of power, and to the lowest-cost source of power, over a wide geographic footprint. These benefits have increased over time. PJM notes that its value proposition for consumers has increased over the past 13 years to a current estimate of \$3.2 to \$4.0 billion, an increase from an estimated \$2.2 billion in 2011.¹⁷

The Commission recognized that while the benefits of RTO participation were significant and increasing over time, so too were the burdens. RTO participation included a host of “duties and responsibilities” that had grown since Order No. 679 was issued in 2006:

These [duties and responsibilities] include: loss of operational control of transmission facilities to a third party; an obligation to build new transmission facilities at the direction of the RTO/ISO; diminished decision-making control over assets while retaining the responsibility of maintaining the system; meeting reliability standards; obligations to obey RTO/ISO rules; and an obligation to provide electric service even when

¹⁵ *Id.* at P 93.

¹⁶ *Id.*

¹⁷ *Id.* at P 94.

foundational agreements can change, thereby changing the terms and conditions under which the transmitting utility initially agreed to participate in the RTO/ISO.¹⁸

The Commission has also tasked RTOs and their members to implement the Commission's most important policy initiatives, including competitive wholesale markets in Order No. 2000,¹⁹ nonincumbent transmission development in Order No. 1000,²⁰ demand response in Order No. 745,²¹ price formation and aligning dispatch and settlement intervals in Order No. 825,²² energy storage in Order No. 841,²³ and, most recently, aggregated distributed energy resources in Order No. 2222.²⁴ Not surprisingly, the Commission concluded in the NOPR that “[a]lthough RTO/ISO participation provides substantial benefits for consumers, we agree with commenters that the RTO-Participation Incentive also compensates transmitting utilities for the ongoing duties and responsibilities of RTO/ISO membership.”²⁵

What followed, however, was startling, when the Commission issued a Supplemental Notice of Proposed Rulemaking on April 15, 2021 with two dissents and a separate

¹⁸ *Id.* at P 96.

¹⁹ *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 (1999).

²⁰ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Although the nonincumbent transmission development requirements of Order No. 1000 also apply outside of RTO regions, they have, in practice, had the most impact in RTO regions. See FERC Staff, *2017 Transmission Metrics*, at 4-5 (2017), https://www.ferc.gov/sites/default/files/2020-04/transmission-investment-metrics_0.pdf.

²¹ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 (2011), *vacated*, *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev'd*, 577 U.S. 260 (2016).

²² *Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 825, 155 FERC ¶ 61,276 (2016).

²³ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g and clarification*, Order No. 841-A, 167 FERC ¶ 61,154 (2019), *petition denied*, *NARUC v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020).

²⁴ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh'g and clarification*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021).

²⁵ NOPR, 170 FERC ¶ 61,204 at P 93.

concurrence.²⁶ The Supplemental NOPR unveiled a starkly different proposal than the one in the NOPR. Instead of proposing a fixed 100-basis-point incentive for RTO participation, the Commission proposed to reduce the incentive to 50-basis-points and restricted eligibility for the incentive to the first three years after a transmitting utility transferred operational control of its facilities to the RTO.²⁷ The Commission further proposed that utilities that had joined and remained in an RTO for three or more years were required to submit a compliance filing to remove the incentive from their transmission tariff.²⁸

The Commission's rationale for this abrupt policy reversal was scant and conclusory in nature. First, the Commission concluded that it had the "latitude" to act given the meaning of "join" in section 219.²⁹ Second, the Commission speculated that providing the incentive indefinitely might not be necessary to incentivize a transmitting utility to join an RTO.³⁰ Third, the Commission was concerned with costs to ratepayers, "particularly given the substantial benefits of Transmission Organization membership to participating utilities."³¹ The Supplemental NOPR does not appear to take into account the full measure of burdens and risks borne by RTO members or the benefits, both quantitative and qualitative, provided by existing RTOs to consumers.

The Supplemental NOPR risks undermining the development of competitive wholesale markets in the electric industry and the establishment of RTOs, which now serve about two-thirds of the United States. In Order No. 888, the Commission restructured the electric industry and required open access to transmission. Other orders followed, including Orders No. 889, 890,

²⁶ Supplemental NOPR, 175 FERC ¶ 61,035.

²⁷ *Id.* at P 5.

²⁸ *Id.* at P 1.

²⁹ *Id.* at P 9.

³⁰ *Id.*

³¹ *Id.*

and 2000, that recognized the value of competition and supported competitive wholesale markets. More than 20 years ago, in Order No. 2000, the Commission envisioned that RTOs would improve power market performance and promote economic efficiency:

These benefits will include: increased efficiency through regional transmission pricing and the elimination of rate pancaking; improved congestion management; more accurate estimates of ATC; more effective management of parallel path flows; more efficient planning for transmission and generation investments; increased coordination among state regulatory agencies; reduced transaction costs; facilitation of the success of state retail access programs; facilitation of the development of environmentally preferred generation in states with retail access programs; improved grid reliability; and fewer opportunities for discriminatory transmission practices. All of these improvements to the efficiencies in the transmission grid will help improve power market performance, which will ultimately result in lower prices to the Nation's electricity consumers.³²

Experience has confirmed the benefits to consumers anticipated by the Commission.

III. COMMENTS ON THE SUPPLEMENTAL NOPR

In spite of the significant benefits to consumers and burdens and risks to utilities of participation in RTOs, the Commission proposes to slash the RTO-participation incentive in the Supplemental NOPR. WIRES respectfully opposes this proposal. First, the Commission can only change its existing rule if it meets the dual burden of section 206 of the FPA: the Commission must show both that its existing rule is unjust and unreasonable and that the replacement rule is just and reasonable. Here, the Commission cannot meet this burden, for the existing rule is just and reasonable and the replacement rule is unduly discriminatory and results in a confiscatory rate. Second, Order No. 679 was properly decided, and the language, purpose, and legislative history of FPA section 219 requires that the RTO-participation incentive be available to a transmitting utility that participates in an RTO for the entire duration of its membership. Third, compelling policy reasons support the existing RTO-participation incentive,

³² Order No. 2000, 89 FERC ¶ 61,285 at 89-90.

including facilitating the development and integration of renewables, encouraging competitive generation markets and the growth of RTOs, and minimizing the risk of RTO exit.

A. The Commission Cannot Carry Its Burden under Section 206 of the FPA

In the NOPR, the Commission acknowledged that it was proceeding under its FPA sections 205 and 206 authority.³³ Section 219 specifically requires that revisions to its rules be subject to the requirements of sections 205 and 206.³⁴ Section 206 of the FPA also applies to “rules” and “regulations” affecting rates or charges, and requires that such rules and regulations be just, reasonable, and not unduly discriminatory or preferential.³⁵ Under section 206, the Commission bears the burden of showing that the existing rule is unjust, unreasonable, or unduly discriminatory or preferential and that its replacement rule is just and reasonable and not unduly discriminatory or preferential.³⁶ Here, the Commission cannot carry its burden under either prong of section 206.

1. The Current Rule Is Not Unjust, Unreasonable, or Unduly Discriminatory or Preferential

In support of the Supplemental NOPR, the Commission’s reasoning is conclusory at best. With little or no analysis or support in the record, the Commission cites a legal rationale, a policy argument, and a concern over cost:

³³ See NOPR, 170 FERC ¶ 61,204 at P 139 (“We conclude that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under section 380.4(a)(15) of the Commission’s regulations, *which provides a categorical exemption for approval of actions under sections 205 and 206 of the FPA* relating to the filing of schedules containing all rates and charges for the transmission or sale of electric energy subject to the Commission’s jurisdiction, plus the classification, practices, contracts, and regulations that affect rates, charges, classification, and services.”) (emphasis added).

³⁴ 16 U.S.C. § 824s(d) (“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.”).

³⁵ 16 U.S.C. § 824e(a) (“any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential”).

³⁶ *Emera Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017). See also 16 U.S.C. § 824e(b) (“In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant.”).

Given that the statute only directs an incentive for entities that ‘join’ a Transmission Organization, we believe that the Commission has latitude under the statute to tailor this incentive more narrowly to encourage joining, rather than remaining in, a Transmission Organization. We believe that providing the Transmission Organization incentives indefinitely may not be necessary to incentivize a transmitting utility to join a Transmission Organization and, given the large impact that such an incentive has on ratepayers, may not appropriately balance utility and ratepayer interests, particularly given the substantial benefits of Transmission Organization membership to participating utilities.³⁷

Each of those assertions, however, fails to establish that the current rule is unjust, unreasonable, or unduly discriminatory or preferential. The legal rationale is a cautious one. It does not assert that the text of the statute compels changing existing Commission policy; instead, it maintains that the Commission has “latitude” to act. But asserting that the Commission has the latitude to act is a far cry from alleging that the existing rule is unlawful. Moreover, in context, a sounder reading of section 219 construes “joins” as shorthand for “membership” in an RTO. And it is continuing membership rather than the initial act of joining that realizes the benefits of RTO participation for consumers. There is little value – and, indeed, there is detriment – in a utility joining and then exiting an RTO. Conversely, for market efficiency, reliability, and transmission planning purposes, an RTO benefits from having a stable membership.

Similarly, the Commission’s policy rationale is equally unavailing. The assertion that “providing the Transmission Organization incentives indefinitely may not be necessary to incentivize a transmitting utility to join a Transmission Organization”³⁸ appears to be based on speculation. No quantitative evidence supports this assertion, and it is improbable at best as a qualitative matter. Since the issuance of Order No. 679, utilities have understood that they are eligible for the incentive as long as they join and remain in an RTO. While participation by utilities in RTOs over the last 15 years has generally remained stable with the incentive, now is

³⁷ Supplemental NOPR, 175 FERC ¶ 61,035 at P 8.

³⁸ *Id.*

not the time for the Commission to engage in a risky experiment to see if that will remain the case without the incentive.

The fact of the matter is that over the past 15 years the burdens and risks of being in an RTO have only increased over time. In the NOPR, the Commission identified a panoply of utility duties and responsibilities that come with RTO membership:

The duties and responsibilities associated with RTO/ISO membership have also increased since Order No. 679. These include: loss of operational control of transmission facilities to a third party; an obligation to build new transmission facilities at the direction of the RTO/ISO; diminished decision-making control over assets while retaining the responsibility of maintaining the system; meeting reliability standards; obligations to obey RTO/ISO rules; and an obligation to provide electric service even when foundational agreements can change, thereby changing the terms and conditions under which the transmitting utility initially agreed to participate in the RTO/ISO.³⁹

Similarly, in its Comments to the NOPR, WIRES included a study from London Economics International (“London Economics”) that explains the risks of RTO participation.⁴⁰

There are three categories of risk:

1. **governance of an RTO**, which obliges TOs to relinquish control over regional transmission planning and operations to the RTO;
2. **federal policies and regulatory changes** over the last ten years, which have introduced challenges and uncertainties for RTO-participating TOs;
3. **emergence of state and local policies** predominantly in RTO franchise areas, which have accelerated the pace of industry transformation and created uncertainties around transmission system use.⁴¹

³⁹ NOPR, 170 FERC ¶ 61,204 at P 96.

⁴⁰ Comments of WIRES, Docket No. RM20-10-000 (July 1, 2020) (London Economics International LLC, *Economic Considerations in the Matter of Economic Transmission Incentives*, at 12 (July 1, 2020) (“London Economics Report”).

⁴¹ London Economics Report at 12.

With respect to RTO governance, transmitting utilities “relinquish control over transmission policy, stakeholder governance, and rate design.”⁴² RTO members are also subject to Commission policies designed to promote competition and innovation, including nonincumbent transmission development, demand response, efficient price formation, energy storage, and aggregated distributed energy resources.⁴³ In addition, “the geographic areas experiencing the greatest influence from state and local policies are highly correlated with the location of RTOs.”⁴⁴

Responding to RTO governance issues, federal policy, and state and local policy has resulted in increasingly complicated and time-consuming stakeholder processes as the electric industry goes through a period of unprecedented change. Some RTOs hold more than 300 meetings per year, which increases the cost and complexity for their members.⁴⁵ As a logical matter, in light of the significant burdens of RTO membership, it is hard to see how reducing the incentive will result in greater utility participation. In fact, it may actually lead to departures.

The Commission asserts that the incentive’s costs are high (around \$400 million a year) and that utilities benefit from RTO membership.⁴⁶ But while the increasing burdens of RTO membership have been amply documented, the Commission has failed to specify how utilities benefit from RTO membership. Furthermore, it is unclear how those benefits compare to the well-documented obligations and burdens of RTO membership. The Commission, however, must articulate the benefits and weigh them against the burdens.

⁴² *Id.* at 14.

⁴³ *Id.* at 16-20.

⁴⁴ *Id.* at 20-21.

⁴⁵ *Id.* at 14.

⁴⁶ Supplemental NOPR, 175 FERC ¶ 61,035 at P 8 n.21.

More critically, there is a fatal flaw in the Commission's logic with respect to the Commission-identified benefits of existing RTO participation: many of those benefits ultimately flow primarily to consumers and *not* to utilities. For example, utilities typically do not benefit financially from reduced energy prices, more efficient dispatch, cost savings achieved through reserve sharing, or lower capacity costs. All of those benefits accrue to consumers.⁴⁷ However, the Commission has failed to account for the way in which the benefits of RTO participation to consumers dwarf the cost of the incentive, which is an analysis that the Commission must perform to demonstrate that the existing rule is unjust, unreasonable, or unduly discriminatory or preferential. As the NOPR recognized, PJM estimates total annual benefits and savings of \$3.2 to 4 billion.⁴⁸ SPP estimates annual savings of \$2.2 billion.⁴⁹ MISO estimated regional benefits of \$3.1 billion to \$3.9 billion in 2020.⁵⁰ From the benefits data reported from those three RTOs alone, the ratio of benefits (about \$8 billion using the lowest number when a range is specified) to costs (\$400 million), would be 20 to 1.

Other benefits may be harder to quantify but, as a qualitative matter, have long been recognized by the Commission. In the NOPR, the Commission summarized a host of benefits provided by existing RTO membership:

These benefits include access to large competitive markets, optimization of the transmission system, regional transmission planning that supports more efficient or cost-competitive transmission development to meet regional transmission needs, reduction of the costs of carrying reserves through reserve sharing, and increased access to an expanded set of

⁴⁷ In restructured markets, the utility obtains few, if any, of these benefits, which flow directly to its customers. Even where utilities remain vertically integrated, state regulators typically require utilities to pass through any revenues that their rate-based generation earns in the RTO markets to customers, such that the utility itself does not benefit from the market efficiencies.

⁴⁸ NOPR, 170 FERC ¶ 61,204 at P 93 (citing *PJM Interconnection, L.L.C.*, Comments, Docket No. PL19-3-000, at 6-7 (filed June 26, 2019)).

⁴⁹ *Id.* (citing SPP, *14-to-1 The Value of Trust*, at 3 (May 29, 2019)), <https://www.spp.org/documents/58916/14-to-1%20value%20of%20trust%2020190524%20web.pdf>.

⁵⁰ MISO, *2020 Value Proposition*, at 5 (Feb. 12, 2021), <https://cdn.misoenergy.org/2020%20MISO%20Value%20Proposition%20Calculation%20Details521882.pdf>.

diverse resources. All of these attributes reduce the cost of delivered power by facilitating broader and more robust access to more sources of power, and to the lowest-cost sources of power, over a wider geographic footprint. These benefits have increased over time.⁵¹

London Economics has noted that “[q]ualitatively, these benefits arise because RTO participation enables functional improvements in operations, supply procurement (energy and reserve markets) and planning.”⁵² By any metric, given the Commission-cited benefits provided by existing RTO membership – benefits not contested in the Supplemental NOPR – the current rule has led to a just and reasonable outcome that has provided significant benefits to consumers. Put another way, on this record, it cannot be said that the existing policy is unjust, unreasonable, or unduly discriminatory or preferential. Therefore, the Commission should withdraw its proposal.

2. The Supplemental NOPR’s Replacement Rule Is Unjust, Unreasonable, and Unduly Discriminatory or Preferential

In contrast to the existing incentive’s justness and reasonableness, the proposed replacement rule is deeply flawed. The Commission has proposed to provide the incentive for three years to utilities that join an RTO and to end the incentive for utilities that have belonged to an RTO for more than three years.⁵³ The duration limit is unjust and unreasonable in failing to account for the risks of RTO membership and the benefits provided to ratepayers. It is also unduly discriminatory in imposing an uncompensated burden on one group of transmitting utilities but not the other. RTO members are unduly harmed by the duration limit because they have made significant past investment decisions in reliance on the incentive, which has been in place for more than 15 years. For all of those reasons, the replacement rule should be rejected.

⁵¹ NOPR, 170 FERC ¶ 61,204 at P 94.

⁵² London Economics Report at 28.

⁵³ Supplemental NOPR, 175 FERC ¶ 61,035 at P 1.

a. The Duration Limit Is Unjust and Unreasonable

The Commission’s proposal is deficient in three important respects because it fails to account properly for benefits of existing RTO participation to consumers and the burdens and risks of RTO membership for utilities. First, with respect to benefits, it is hornbook law that ratemaking is not a science but an art.⁵⁴ Nevertheless, the Commission’s discretion is not boundless,⁵⁵ and it exceeds the outer limits of its discretion in providing no compensation to utilities for RTO participation despite the documented quantitative benefits identified by the Commission and benefit-to-cost ratio provided by RTOs to consumers (which greatly exceed the cost of the incentive). Significant qualitative factors add to the RTO value proposition, which further supports providing the incentive to utilities that remain in an RTO. To engage in reasoned decision making, the Commission must consider such benefits in determining whether its proposal is just and reasonable. The Commission has failed to do so in the Supplemental NOPR, mistakenly attributing the benefits of existing RTO participation to *utilities* and relying on this faulty assumption to justify limiting the incentive to the first three years of a utility’s membership.

Second, a foundational principle of ratemaking is that “the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”⁵⁶ As London Economics has shown, transmitting utilities in RTOs face risks related to RTO governance, Commission policy, and state and local policy that transmitting utilities in

⁵⁴ See *Cities of Bethany, Bushnell, Cairo, Carmi, Casey, Flora, Greenup, Marshall, Metropolis, Newton, Rantoul, and Roodhouse, Illinois v. FERC*, 727 F.2d 1131, 1138 (D.C. Cir. 1984) (“ratemaking is less a science than it is an art”); *Alabama Elec. Coop, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (same).

⁵⁵ See *Illinois Commerce Comm’n v. FERC*, 756 F.3d 556, 564 (7th Cir. 2014) (if the Commission believes cost-benefit analysis is not feasibly for transmission cost allocation purposes, “it must explain why that is so and what the alternatives are”).

⁵⁶ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

bilateral markets do not.⁵⁷ As an example, transmitting utilities in RTOs are far more likely to have to compete for transmission projects under Order No. 1000 than transmitting utilities in bilateral markets. Under Order No. 1000, RTOs have completed around 30 competitive transmission project solicitations resulting in approximately 15 competitive projects to date.⁵⁸ In comparison, no competitive solicitation has advanced in a non-RTO region.⁵⁹ In the absence of an incentive, the transmitting utility in an RTO is treated the same as a transmitting utility in a bilateral market even though they clearly do not share “corresponding risks.”

Third, in disregarding the burdens and risks of RTO membership, the Commission’s proposal results in a confiscatory rate. A “guiding principle” in ratemaking is that a rate cannot be so low as to be confiscatory.⁶⁰ The Supreme Court has noted that “the ‘lowest reasonable rate’ is one which is not confiscatory in the constitutional sense.”⁶¹ In determining whether a rate methodology is confiscatory, the Commission has recognized that it “is not bound myopically to consider only certain costs and revenues, but ignore all others. The Commission may consider whether the ‘end result’ of its rate methodology is reasonable.”⁶²

Here, in ignoring the burdens and risks of RTO participation, the Supplemental NOPR’s end result is unreasonable. The Commission has recognized that RTO membership has “duties and responsibilities” and that those burdens have increased over time.⁶³ The Supplemental NOPR, however, ignores those burdens and fails to compensate transmitting utilities for the burdens and risks associated with RTO participation after the first three years of membership.

⁵⁷ London Economics Report at 12-26.

⁵⁸ *Id.* at 17 n.45.

⁵⁹ *Id.*

⁶⁰ *Duquesne Light and Power v. Barasch*, 488 U.S. 299, 307-08 (1989).

⁶¹ *Id.* at 308 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)).

⁶² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the Cal. Indep. Sys. Operator and the Cal. Power Exchange Corp.*, 114 FERC ¶ 61,070, at P 81 (2006).

⁶³ NOPR, 170 FERC ¶ 61,204 at P 96.

The burdens and risks for utilities of RTO membership continue as long as they remain in an RTO.⁶⁴ Over the last two decades, the Commission has directed RTOs to advance many of the Commission’s most important policy priorities. This has required transmitting utilities in RTOs to commit the resources to respond to and to effectuate the policy – resources that could otherwise have been used in business activities that are more beneficial to the utility.

It is no answer to suggest that an aggrieved utility can simply leave the RTO. The process of exiting an RTO is time consuming and costly. Invariably, as Commission experience has shown, departures from RTOs can trigger litigation over cost allocation responsibilities.⁶⁵ The utility will need the approval of the RTO, state regulators, and the Commission. Until the utility is allowed to depart, it must continue to meet all of its many obligations as an RTO member. Thus, the Supplemental NOPR establishes a confiscatory rate in failing to account for the continuing burdens and risks of RTO membership.

b. The Duration Limit Is Unduly Discriminatory

Limiting the RTO-participation incentive to three years would unduly discriminate between transmitting utilities that belong to an RTO and transmitting utilities that do not. The former would be subject to a range of risks and burdens of RTO membership without compensation, while the latter would not. Under FPA sections 205, 206, and 219, the Commission cannot approve rates that are “unduly discriminatory or preferential.” Undue discrimination occurs when similarly situated entities are treated in a manner that results in

⁶⁴ See London Economics Report at 12.

⁶⁵ See *MISO Transmission Owners v. FERC*, 860 F.3d 837, 839 (6th Cir. 2017) (Duke’s departure from MISO triggered exit fee and litigation over cost allocation for projects MISO approved after Duke announced its departure but before it left).

“arbitrary differences”⁶⁶ or that “grant[s] any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.”⁶⁷

Here, the Commission creates an arbitrary difference between transmitting utilities that belong to an RTO and those that do not. With respect to incentives, after a three-year period for RTO members, the utilities are treated the same as utilities outside of an RTO even though they clearly are not. As the Commission has previously recognized, RTO members have ongoing responsibilities and obligations that non-RTO members do not. Without providing compensation to offset those regulatory and governance burdens, the Commission would set rates that unduly discriminate against RTO members. In other words, the Supplemental NOPR proposal would create two classes of transmitting utilities, one of which bears the risks and burdens of RTO membership without compensation after three years and the other of which does not.

B. EPCRA 2005 Supports Providing the Incentive to Utilities that Previously Joined and Remain in an RTO

The existing RTO-participation incentive properly interprets EPCRA 2005. First, the Commission’s precedent in Orders No. 679,⁶⁸ 679-A,⁶⁹ and 679-B,⁷⁰ all of which were issued unanimously, has consistently applied the incentive to transmitting utilities that join and remain in an RTO. These orders are entitled to deference because they were issued contemporaneously by the Commission that implemented EPCRA 2005 and that was most aware of its text, purpose, and legislative history. Second, the text of section 219 also supports this result. In context, “joins” does not relate to a single moment in time, but speaks more broadly to the concept of

⁶⁶ *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1127 (D.C. Cir. 2011) (finding undue discrimination where transmission owners in MISO had the discretion to choose between two different schedules for reactive power compensation, one of which provided compensation under a cost-based rate and the other of which did not for reactive power produced within the deadband).

⁶⁷ 16 U.S.C. § 824d(b).

⁶⁸ Order No. 679, 116 FERC ¶ 61,057.

⁶⁹ Order No. 679-A, 117 FERC ¶ 61,345.

⁷⁰ Order No. 679-B, 119 FERC ¶ 61,062.

membership or participation. Third, legislative history supports this reading, as does the policy rationale underlying the incentive.

1. Commission Precedent Is Clear and Compelling

Since the passage of EAct 2005, the Commission has been unwavering in holding that section 219 allows utilities that join and remain in an RTO to be eligible to receive the RTO-participation incentive.⁷¹ In Order No. 679, the Commission squarely considered the issue of eligibility, as some commenters had argued that “the incentive should only apply going forward for new members, not for those who already joined” and that “incentives should incite or spur a desired future action, and thus it makes no sense to provide incentives to transmission owners for past behavior.”⁷² In response, the Commission refused to “make a generic finding on the duration of incentives.”⁷³ Instead, “[a]n entity will be presumed to be eligible for the incentive if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization, and its membership is on-going.”⁷⁴

The Commission explained that the concept of “joins” was not tied to a moment in time, given the purpose of EAct 2005, policy considerations, and the desire to avoid undue discrimination:

[E]ntities that have already joined, and that remain members of, an RTO, ISO, or other Commission-approved Transmission Organization, are eligible to receive this incentive. *The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact that continuing membership is generally voluntary. Our interpretation of the statute is that eligibility for this incentive flows to an entity that ‘joins’ a Transmission Organization and is not tied to when the entity joined. As some commentators note, to do otherwise could create perverse incentives for an entity to actually leave*

⁷¹ Indeed, even before Order No. 679, the Commission had provided a 50-basis-point incentive for utilities that joined an RTO. See *Midwest Indep. Transmission Sys., Inc.*, 102 FERC ¶ 61,143 at P 5 (2003), *aff’d in part and petition granted in part*, *Pub. Serv. Comm’n of Kentucky v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005).

⁷² Order No. 679, 116 FERC ¶ 61,057 at P 315.

⁷³ *Id.* at P 327.

⁷⁴ *Id.*

Transmission Organizations and then join another one. It would also 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.⁷⁵

The Commission hewed to its position on rehearing. In Order No. 679-A, the Commission reiterated that the incentive should be available for utilities that join and remain in RTOs. This result was consistent with EAct 2005’s purpose and policy rationales that recognized the value of RTOs, the desirability of spreading their benefits “to as many consumers as possible,” and the importance of providing existing members with “an inducement to stay”:

We affirm the finding in the Final Rule that the incentive applies to all utilities joining transmission organizations, irrespective of the date they join, based on a reading of section 219 in its entirety. Section 219 specifically provides that “the Commission shall . . . provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.” The stated purpose of section 219 is to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power. *We consider an inducement for utilities to join, and remain in, Transmission Organizations to be entirely consistent with those purposes. The consumer benefits, including reliability and cost benefits, provided by Transmission Organizations are well documented, and the best way to ensure those benefits are spread to as many consumers as possible is to provide an incentive that is widely available to member utilities of Transmission Organizations and is effective for the entire duration of a utility’s membership in the Transmission Organization. To limit the incentive to only utilities yet to join Transmission Organizations offers no inducement to stay in these organizations for members with the option to withdraw, and hence risks reducing Transmission Organization membership and its attendant benefits to consumers.* Because the incentive is applicable to utilities that join Transmission Organizations and is consistent with the requirements of section 219 of the FPA, the incentive complies with EAct 2005 and the FPA.⁷⁶

In Order No. 679-B, the Commission unequivocally declared, “[A]n inducement for utilities to join, and remain in, [a] Transmission Organization is consistent with the purpose of section 219, which is to provide incentive-based rate treatments that benefit consumers by

⁷⁵ *Id.* at P 331 (emphasis added).

⁷⁶ Order No. 679-A, 117 FERC ¶ 61,345 at P 86 (emphasis added).

ensuring reliability and reducing the cost of delivered power.”⁷⁷ The orders are entitled to deference because they were issued by the Commission that was most familiar with EPCRA 2005 and that implemented its directives. “Great weight” should be given to an agency’s “contemporaneous construction of a statute by the . . . [officials] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.”⁷⁸ Not surprisingly, in the 15 years since the issuance of Order No. 679, the Commission has routinely supported the incentive for utilities that joined and remain in an RTO, and utilities have relied upon a reasonable expectation that they were eligible for the incentive as they assessed the costs and benefits of RTO membership.⁷⁹

2. Congress Intended the Commission to Provide Incentives for Utilities that Join and Remain in RTOs

The text of section 219 supports the continued eligibility of utilities for the RTO-participation incentive if they join and remain in an RTO. The language of section 219(c) is mandatory in nature: “In the rule issued under this section, the Commission *shall*, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”⁸⁰ In context, it is clear that Congress intended “joins” to

⁷⁷ Order No. 679-B, 119 FERC ¶ 61,062 at P 19.

⁷⁸ *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 549 (1940) (quoting *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933)). See also *Shapiro v. United States*, 335 U.S. 1, 12 n.13 (1948) (accorded special weight to “the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions which it interprets”); *White v. Winchester Country Club*, 315 U.S. 32, 41 (1942) (agency’s “substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute”).

⁷⁹ See *Pacific Gas & Elec. Co.*, 148 FERC ¶ 61,245 (2014), *reh’g order*, 154 FERC ¶ 61,245 (2016), *petition granted*, *Cal. Pub. Util. Comm’n v. FERC*, 879 F.3d 966 (9th Cir. 2018); *Pacific Gas & Elec. Co.*, 152 FERC ¶ 61,252 (2015), *reh’g order*, 154 FERC ¶ 61,118 (2016), *petition granted*, *Cal. Pub. Util. Comm’n v. FERC*, 879 F.3d 966 (9th Cir. 2018) (“*CPUC*”). In *CPUC*, the Ninth Circuit granted the state commission’s petition for review, holding that the RTO incentive was unavailable to a utility required to remain in CAISO as a matter of state law. *CPUC*, however, supports WIRES’ position in that the Ninth Circuit implicitly found that a utility was eligible for the incentive unless state law mandated its participation.

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

mean more than the one-time act of joining. Instead, as the Commission has previously recognized, Congress meant for “joins” to mean “joins and remains in,” as in RTO membership.

First, the plain meaning of “join” supports this meaning. The *Merriam-Webster Dictionary* defines “join” in part as “to become a member of a group or organization.”⁸¹ According to the *American Heritage Dictionary*, “join” can mean “[t]o become a part or member of” or “[t]o become a member of a group.”⁸² Membership continues as long as an entity remains in the larger group. Under this definition, “join” does not begin and end at a single moment in time but instead denotes a continuing status until the membership concludes.⁸³ Reinforcing this point is the fact that no language in section 219 specifically limits the incentive’s duration, which Congress could have provided had it wished to do so.

Moreover, the statute allows the incentive for a utility “that joins” an RTO.⁸⁴ Once the utility joins an RTO it is eligible for that incentive under the statute as long as it remains in the RTO. As Commissioner Danly has argued, “‘That’ in this sentence is a relative pronoun. Its function is to introduce a restrictive relative clause. It does no more than identify the universe of entities eligible for the incentive.... There is also no limitation in the verb [joins].”⁸⁵ Had Congress intended to provide a one-time incentive, it could have used “to” instead of “that” to focus on the act of joining or it could have specified a time limit on the incentive’s duration.⁸⁶

⁸¹ *Join*, MERRIAM-WEBSTER.COM., <https://www.merriam-webster.com/dictionary/join> (last visited Jun. 23, 2021).

⁸² *Join*, AHDICITIONARY.COM., <https://www.ahdictionary.com/word/search.html?q=join> (last visited Jun. 23, 2021).

⁸³ In other areas of the law, statutes have been read similarly. “Possession” of contraband, for example, continues as long as one possesses the contraband and does not occur only when one first receives the contraband. *United States v. Berndt*, 530 F.3d 553, 554-55 (7th Cir. 2008). Similarly, escape from federal custody occurs as long as one is on escape status and does not occur only at the moment of escape. *United States v. Bailey*, 444 U.S. 394, 413 (1980) (“we think it clear beyond peradventure that escape from federal custody . . . is a continuing offense, and that an escapee can be held liable for failure to return to custody as well as for his initial departure”).

⁸⁴ Supplemental NOPR, 175 FERC ¶ 61,035 (Danly, Comm’r, dissenting at 1).

⁸⁵ *Id.* (Danly, Comm’r, dissenting at 1, n.4).

⁸⁶ *Id.* (Danly, Comm’r, dissenting at 1).

The statute’s purpose supports this reading of “joins.” In section 219, Congress directed the Commission to establish incentives “for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”⁸⁷ That purpose can only be accomplished if a utility joins and remains in an RTO. The value of an RTO depends on its membership and the stability of that membership; in other words, achieving the benefits of RTO participation for consumers is contingent on a utility’s continuing membership in the RTO. Under the Commission’s reading of the statute, not only would utilities have less incentive to join an RTO, they would have less incentive to remain as well. As a result, a cramped reading of “joins” would frustrate the very purpose of the statute. This the Commission cannot do, for when a statute is open to more than one interpretation it must be read “in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.”⁸⁸

Section 219’s legislative history supports the Commission’s determination in Order No. 679 and its progeny. The House’s version of EPAct 2005 titled this section “Additional incentives for RTO *participation*.”⁸⁹ This is consistent with the recollection of former Representative Joe Barton, who was the Chairman of the House Energy and Commerce Committee from 2004 to 2007 and House sponsor of the Energy Policy Act of 2005. Mr. Barton explains that the incentive was not meant to be “a one-time payment or a one-time deal”:

[S]ection 219(c) does not contain a ‘sunset’ clause and at no point does it implicitly, or expressly, state that the incentive to a utility that joins a Transmission Organization should be limited in duration. Consistent with my instructions to Conference Committee staff around ambiguity, if the committee had intended that the incentive to a utility that joins a Transmission Organization was meant to be a one-time payment or one-

⁸⁷ 16 U.S.C. § 824s(a).

⁸⁸ *Shapiro v. United States*, 335 U.S. 1, 31 (1948). *See also D.B. v. Cardall*, 826 F.3d 721, 739 (4th Cir. 2016) (“When a statute is subject to two contrary interpretations, we should adopt the one that ‘effectuates rather than frustrates the major purpose of the legislative draftsmen.’”).

⁸⁹ H.R. 6, 109th Cong. § 218(b) (as passed by House, Apr. 21, 2005) (emphasis added).

time deal, I would have instructed Conference Committee staff to make that clear in the language of the statute. Both myself, and the Conference Committee staff at the time, were more than capable of drafting language to that effect. The fact that section 219(c) does not expressly limit the incentive to a utility for joining a Transmission Organization indicates that I did not intend for that provision to be a ‘loss leader’ or one-time deal to get a utility to join a Transmission Organization.⁹⁰

Contemporaneous testimony from the Commission’s General Counsel, Cynthia Marlette, establishes that the Commission sought to incentivize “membership” in an RTO, not the one-time act of joining it, in recognition of the “major benefits” provided by RTOs. On February 10, 2005, Ms. Marlette provided a statement to the House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality:

The Commission's policy is to encourage *membership* in RTOs, since RTOs enhance the reliability and economic efficiencies of a region's transmission grid and power supply. The conference report on H.R. 6 endorses voluntary participation in RTOs in section 1232's “Sense of the Congress” statement. This provision is beneficial in light of the major benefits that RTOs can bring to electric markets. In addition, increased *membership* in FERC-approved RTOs or ISOs by governmental transmitting utilities would provide even further benefits to electric customers, and section 1232 of the conference report on H.R. 6 would facilitate this result for federal power marketing agencies and the Tennessee Valley Authority.⁹¹

Ms. Marlette’s statement is particularly relevant because of her role as the Commission’s General Counsel. In *Shapiro v. United States*, the Supreme Court gave “special consideration” to the written statement of an agency’s General Counsel that was presented at a congressional hearing on legislation that was later enacted.⁹² The Court observed:

We may accord to the construction expounded during the course of the hearings at least that weight which this Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored

⁹⁰ Affidavit of the Honorable Joe Barton, at P 6 (June 2, 2021) (attached hereto as **Exhibit 1**).

⁹¹ *Energy Policy Act of 2005: Hearing on H.R. 6 Before the Subcommittee on Energy and Air Quality of the H. Comm. On Energy and Com.*, 109th Cong. 30 (2005) (statement of Cynthia Marlette, General Counsel, FERC) (emphasis added), *reprinted in* 8 Legislative History of P.L. 109-58 Energy Policy Act of 2005 (2005).

⁹² *Shapiro v. United States*, 335 U.S. at 12 n.13.

the particular provisions which it interprets. And we may treat those contemporaneous expressions of opinion as ‘highly relevant and material evidence of the probable general understanding of the times. . . .’⁹³

In sum, the Commission should not abandon its longstanding policy of providing an incentive for RTO membership for the entire duration of a utility’s participation in an RTO. The text of section 219 requires that a utility “that joins” an RTO be eligible for the incentive as long as it remains in the RTO. The statute itself does not contain specific language limiting the duration of the incentive. Its stated purpose – “benefitting consumers by ensuring reliability and reducing the cost of delivered power”⁹⁴ – is promoted by encouraging utilities to remain in an RTO. Order No. 679, which reflects the Commission’s contemporaneous interpretation of section 219, furthers this purpose, because it recognizes the value of RTOs and provides an incentive for utilities’ continued participation. Finally, legislative history supports this interpretation over the one the Commission sets forth in the Supplemental NOPR.

C. Compelling Policy Reasons Support Retaining the Incentive

Now is not the time to undermine RTOs at the expense of other urgent policies. Retaining membership in RTOs is more important than ever as policymakers address the climate crisis and support the energy transition. First, the climate crisis requires decarbonization of the power industry and electrification of other parts of the economy. RTOs, given their role in overseeing electric grids, can help many regions achieve those goals. Second, the decision to join an RTO is generally a voluntary one. This means that incentives are critical for attracting new members and retaining existing ones. Finally, if existing RTO members lose the incentive, there is a very real risk that some will decide that the risks and burdens of membership outweigh

⁹³ *Id.* (quoting *White*, 315 U.S. at 41).

⁹⁴ 16 U.S.C. § 824s(a).

the benefits. Departures from RTOs could unravel the very markets that the Commission has spent two decades developing and nurturing.

1. Addressing the Climate Crisis and Supporting the Energy Transition

The Biden Administration’s goal is to have zero carbon emissions from the power industry by 2035 and for the economy to be carbon neutral by 2050. To reach those goals will require a vast addition of renewable resources and electrification of the economy. According to the National Renewable Energy Laboratory, “widespread electrification can lead to historically unprecedented growth” in load in absolute terms.⁹⁵ Similarly, to meet electrification-related demand, the Brattle Group estimates that 70 GW to 200 GW of additional new power generation will be needed by 2030 and another 200 GW to 800 GW of generation between 2030 and 2050.⁹⁶ The transition to a low carbon future will require optimizing the capacity of existing transmission, as well as planning and developing additional transmission.⁹⁷

RTOs help facilitate this transition and enable electrification. They support renewable development in a multitude of ways envisioned by Order No. 2000, including regional transmission pricing and the elimination of rate pancaking, improved congestion management, more accurate measurements of Available Transfer Capability, reduced transaction costs, and fewer opportunities for discriminatory transmission practices.⁹⁸ RTOs also facilitate regional

⁹⁵ Trieu Mai, Paige Jadun, Jeffrey Logan, Colin McMillan, Matteo Muratori, Daniel Steinberg, Laura Vimmerstedt, Ryan Jones, Benjamin Haley, and Brent Nelson, *Electrification Futures Study: Scenarios of Electric Technology Adoption and Power Consumption for the United States*, at xiv (2018), <https://www.nrel.gov/docs/fy18osti/71500.pdf>.

⁹⁶ The Brattle Group, *The Coming Electrification of the North American Economy, Why We Need a Robust Transmission Grid*, at iv (Mar. 2019), <https://wiresgroup.com/wp-content/uploads/2020/05/2019-03-06-Brattle-Group-The-Coming-Electrification-of-the-NA-Economy.pdf>.

⁹⁷ *Id.* at iii.

⁹⁸ Order No. 2000, 89 FERC ¶ 61,285, at 89-90. *See also* Rich Glick and Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 17 n.69 (2019) (“One of the many beneficial effects of these large regional markets is their potential to more effectively integrate variable energy resources by, among other things, reducing curtailment, eliminating rate pancaking, and identifying regional transmission needs. By integrating variable energy resources more effectively, organized markets can facilitate greater competition for a range of services, with corresponding benefits to ratepayers.”).

transmission planning and cost allocation, which will be critical to integrating renewable resources at the lowest cost to consumers. Their markets are transparent, which promotes liquidity and the use of financially settled offtake arrangements such as virtual power purchase agreements.⁹⁹

RTOs have led the way in reliably integrating ever-higher amounts of renewable energy. On March 13, 2021, CAISO set a new record of 92.5 percent renewable penetration.¹⁰⁰ Two weeks later, on March 29, 2021, SPP set its own record and reached 84.2 percent.¹⁰¹ RTOs are able to achieve this success because of the integrated nature of their transmission systems and their load, resource, and geographic diversity, which helps address the variability of renewable resources. As a result, now is the time for the Commission to encourage, not chill, RTO participation from transmitting utilities.

2. The Best Tool in the Toolkit

At present, the only tool the Commission has to encourage RTO participation is the use of incentives. Longstanding Commission policy is that a transmitting utility's decision on whether or not to join an RTO is a voluntary one. The current incentive encourages utilities to join and remain in RTOs. Conversely, a duration limit has the opposite effect, undoubtedly altering the calculus for both utilities that do not yet belong to an RTO and utilities that do. In

⁹⁹ Other market structures can meet functions identified in this paragraph. Since its formation in November 2014, the Western Energy Imbalance Market has resulted in \$1.28 billion in gross benefits for consumers and reduced the curtailment of renewable energy. See *Western EIM - Benefits*, <https://www.westerneim.com/Pages/About/QuarterlyBenefits.aspx> (last visited Jun. 23, 2021). In addition, a group of utilities in the Southeast has proposed creating the Southeast Energy Exchange Market ("SEEM"), which is an integrated, automated intra-hour energy exchange but not an energy imbalance market. See SEEM, *Frequently Asked Questions*, <https://southeastenergymarket.com/faq/> (last visited Jun. 23, 2021). SEEM's proposal is currently pending before the Commission.

¹⁰⁰ California ISO, *Key Statistics, Peaks for March 2021*, at 1 (Apr. 2021), <http://www.caiso.com/Documents/Key-Statistics-Mar-2021.pdf>.

¹⁰¹ Kassia Micek & Daryna Kotenko, *SPP Breaks Four Renewable, Wind Records Causing Power Prices to Dip Negative*, S&P GLOBAL (Mar. 30, 2021), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/033021-spp-breaks-four-renewable-wind-records-causing-power-prices-to-dip-negative>.

assessing the benefits of membership, the former will know that the incentive only lasts for a few years. The latter will recognize that their eligibility has ended. Unless it is clear that the benefits of RTO participation for a utility outweigh the risks and burdens, a rational transmitting utility would prefer to leave. Put another way, the Commission has used a carrot, not a stick, to encourage RTO participation. If the carrot has resulted in a just and reasonable outcome, the Commission should not now offer a slice of a carrot and expect the same response or outcome.

3. Mitigating the Risk of RTO Exit

Given the risks and burdens associated with RTO participation, the Supplemental NOPR creates a risk that existing members will leave RTOs, which would jeopardize regional decarbonization and transmission planning efforts. The Supplemental NOPR represents a dramatic break from what has been viewed as settled Commission policy. Utilities that have joined RTOs have long had a reasonable expectation that they would receive the incentive and counted on the incentive as they weighed the benefits and burdens of continued RTO participation. In the absence of the incentive, a rational utility would opt to leave an RTO if it concludes that the risks and burdens outweigh the benefits.

Indeed, the Supplemental NOPR appears to bet that in the absence of the incentive transmitting utilities would see enough benefit from RTO membership that they would not exit. But nowhere does the Commission explain the basis for this crucial assumption. If the Commission's assumption is wrong, the harm to RTOs and consumers could be immense and undo decades of Commission effort to support these markets. In a very real sense, the benefit of RTOs depends on a network effect in which an RTO's value increases with the number of participating utilities. Conversely, each departure may reduce the RTO's efficiency and value proposition as gaps and seams emerge in its system and service.

IV. CONCLUSION

For the reasons discussed in its Comments, WIRES respectfully submits that the Commission should not limit the period of time that a transmitting utility is eligible to receive an incentive to join and remain in an RTO. Such a limitation would be contrary to section 206 of the FPA, inconsistent with the text, purpose, and legislative history of section 219, and impede important public policies designed to support a cleaner, more reliable and resilient grid.

Respectfully submitted,

/s/ Norman C. Bay

Norman C. Bay
Willkie Farr & Gallagher LLP
1875 K St., N.W.
Washington, D.C. 20006-1238
(202) 303-1155

/s/ Larry Gasteiger

Larry Gasteiger
Executive Director
WIRES
529 Fourteenth Street, NW
Suite 1280
Washington, DC 20045
Office: (202) 591-2482
Mobile: (703) 980-5750
lgasteiger@exec.wiresgroup.com

EXHIBIT 1

**AFFIDAVIT OF
THE HONORABLE JOE BARTON**

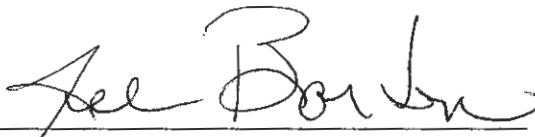
THE STATE OF TEXAS)
)
COUNTY OF Ellis)

I, Joe Barton, make this affidavit and hereby on oath state the following:

1. I am over the age of 18, and I am fully competent to provide this Affidavit. The facts set forth in this Affidavit are within my personal knowledge and are true and correct.
2. I served in the United States House of Representatives from 1985 to 2019, representing the State of Texas’s 6th Congressional District.
3. From 2004 to 2007, I served as the Chairman of the House Energy and Commerce Committee. During that time, I was the House sponsor of the Energy Policy Act of 2005, and I was the Chairman of the House-Senate Energy Conference Committee for the Energy Policy Act of 2005. As Chairman of the Conference Committee on this bill, Conference Committee staff acted at my direction. As part of my instructions to the Conference Committee staff, I told them that I did not want there to be any ambiguity with respect to the provisions of the bill.
4. The Energy Policy Act of 2005 revised the Federal Power Act to include section 219 entitled “Transmission Infrastructure Investment.” Section 219(c) included a provision directing the Federal Energy Regulatory Commission to “provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”
5. As I recall, section 219 was not controversial among the members of the Conference Committee. The general instruction from the principal members of the Conference Committee to the Conference Committee staff was to draft a provision that would provide incentives to build more transmission. As to the Transmission Organization incentive, one of the main goals of the Conference Committee was to ensure that the provision did not mandate that a utility join a Transmission Organization, but directed the Federal Energy Regulatory Commission to provide an appropriate incentive for those electric utilities that opt to participate.

6. Contrary to the interpretation proffered in the Federal Energy Regulatory Commission's April 21, 2021 Notice of Proposed Rule Making, section 219(c) does not contain a "sunset" clause and at no point does it implicitly, or expressly, state that the incentive to a utility that joins a Transmission Organization should be limited in duration. Consistent with my instructions to Conference Committee staff around ambiguity, if the committee had intended that the incentive to a utility that joins a Transmission Organization was meant to be a one-time payment or one-time deal, I would have instructed Conference Committee staff to make that clear in the language of the statute. Both myself, and the Conference Committee staff at the time, were more than capable of drafting language to that effect. The fact that section 219(c) does not expressly limit the incentive to a utility for joining a Transmission Organization indicates that I did not intend for that provision to be a "loss leader" or one-time deal to get a utility to join a Transmission Organization.

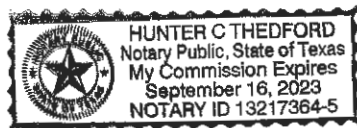
Signed this 2 day of JUNE, 2021



Joe Barton

BEFORE ME, the undersigned authority, this day personally appeared in person and by oath stated that the facts herein stated are true and correct.

SWORN TO AND ASCRIBED BEFORE ME on this 2nd day of June, 2021.





Notary Public in and for the State of Texas

My commission expires: September 16, 2023