

Commission granted, in part, and denied, in part, Dayton’s request for certain transmission rate incentives and set certain issues for paper hearing.⁷ In particular, the August 17 Order accepted and suspended for a five-month period Dayton’s request for the RTO Participation Incentive, subject to refund and the outcome of a paper hearing to explore whether Dayton has shown that its participation in PJM or another RTO is voluntary or if such participation is mandated by Ohio law. On September 10, 2020, WIRES filed a motion to intervene out-of-time,⁸ followed by an initial brief on October 16, 2020.⁹ On October 16, 2020, EEI filed a motion to intervene out-of-time and comments in which it asserted that the applicability of the RTO Participation Incentive should not hinge on the voluntariness of a utility’s RTO membership, and requested that the Commission authorize Dayton to apply the RTO Participation Incentive to its base ROE.¹⁰ On July 15, 2021, the Commission issued the Order on Paper Hearing in which it determined that Dayton does not qualify for the RTO Participation Incentive, and therefore denied the Application with respect to that request.

As discussed herein, Joint Requestors seek rehearing of the Order on Paper Hearing. The Commission should grant rehearing and grant Dayton’s request for the RTO Participation Incentive. Specifically, the Commission should not condition its granting of the RTO Participation Incentive upon whether Dayton’s membership in PJM is voluntary because Section 219(c) of the Federal Power Act (“FPA”) requires that the Commission provide for incentives to each transmitting utility or electric utility that becomes a member of a Transmission

⁷ *The Dayton Power & Light Co.*, 172 FERC ¶ 61,140 (2020) (“August 17 Order”).

⁸ Motion to Intervene Out-of-Time of WIRES, Docket No. ER20-1068 (Sept. 10, 2020). The Commission granted WIRES’s late-filed motion to intervene. *See* Order on Paper Hearing at P 12.

⁹ Brief of WIRES, Docket Nos. ER20-1068-000 and ER20-2100-000 (Oct. 16, 2020).

¹⁰ Motion to Intervene Out-of-Time or in the Alternative to Participate as Amicus Curiae and Comments of the Edison Electric Institute, Docket Nos. ER20-1068-000 and ER20-2100-000 (Oct. 16, 2020) (“EEI Comments”). The Commission granted EEI’s late-filed motion to intervene. *See* Order on Paper Hearing at P 12.

Organization.¹¹ The statute does not distinguish between whether the utility joins an RTO/ISO of its own volition or whether it does so pursuant to a requirement by a state legislature or public service commission. A “Transmission Organization is a Regional Transmission Organization (“RTO”), Independent System Operator (“ISO”), independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.”¹² Accordingly, the Order on Paper Hearing exceeds the Commission’s statutory authority. Furthermore, the Commission should reconsider the Order on Paper Hearing because it erroneously permits state legislation to dictate the applicability of federal policy, in the form of the RTO Participation Incentive, which is the purview of the Commission.

Alternatively, the Commission should defer ruling in this proceeding until it has issued a rule on whether to link “voluntariness” with the RTO Participation Incentive. The Commission raised this issue in a Notice of Proposed Rulemaking (“NOPR”) issued in March 2020¹³ and specifically requested comment on the issue in a Supplemental Notice of Proposed Rulemaking (“Supplemental NOPR”) issued on April 15, 2021.¹⁴ Joint Requestors submitted comments in response to the NOPR and Supplemental NOPR.¹⁵

¹¹ 16 U.S.C. 824s(c), (“[I]n the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.”).

¹² 16 U.S.C. § 796(29) (internal quotes omitted).

¹³ *Elec. Transmission Incentives Policy Under Section 219 of the Fed. Power Act*, Notice of Proposed Rulemaking, 170 FERC ¶ 61,204 (2020) (“NOPR”).

¹⁴ *Elec. Transmission Incentives Policy Under Section 219 of the Fed. Power Act*, Supplemental Notice of Proposed Rulemaking, 175 FERC ¶ 61,035 (2021) (“Supplemental NOPR”).

¹⁵ Comments of the Edison Electric Institute, Docket No. RM20-10-000 (July 1, 2020); Initial Comments of the Edison Electric Institute, Docket No. RM20-10-000 (June 25, 2021); Reply Comments of the Edison Electric Institute, Docket No. RM20-10-000 (July 26, 2021); Comments of WIRES, Docket No. RM20-10-000 (July 1, 2020); Reply Comments of WIRES, Docket No. RM20-10-000 (July 26, 2020); Comments of WIRES, Docket No. RM20-10-000 (June 25, 2021); Reply Comments of WIRES, Docket No. RM20-10-000 (July 16, 2021).

II. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES

In accordance with 18 C.F.R. § 385.713(c)(1) and (2), Joint Requestors provide the following specifications of error and statement of issues, including citations to representative Commission and court precedent:

1. The Commission’s decision to condition its granting of the RTO Participation Incentive based upon whether Dayton’s membership in PJM is voluntary is contrary to the plain language of Section 219 of the FPA, or at a minimum an unreasonable interpretation of the statutory text and is therefore unjust and unreasonable.¹⁶ In Section 219 of the FPA, Congress directed the Commission to establish incentives for participation in an RTO. Congress chose not to limit its directive to provide incentives to utilities, including for those whose participation in an RTO is strictly voluntary. Therefore, the Commission erred in conditioning the RTO Participation Incentive on whether Dayton’s RTO membership is voluntary.
2. The Commission’s decision in the Order on Paper Hearing exceeds the Commission’s statutory authority because it permits state legislation to determine the applicability of an incentive that is required under federal law.¹⁷ In Section 219 of the FPA, Congress directed the Commission to establish incentives for RTO participation. The Commission subsequently found that utilities are entitled to this incentive as a matter of federal law.¹⁸ A utility’s eligibility for the RTO Participation Incentive cannot hinge upon a state legislative body’s decision to enact new legislation or repeal or modify existing legislation pertaining to RTO participation. Therefore, the Commission’s decision in the Order on Paper Hearing is in excess of its statutory authority under Section 219 of the FPA.
3. Participation in an RTO can only be accomplished via an FPA Section 205¹⁹ filing by the transmission owning public utility, in which such public utility amends its open access tariff and agrees to transfer service responsibilities under such tariff to an RTO. Section 205 can only be triggered by a voluntary filing by the public utility, unless such utility has voluntarily waived its Section 205

¹⁶ See 5 U.S.C. § 706(2); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (noting that “the agency . . . must give effect to the unambiguously expressed intent of Congress” and that an agency’s interpretation of statutory text must be “reasonable”); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (noting that determining “plain . . . meaning” is the first (and often last) step in statutory interpretation); *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,224 at P 35 & n.85 (2007) (“*Amaranth*”) (similar).

¹⁷ See 5 U.S.C. § 706(2)(C).

¹⁸ *Pac. Gas and Elec. Co.*, 170 FERC ¶ 61,194 (2020).

¹⁹ 16 U.S.C. § 824d.

rights.²⁰ Neither the Commission nor any state has the authority to order a public utility to make a Section 205 filing. Since Congress did not amend Section 205 to eliminate or condition this exclusive utility filing right when it enacted Section 219, Congress could not have intended that the Commission's authority to grant the RTO Participation Incentive under Section 219 of the FPA could be overridden by state laws mandating RTO participation.

4. The Commission acted arbitrarily and capriciously, and abused its discretion, by promulgating a new test for determining the applicability of the RTO Participation Incentive through a case-specific Order rather than amending its regulations through the currently pending rulemaking proceeding in Docket No. RM20-10-000 that follows the requisite notice-and-comment requirements and is intended to address the appropriateness of that same test.²¹

III. REQUESTS FOR REHEARING

- A. **The Commission should grant rehearing because the Commission's decision to condition the RTO Participation Incentive on whether Dayton's membership in PJM is voluntary is contrary to the plain language of Section 219 of the FPA, and therefore is in excess of the Commission's statutory authority.**

FPA section 219(c) requires that the Commission provide for incentives to each transmitting utility or electric utility that becomes a member of a Transmission Organization.²² The statute is clear that the Commission shall provide an incentive to utilities that join an RTO and does not make a distinction as to the reason for joining. Thus, the statute does not give the Commission discretion to provide the RTO Participation Incentive only to some utilities that join a RTO. Section 219(a) indicates that the purpose of the statute is "benefitting consumers" through reliability enhancements and reduced congestion. Membership in an RTO is one way to

²⁰ *Atlantic City Electric Co. et al, v. FERC*, 295 F.3d 1, 10-11 (2002) (noting "utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205" and that "FERC lacks the authority to require the [utility] petitioners to cede their right under section 205 of the [FPA]").

²¹ See 5 U.S.C. § 706(2); 5 U.S.C. §§ 553(b)-(c).

²² 16 U.S.C. 824s(c) states "[I]n the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization."

accomplish this, as recognized in the statute. These benefits of RTO participation accrue to customers regardless of whether the utility joined an RTO of its own volition or did so pursuant to a requirement by a state legislature or public service commission. The RTO Participation Incentive is required by Section 219 of the FPA to be provided to all utilities that join a Transmission Organization, and the voluntariness of Dayton’s participation in PJM should be immaterial to the Commission’s decision of whether to grant Dayton’s request for the RTO Participation Incentive.²³ As noted by Commissioner Danly, the plain statutory text of Section 219 of the FPA “does not limit the provision of incentives to only those utilities ‘that voluntarily join[]’ a transmission organization,” and that the Commission’s addition of the voluntariness requirement “works an amendment of unambiguous law and only Congress—not FERC—has the authority to pass and amend statutes.”²⁴

Despite the clear language of the statute, the Order on Paper Hearing asserts that a voluntariness requirement is in fact consistent with Section 219 of the FPA. The Commission bases its decision in part on the observation in Order No. 679²⁵ that continued RTO membership is “generally voluntary.”²⁶ The Commission takes this sentence from Order No. 679 and appears to be creating a new standard for granting the RTO Participation Incentive that is contrary to the intent and clear language of the statute. When the sentence is read within the context of the paragraph and Order No. 679, it is clear that the Commission’s reliance on it in the Order on

²³ Section 202(a) of the FPA, which directs FERC to divide the country into regional districts for the generation, transmission, and sale of electric energy, specifically characterizes the interconnection and coordination of facilities in such districts as “voluntary.” See 16 U.S. Code § 824a(a). This reinforces the conclusion that RTO membership must be “voluntary” in nature.

²⁴ Order on Paper Hearing, Danly Dissent at PP 2-3 (internal quotations omitted).

²⁵ *Promoting Transmission Inv. through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh’g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007) (“Order No. 679”).

²⁶ Order on Paper Hearing at P 26 citing Order No. 679 at P 331.

Paper Hearing is improperly expansive. First, the sentence was included as part of Order No. 679's explanation of why the RTO Participation Incentive should be provided to entities that are joining an RTO and to those that have joined and remain members of a RTO.²⁷ Second, after the Commission noted "that continuing membership is generally voluntary," it did not proceed to assert that the RTO Participation Incentive is inappropriate where such membership is *not* voluntary.²⁸ Most significantly, the Commission in Order No. 679 indicated via footnote that its clarification on the eligibility of the RTO Participation Incentive "also applies to utilities that joined RTOs or ISOs because of merger conditions or market-based rate requirements."²⁹ Thus, contrary to the Commission's reliance on the statement to deny granting the RTO Participation Incentive, Order No. 679 indicates that requirements that make RTO membership mandatory for utilities do not bar those utilities from receiving the RTO Participation Incentive. This supports the conclusion that state legislation requiring membership in a Transmission Organization should not disqualify affected utilities from receiving the RTO Participation Incentive. Thus, the Commission's reliance on this sentence in Order No. 679 is not enough to justify a statutory interpretation that is at odds with the plain language of the statutory text and Congress's decision to impose a voluntariness requirement on the RTO Participation Incentive.

For the reasons described above, the Commission's decision to condition its granting of the RTO Participation Incentive based upon whether Dayton's membership in PJM is voluntary is contrary to the plain language of Section 219 of the FPA, or at a minimum an unreasonable

²⁷ Order No. 679 at P 331.

²⁸ *Id.* at P 331.

²⁹ *Id.* at n.180.

interpretation of the statutory text and is therefore in excess of the Commission’s statutory authority.³⁰

B. The Commission should grant rehearing because the Order on Paper Hearing exceeds the Commission’s statutory authority by permitting state legislation to determine the applicability of an incentive that is required under federal law.

In Section 219 of the FPA, Congress sought to encourage RTO participation by explicitly stating that the Commission “shall... provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.”³¹ Thus, the RTO Participation Incentive is a product of federal law and policy that the Commission is required to implement for all utilities that meet the statutory requirement of joining a Transmission Organization. In implementing the statute, the Commission established the RTO Participation Incentive, and subsequently found that utilities are entitled to this incentive as a matter of federal law under Section 219 of the FPA and Order No. 679.³² Despite this statutory requirement and Commission precedent, the Order on Paper Hearing denies Dayton’s request for the RTO Participation Incentive due to the existence of an Ohio statute, the interpretation of which is an issue in the proceeding.³³ The result is that the Commission has enabled state legislation to determine the applicability of an incentive which utilities are entitled to under federal law. This exceeds the Commission’s statutory authority under Section 219 of the FPA to provide incentives pursuant to federal

³⁰ See 5 U.S.C. § 706(2)(C); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (noting that “the agency . . . must give effect to the unambiguously expressed intent of Congress” and that an agency’s interpretation of statutory text must be “reasonable”); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (noting that determining “plain . . . meaning” is the first (and often last) step in statutory interpretation); *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,224 at P 35 & n.85 (2007) (“*Amaranth*”) (similar).

³¹ 16 U.S.C. 824s(c).

³² *Pac. Gas and Elec. Co.*, 170 FERC ¶ 61,194 at P 38 (2020) (noting that “section 219 of the FPA and Order No. 679 provide the basis for granting the RTO-Participation Incentive”).

³³ Order on Paper Hearing at P 54.

policy.³⁴ While state activity is an indication of state intent and state policy goals, it is distinct and independent from the Commission's obligation under the federal statute that requires the Commission to provide an incentive for joining a Transmission Organization. A utility's eligibility for the RTO Participation Incentive should not hinge upon a state legislative body's ability to enact new legislation or repeal or modify existing legislation pertaining to RTO participation. By opening the door for state policy to dictate the applicability of federal incentives, the Commission has exceeded its statutory authority.

In addition, the benefits for customers and the risks, burdens and responsibilities for transmission owning public utilities associated with RTO membership do not vary depending on whether the utility joins the Commission regulated RTO voluntarily as discussed in Docket No. RM20-10-000. These benefits, risks and burdens arise from the willingness to turn over operational control of transmission facilities to the RTO and are the same whether there is a state statute. In the Order on Paper Hearing, the Commission does not address these risks or the role of the RTO Participation Incentive in compensating public utility transmission owners for the risks and responsibilities associated with membership in a RTO. This is reflected in the Commission's statement that its "decision to deny the incentive RTO Adder here is irrelevant to Dayton's base ROE and financial integrity, credit ratings, and ability to attract investment."³⁵ The Commission's base ROE methodology does not compensate public utility transmission owners for the specific risks and burdens of RTO membership.³⁶ Disallowing the RTO Participation Incentive for some companies that join or remain in an RTO, regardless of the

³⁴ 5 U.S.C. § 706(2)(C).

³⁵ Order on Paper Hearing at P 29.

³⁶ See e.g., *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Reply Comments of the Indicated Transmission Owners, Exhibit B – Reply Affidavit of Ellen Lapson, CFA, Docket No, RM20-10-000 at P 9 (July 26, 2021).

reason for joining, creates an uneven playing field in the competition for investment capital, a result that Commission policy should avoid.

Thus, the Commission is required to provide a RTO Participation Incentive under section 219 of the FPA. Section 219 does not contain a voluntariness requirement and the Commission's decision to allow state law to pre-empt its responsibility under the FPA exceeded its statutory authority. Furthermore, RTOs are subject to Commission, not state, jurisdiction and all transmission owner public utilities that join an RTO are subject to the same risks, burdens and responsibilities that are not compensated in the Commission's base ROE methodology. The Commission's decision to treat similarly situated entities differently is also arbitrary and capricious.

C. The Commission should grant rehearing because neither the Commission nor any state has authority to order a public utility to make a Section 205 filing.

Participation in an RTO can only be accomplished via a FPA Section 205 filing by the transmission owning public utility, in which it agrees to amend its open access transmission tariff and enter into other agreements to transfer operating control and other rights to an RTO. As an initial matter legal precedent bars states from compelling a public utility from making a Section 205 filing.³⁷ In addition, the Court of Appeals for the D.C. Circuit has held, in the very context of the Commission's attempt to modify voluntary participation in an RTO by the PJM transmission owners, that Section 205 can only be implemented via a voluntary filing by the public utility transmission owners.³⁸ This decision confirming a critical limitation embodied in

³⁷ *Mass., Dep't of Pub. Utils. v. United States*, 729 F.2d 886 (1st Cir. 1984) (finding that a state cannot dictate a public utility's FERC rate filings). See also, *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Reply Comments of the Indicated Transmission Owners, Exhibit A - Affidavit of the Hon. Joseph T. Kelliher, Docket No, RM20-10-000 at P 32 (July 26, 2021) ("Kelliher Affidavit").

³⁸ *Atlantic City*, 295 F.3d at 10-11.

Section 205 preceded enactment of Section 219. At the time Section 219 was enacted, therefore, Congress knew that in order for anyone to force a public utility to join an RTO, Section 205 would need to be amended. Congress did not enact such an amendment, and for this reason Congress could not have intended that the Commission's authority to grant the RTO Participation Incentive under Section 219 of the FPA could be overridden by state laws mandating RTO participation.

Furthermore, federal policy with regard to RTOs has long been that membership in such organizations should be voluntary. Order No. 2000, which encouraged Transmission Owners to surrender control of their transmission assets to RTOs and ISOs, was clear that RTO membership should be voluntary in nature in order to encourage regional flexibility and avoid legal challenges that would arise in response to a membership mandate.³⁹ Indeed, in recent years the Commission has affirmed this "longstanding policy of voluntary RTO/ISO formation and membership."⁴⁰

Thus, the law was clear at the time that Section 219 of the FPA was enacted that participation in an RTO required a voluntary Section 205 filing by each participating public utility transmission owner. The Commission's decision in the Order on Paper Hearing allows state laws to pre-empt the Commission's obligation under FPA Section 219, which does not contain any voluntariness language, and considering the legal precedent is unsupported and is arbitrary and capricious.

³⁹ *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 at 115-16 (1999) (subsequent history omitted); *see also* Kelliher Affidavit at P 6.

⁴⁰ *Pacific Gas and Electric Company*, Order on Remand, Docket Nos. ER14-2529-005, et al., 168 FERC ¶ 61,038 at P 45 (2019).

D. The Commission should grant rehearing because the Commission acted arbitrarily and capriciously, and abused its discretion, by promulgating a new test for determining the applicability of the RTO Participation Incentive through a case-specific Order rather than a regulation, and by failing to engage in notice-and-comment rulemaking.

If the Commission decides not to grant rehearing and provide Dayton with the RTO Participation Adder through its application in the instant docket, then, at a minimum, the Commission should grant rehearing and defer ruling on the matter until the issue of “voluntariness” is resolved in the concurrent rulemaking proceeding. As noted above, the Commission is currently in the midst of a rulemaking proceeding on the RTO Participation Incentive as well as other issues in which it is evaluating the merits of the same “voluntariness” requirement it used to deny Dayton’s request for the RTO Participation Incentive.⁴¹ In that proceeding, the Commission has solicited comments from the public on the proposed “voluntariness” requirement, and will issue a final rule with broad applicability once it has considered that public input. Given the far-reaching nature of the NOPR and Supplemental NOPR, the Commission acted arbitrarily, capriciously, and inconsistent with the notice and comment requirement of the Administrative Procedure Act⁴² by addressing the issue in the instant proceeding and effectively creating a broadly applicable “voluntariness” requirement for the RTO Participation Incentive without going through the necessary notice and comment

⁴¹ See NOPR at P 98 (2020) (proposing “that the RTO-Participation Incentive should be applied to transmitting utilities that join and remain enrolled in an [RTO] regardless of the voluntariness of their participation”) (“NOPR”); Comments of the Edison Electric Institute, Docket No. RM20-10-000 at 17-19 (July 1, 2020) (endorsing the view that the RTO Participation Incentive should not be dependent on the voluntariness of a utility’s participation in an RTO); Supplemental NOPR at PP 17-19 (seeking comment on whether the RTO Participation Incentive should be available only to transmitting utilities that join an RTO voluntarily); Initial Comments of the Edison Electric Institute, Docket No. RM20-10-000 at 23 (June 25, 2021) (stating that “the perceived ‘voluntariness’ of a utility’s participation in a Transmission Organization should be immaterial to the Commission’s decision of whether to grant a request for incentives.”); Reply Comments of the Edison Electric Institute, Docket No. RM20-10-000 at 15-16 (July 26, 2021) (reiterating same).

⁴² Administrative Procedure Act (APA), Pub. L. 79–404, 60 Stat. 23.

procedures. For the foregoing reasons, the Commission's decision in the Order on Paper Hearing is arbitrary and capricious, and an abuse of discretion.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Joint Requestors respectfully request that the Commission grant rehearing of its Order on Paper Hearing.

Respectfully submitted,

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August 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 16th day of August 2021.

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