

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

(Issued March 25, 2020)

Attached is the statement by Commissioner Glick dissenting in part to an order issued on March 20, 2020, in the above referenced proceeding. *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 170 FERC ¶ 61,204 (2020).

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

(Issued March 25, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I agree with some of this notice of proposed rulemaking (NOPR). I write separately to highlight aspects of the NOPR that merit particular attention by commenters as well as others that appear to be flatly unjust and reasonable or otherwise fall short of Congress' direction in section 219 of the Federal Power Act¹ (FPA) to incentivize the development of a transmission system that gives customers their money's worth.

I. The Transco Incentive

2. Let's start with the good. I fully support the Commission's proposal to eliminate Transco-specific incentives. Like my colleagues, I recognize that Transcos have played a role in developing new transmission infrastructure.² But I also agree that the record before us reflects that the "Transco business model has not enhanced the deployment of transmission infrastructure sufficiently to justify incentives based on this business model."³ As I have previously observed, it is "not clear that Transcos are superior to other public utilities that can and do invest in transmission facilities— including competitively developed transmission facilities—or that awarding Transcos a higher ROE actually leads to greater transmission investment."⁴ In light of those facts, I do not believe that it is appropriate to continue requiring customers served by a Transco to pay a higher ROE. I believe that the proposal to eliminate those incentives will help meet our statutory obligation to ensure that incentive rates are just and reasonable.⁵

¹ 16 U.S.C. § 824s (2018).

² See *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 170 FERC ¶ 61,204, at P 91 (2020) (NOPR); see also Gridliance Comments at 22-24; Gridliance Comments, Attachment B (report discussing benefits of the Transco business model); ITC Holdings Comments at 5-6.

³ NOPR, 170 FERC ¶ 61,204 at P 91.

⁴ *GridLiance West Transco LLC*, 164 FERC ¶ 61,049 (2018) (Glick, Comm'r, concurring at 2).

II. The Shift from Risks and Challenges to Benefits

3. I also support the Commission's proposal to award incentives based on a transmission facility's benefits, rather than its risks and challenges.⁶ Section 219 instructs the Commission to set up a transmission incentives regime "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."⁷ Granting incentives to benefit customers is what Congress instructed us to do and that should be the focus of our analysis. Moreover, incentivizing beneficial transmission projects, as opposed to those facing risks and challenges, is more likely to prove a wise use of customers' money.

4. Nevertheless, while I support the shift to benefits, I am concerned that the NOPR omits what should be a bedrock principle of any effort to administer section 219: That incentives must actually incentivize something. A payment that does not incentivize anything is a handout, not an incentive.⁸ Handing out customers' money to transmission owners without a strong belief that that money will induce beneficial conduct is unjust and unreasonable and inconsistent with Congress' intent behind section 219.

5. That means that the Commission must conclude that any incentive we create will lead transmission owners to take actions that benefit customers. It does not, however, mean that when granting an incentive the Commission must find that the incentive is a "but-for" cause of the transmission owner taking the action in question. An example may be helpful. Suppose that, for whatever reason, the Commission elects to incentivize the development of transmission facilities that operate at or above 500 kV through a 50-basis-point ROE adder. In my view, the Commission would need to conclude that the ROE adder would induce the development of additional facilities meeting that criterion. But the Commission would not need to find that receiving the ROE adder was a necessary step in the development of any particular 500 kV facility in order for that facility to be eligible for the incentive.⁹ In the event that the Commission cannot find that

⁵ 16 U.S.C. § 824s(d).

⁶ NOPR, 170 FERC ¶ 61,204 at P 34.

⁷ 16 U.S.C. § 824s(a).

⁸ See R Street Comments at 7 ("The term 'incentive' necessarily implies that the Commission is urging the incentivized party toward some action."); see generally *Cal. Public Util. Comm'n v. FERC*, 879 F.3d 966, 974-79 (9th Cir. 2018) (*CPUC v. FERC*) (explaining that the Commission has "a longstanding policy" that incentives must incentivize something "and that there must be a connection between the incentive and the conduct meant to be induced").

⁹ And just because an incentive incentivizes something does not make it just and

the ROE adder would incentivize the development of 500 kV facilities, then I believe it would be categorically unjust and unreasonable, since it would hand out customers' money for nothing in return.

6. The NOPR, however, does not appear to require a finding along those lines. Instead, it appears to propose handing out certain incentives based only on project characteristics without assessing whether those incentives would beget more projects with those characteristics. I encourage commenters to address the issue of whether the incentives proposed in the NOPR would actually incentivize anything in addition to whether they would be just and reasonable.

III. The Application of the Benefits Framework

7. Although I support the Commission's proposal to focus on benefits rather than risks and challenges, I have a number of specific concerns about the how Commission is proposing to put that focus into practice. In general, the NOPR seems to target only the low-hanging fruit that is already amply accounted for in transmission planning processes. By contrast, it fails to do much, if anything, about the many benefits of transmission that are not fully reflected in those processes. To be just and reasonable, incentives ought to do more than reward the projects that are already most likely to be developed.

8. And yet that is most of what this NOPR would do. Consider the proposed incentives for economic transmission projects. The NOPR proposes to give an ROE adder to a fraction of the most beneficial projects (on both an *ex ante* and an *ex post* basis) based *only* on "adjusted production costs or similar measures of congestion reduction or certain other quantifiable benefits."¹⁰ Measures like adjusted production cost already form the backbone of how transmission planning regions identify and select economic transmission facilities.¹¹ I am concerned that the Commission's proposal to grant a higher ROE to projects that already get high marks according to those measures will just reward the projects that are most likely to get built anyway. In other words, the Commission's proposal would not incentivize anything additional, it would just further reward those projects that are likely to do well under the status quo.

9. In addition, focusing exclusively on measures like adjusted production cost is unfortunate because not all of the benefits provided by transmission are directly quantifiable. Throughout this record, parties emphasized the diverse range of benefits that transmission can provide, with multiple parties pointing to work by the Brattle Group that identifies and categorizes the wide range of potential transmission benefits.¹² I am concerned that, in contrast to measures like adjusted production cost, many of those

reasonable.

¹⁰ NOPR, 170 FERC ¶ 61,204 at PP 48, 59.

¹¹ *Id.* P 48.

benefits are not receiving adequate attention in the regional transmission planning processes. Accordingly, I hope that commenters will take a hard look at the proposal to focus exclusively on measures like adjusted production cost and discuss whether that focus is likely to lead to the development of additional transmission. I also encourage commenters to discuss whether and how the Commission should factor additional considerations, such as those outlined by the Brattle Group, into its process for granting incentives.

10. The Commission's *ex post* proposal¹³ is slightly more appealing insofar as the allure of a higher ROE may provide a further incentive for transmission developers to keep development costs in check. Anything that keeps costs down has the obvious potential to benefit customers. That said, the NOPR does not provide any reason to believe that the proposed *ex post* incentive is likely to do more to keep costs down than it would cost in the form of a higher ROE. I encourage commenters to develop whatever record they can on this issue, recognizing that forecasting the effects of the contemplated *ex post* incentive may prove challenging.

11. In addition, I hope that commenters will discuss in detail the proposal to create a "rebuttable presumption" that the measures used to evaluate an economic transmission project's benefit-cost ratio in a regional transmission planning process should be used to determine its benefits when awarding incentives. In many cases, those measures were designed specifically with transmission planning in mind, not ROE adders, and it is not immediately obvious that the two are interchangeable. In any case, as the NOPR explains, different regions use significantly different metrics in evaluating the benefits of a proposed economic project.¹⁴ It seems possible that incentives could be allocated disproportionately to one region based simply on how that region plans transmission projects and not any differences in how those projects function or the benefits they provide. Such a result would raise undue discrimination concerns for transmission owners as well as concerns about the impact on customers in the region or regions where incentives are concentrated.

12. Finally, as the Commission notes, a number of RTOs raised concerns about how focusing on benefits might complicate or interfere with their transmission planning processes.¹⁵ I am concerned that the Commission's proposal to dole out incentive ROEs based on measures like adjusted production cost, which, as noted, are the meat and

¹² See, e.g. Public Interest Organizations Comments at 10 (discussing Judy W. Chang, Johannes P. Pfeifenberger, J. Michael Hagerty, Brattle Group, *The Benefits of Electric Transmission: Identifying and Analyzing the Value of Investments* (2013)); AWEA Comments at 10 (similar).

¹³ See NOPR, 170 FERC ¶ 61,204 at PP 43, 59-61.

¹⁴ *Id.* PP 48-49.

potatoes of most transmission planning processes, will only exacerbate those concerns. I encourage parties to address those issues in detail and also discuss what the Commission could do to mitigate any such concerns should it choose to proceed.

IV. The Elephant in the Room: Public Policy Transmission Projects

13. The NOPR is also notable for its failure to address transmission projects that serve public policy purposes. No one can deny the fundamental transition taking place in the electricity sector. As the NOPR recognizes, the generation fleet is turning over and, with that, we are seeing a rapid shift away from large, central-station resources located close to customers and toward renewable resources, such as wind and solar, that are often geographically constrained.¹⁶ That shift is a function of rapidly changing customer preferences, improving economics, and public policy. Although the exact path that the transition will take is hard to predict, one thing seems pretty clear: We will need a lot more transmission.¹⁷

14. Building out the transmission infrastructure needed to accommodate that transition will go a long way toward “ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”¹⁸ Many of the most cost-effective resources needed to satisfy customer demand and meet state public policy goals are located far from load.¹⁹ Attempting to use the current transmission system to access those resources

¹⁵ See *id.* P 44 & n.47.

¹⁶ See *id.* PP 27-29; EEI Comments at 7-8 (“Transmission is the backbone of the Bulk Electric System and continued investment is necessary to address the demands of the future . . . include[ing] changing consumer needs; an evolving fuel mix for electric generation that is marked by the continued addition of renewable and clean energy resources that need to be transported from remote locations to market centers; the potential for higher demand due to increasing market penetration of electric vehicles; and the need to integrate and accommodate new technologies.”); Public Interest Organizations Comments at 3-5 (“The bulk power system increasingly connects generation sources located farther away from load centers, especially weather-influenced (yet dispatchable) renewable energy resources. Also, the rise of distributed energy resources, especially electric vehicles and other energy storage sources of both load and supply, will add new and variable flows into the system, creating new challenges for a system designed around centralized dispatch.”).

¹⁷ See, *e.g.*, WIRES Comments at 4 (discussing a Brattle Group study on the transmission needs driven by electrification).

¹⁸ 16 U.S.C. § 824s(a).

¹⁹ *Cf.*, *e.g.*, Public Interest Organizations Comments at 5 (diagram depicting the

will generate enormous congestion costs, significantly increasing the cost of delivered power. So too will a piece-meal approach to expanding the transmission grid that does not adequately consider the fundamentals underlying the need for additional transmission.²⁰ In addition, bringing those resources online without the necessary transmission infrastructure may lead to reliability issues, especially insofar as the lack of adequate transmission facilities forces what should really be done through transmission planning into the generation interconnection process. Accordingly, building transmission to meet the needs of the clean energy transition will directly further the goals underlying section 219.

15. But while everyone knows that we need additional transmission to ensure that the clean energy transition takes place as cost-effectively and reliably as possible, the projects that would do the most in that regard have proved some of the most difficult to build. And that is one area where section 219 incentives could make a difference. By emphasizing that transmission projects built to meet those needs are Commission priorities and providing an incentive—whether an ROE or a non-ROE incentive—commensurate with that priority, the Commission could take a significant step toward building the transmission system necessary to continue providing low-cost, reliable power as the generation mix evolves.²¹ Although incentives may not prove to be the panacea that resolves all the challenges with developing those projects, they could be an important step in the right direction.

16. Unfortunately, the NOPR does next to nothing to incentivize those projects. It proposes incentives that focus overwhelmingly on addressing existing congestion and reliability concerns. For example, as noted, the Commission proposes to evaluate economic projects solely on the basis of measures like avoided production costs.²² But that approach, which focuses on existing resources, will never incentivize projects that have the potential to greatly decrease the cost of delivered power by accessing regions with enormous, but largely undeveloped potential. That is particularly problematic because the big—*i.e.*, long-haul, high-voltage—transmission projects that have the

interconnection queue in MISO and its neighboring regions).

²⁰ See, *e.g.*, *id.* at 8 (discussing MISO’s analysis indicating that the seventeen multi-value projects build over the last decade succeeded in integrating wind resources at a level that might otherwise have required several hundred discrete projects).

²¹ WIRES Comments at 10 (“[T]he Commission should incentivize transmission projects or systems that are designed to capture economic and environmental benefits for multiple groups of customers and, in addition directly assist in the fulfillment of state public policy goals such as renewable energy standards. The value of such projects are exponentially higher than others and has the potential to provide benefits longer.”).

²² See *supra* PP 8-9.

potential to provide enormous economic and reliability benefits over the long-term take many years, sometimes decades, to develop. That means that we need to be taking steps today with an eye toward the economic and reliability needs of tomorrow. I worry that the NOPR's focus on the current transmission grid and its failure to consider how to incentivize transmission projects that would meet the grid's evolving needs misses an important opportunity and may quickly prove to have been a short-sighted use of customers' money.

17. I encourage parties to continue addressing these issues in their comments on this NOPR. Although the proposal does little in this regard, I will continue to advocate for an incentive regime that is more forward-looking and better accommodates the grid's evolving needs. In any case, even following the enactment of section 219, the Commission has continued providing incentives pursuant to section 205 where it finds that an incentive is worthwhile, but does not fit neatly within its approach to implementing section 219.²³ Accordingly, even if any final rule omits incentives to address the system's changing needs, we may still be able to develop incentives that reflect those needs going forward. A record on how to do so will be important.

V. The Commission's Proposed Section 219(c) Incentive

18. Congress recognized the benefits that RTOs and ISOs can provide when it enacted section 219(c) and directed the Commission to incentivize transmission owners to "join[]" an RTO.²⁴ In the intervening years, those benefits have only increased, with RTOs around the country providing customers with billions of dollars per year in benefits.²⁵ The question before us now is not whether RTOs and ISOs are good or bad—in my view, that question is settled—but whether, in light of those obvious benefits, it is just and reasonable to require customers to pay hundreds of millions of dollars per year²⁶ in higher rates to get transmission owners to join *and remain* in an RTO.²⁷

²³ See, e.g., *Commonwealth Edison Co.*, 167 FERC ¶ 61,173, at PP 28-34 (2019) (granting Commonwealth Edison an incentive under section 205 to help develop a project using superconductor technology).

²⁴ 16 U.S.C. § 824s(c).

²⁵ See, e.g., NOPR, 170 FERC ¶ 61,204 at P 93 (reciting benefits estimates for RTOs, including PJM and MISO); Joint Commenters Comments at 71-72 (noting that both PJM and MISO reported providing benefits on the order of three billion dollars per year).

²⁶ TAPS Comments at 97 ("The direct cost of a 50 basis point ROE adder is roughly \$400 million per year, and growing."); see also *id.* n.275 (describing the method for calculating this estimate based on analysis by Regulatory Research Associates).

19. The answer is no. As an initial matter, the text of section 219(c) contemplates an incentive to induce transmission owners to *join* an RTO. Specifically, that provision requires the Commission to “provide for incentives to each transmitting utility or electric utility that joins a[n RTO].”²⁸ The best interpretation of that language is that Congress intended the Commission to provide an extra inducement to get transmission owners considering RTO membership over the hump and into the RTO—hence the word “joins.” Nothing about Congress’ emphasis on the decision to join an RTO suggests that Congress intended the incentive to apply to all RTOs members in perpetuity.

20. After all, Congress certainly could have provided an incentive for RTO membership, as opposed to joining an RTO. But that is not the choice it made. We should respect that choice and provide incentives specifically for transmission owners that join an RTO, not to any transmission owner that happens to be in one. Elsewhere in the NOPR, the Commission is at pains to point out where its proposed approach to implementing section 219 better adheres to the provision’s actual text.²⁹ Unfortunately, in awarding an incentive ROE to any transmission that is a member of an RTO, the Commission makes clear that it is not interested in the same textual fidelity when it comes to section 219(c).

21. In any case, providing a perpetual payment for RTO membership is bad policy. As noted, an incentive must incentivize something.³⁰ If it does not do that, then it is a handout, not an incentive.³¹ RTOs provide massive benefits, including more efficient coordination and dispatch of generation, enhanced reliability, and more effective integration of renewable resources. Those efficiencies, not to mention the costs of quitting an RTO, are why transmission owners remain in RTOs, not the section 219(c) incentive.³² By piling an additional ROE on top of the already compelling RTO value

²⁷ Recall that section 219 requires the Commission to create certain incentives, but also requires that the resulting rates be just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. § 824s(d).

²⁸ *Id.* § 824s(c).

²⁹ NOPR, 170 FERC ¶ 61,204 at P 36.

³⁰ *Cf.* R Street Comments at 7 (“The term ‘incentive’ necessarily implies that the Commission is urging the incentivized party toward some action.”).

³¹ *See supra* PP 4-5; Consumer Organizations Comments at 28 (“If a utility is already a member of an RTO/ISO, there is no value to be added by providing an incentive that translates into quick cash for doing absolutely nothing more than what the utility was already doing.”).

³² Consumer Organizations Reply Comments at 12 (“Utilities join RTOs for the

proposition, we are forcing customers to pay extra for benefits that they would get anyway.³³ That is not just and reasonable.

22. A better approach—one that hews more closely to the statutory text as well as our obligation to ensure just and reasonable rates—would be to tailor the section 219(c) incentive to transmission owners that are considering joining an RTO. A number of commenters suggested incentives along those lines. For example, numerous parties proposed that the Commission could make transmission owners eligible for an ROE incentive for a fixed period of years after joining an RTO, thereafter eliminating the incentive entirely or phasing it down gradually.³⁴ An approach along those lines would both fulfill section 219(c)'s directive to encourage transmission owners to join RTOs while also respecting section 219(d)'s mandate to ensure that rates remain just and reasonable.

23. Unfortunately, the NOPR takes a very different path, doubling down on the flaws in the current section 219(c) incentive. First, it proposes to eliminate the requirement that RTO membership be voluntary for a transmission owner to be eligible for the section 219(c) incentive.³⁵ While I believe that the current section 219(c) incentive is flawed, it at least recognizes that an additional payment is inappropriate where the transmission

benefits of membership, not to subject themselves to new burdens in exchange for a half point on their returns.”); Joint Commenters Reply Comments at 25 (“Even in situations where a transmission owner’s participation in an RTO/ISO is not legally required, the decision to join or remain in an RTO is not solely a decision of transmission owners – the decision is also influenced by other stakeholders and state regulators based on assessments that benefits are likely to outweigh the costs.”); Public Interest Organizations Comments at 30-31.

³³ OPSI Comments at 10 (“[I]f a utility would be reasonably likely to continue its participation in the Transmission Organization even if its previously granted incentive were to be discontinued, the ongoing costs to consumers of maintaining the incentive would arguably exceed the ongoing benefit of doing so.”); *see* N.J. Board of Public Utilities and N.J. Rate Counsel Initial Comments at 22 (suggesting that FERC’s interpretation of the 219(c) is an example of “what drives stakeholders to refer to the RTO adder as ‘FERC Candy’”).

³⁴ *See, e.g.*, TAPS Comments at 98-99 (recommending that the Commission limit the section 219(c) incentive to ten years); Joint Commentators Comments at 74-75 (recommending an approach for phasing out the RTO participation adder after the transmission owner has been in the RTO for a period of years); Consumer Organizations Reply Comments at 13 (similar).

³⁵ NOPR, 170 FERC ¶ 61,204 at P 98.

owner is required by law to remain in the RTO.³⁶ As the U.S. Court of Appeals for the Ninth Circuit observed when discussing this very issue, “[a]n incentive cannot ‘induce’ behavior that is already legally mandated.”³⁷ The court further observed that the Commission has “a longstanding policy” that “prohibits [it] from rewarding utilities for past conduct or for conduct which they are otherwise obligated to undertake.”³⁸ This proposal marks a sharp break from that policy, offering an incentive where there is—quite literally—nothing to incentivize.³⁹

24. But the biggest head scratcher in this proposal is the notion that we should double the size of the current section 219(c) incentive, from 50 basis points to 100. I see no reason—and, certainly, no compelling record—to believe that we should further increase the price tag of that incentive. The NOPR suggests that increasing the incentive is appropriate because the duties and benefits that flow from RTO membership have increased.⁴⁰ Both points may accurately characterize RTO membership, but neither explains why we should further inflate the section 219(c) incentive. If anything, the

³⁶ In Order No. 679, the Commission recognized the benefits of RTO membership, but explained that it would grant a section 219(c) incentive only “when justified,” which reflected the Commission’s recognition that a transmission owner’s continuing membership in an RTO is “generally voluntary.” See *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, at P 326 (Order No. 679), *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); see also *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038 (2019) (Glick, Comm’r, concurring at P 4) (“[T]he Commission’s reasoning—particularly its decision to resolve this proceeding based entirely on an inquiry into whether PG&E is required to remain in CAISO—suggests that if state law actually required PG&E to remain in CAISO, an RTO-Participation Incentive might well be inappropriate.”).

³⁷ *CPUC v. FERC*, 879 F.3d at 974.

³⁸ *Id.* at 977.

³⁹ The Commission suggests that making the section 219(c) incentive available only where it actually incentivizes something could create an “uneven playing field in the competition for investment capital.” NOPR, 170 FERC ¶ 61,204 at P 98. First of all, if there is an uneven playing field, that is the result of state law and I am unaware of any authority suggesting that the purpose of our incentive program is to mitigate the effects of state laws on particular transmission owners’ relative ability to attract capital. In any case, making it easier for some transmission owners to attract capital does not, by itself, make an incentive just and reasonable. If it did, every ROE incentive would, by definition, be just and reasonable insofar as it increased the ROE.

⁴⁰ NOPR, 170 FERC ¶ 61,204 at P 97.

increased benefits would suggest that a further incentive is *not* needed to get transmission owners to join or remain in an RTO.⁴¹ In addition, the NOPR's only example of an increased duty—Order No. 1000's creation of regional transmission planning processes⁴²—applies equally in RTO and non-RTO regions.⁴³

25. Finally, it is worth reiterating that my concern here is all about gratuitous handouts at customers' expense, not the value proposition offered by RTOs. In fact, I believe that the success of RTOs largely speaks for itself. Under those circumstances, we should implement the specific directive Congress gave us—to reward the decision to *join* an RTO—rather than handing out money for nothing.

VI. The Proposed 250-Basis-Point Cap on Overall ROE

26. The Commission has historically capped transmission owners' overall ROE—*i.e.*, the combined base ROE and any incentives—at the top of the zone of reasonableness established in the relevant ROE proceeding.⁴⁴ Keeping the ROE within that zone has been the principal means by which the Commission ensures that transmission owners' overall ROE is just and reasonable, as required by FPA sections 205, 206, and 219.⁴⁵ The NOPR proposes to eliminate that protection and, instead, place a 250-basis-point cap on incentive ROEs.⁴⁶ It should go without saying that such a change would represent a fundamental break with the Commission's precedent for ensuring that ROEs are just and reasonable. And while I agree with the Commission's observation that incentives do not

⁴¹ TAPS Comments at 98 (“As RTO services have grown, so too have the non-ROE incentives to remain in an RTO.”).

⁴² NOPR, 170 FERC ¶ 61,204 at P 97.

⁴³ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 6 (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) (summarizing the final rule and noting that it applies to all transmission owning utilities, not just those in RTOs and ISOs).

⁴⁴ Order No. 679, 116 FERC ¶ 61,057 at P 2 (explaining that “an incentive rate of return sought by an applicant must be within a range of reasonable returns and the rate proposal as a whole must be within the zone of reasonableness before it will be approved,” which ensures that “the incentive package as a whole results in a just and reasonable rate”).

⁴⁵ See 16 U.S.C. §§ 824d(a), 824e(a) & 824s(d).

⁴⁶ NOPR, 170 FERC ¶ 61,204 at P 80.

necessarily address the same considerations as the base ROE,⁴⁷ I am concerned that statement oversimplifies the role that the zone-of-reasonableness cap has played in ensuring that customers are not overcharged for transmission service.

27. Contrary to the Commission's suggestion in the NOPR, the incentives provided pursuant to section 219 do not have an entirely distinct capital attraction purpose than the base ROE.⁴⁸ Indeed, as the Commission's recitation of the *Hope/Bluefield* standard indicates, the base ROE itself is supposed to permit a transmission owner to "maintain its credit and *attract capital*."⁴⁹ The Commission's approach to setting base ROEs bears that out. In an ROE proceeding, the Commission calculates a zone of reasonableness by estimating comparable utilities' costs of equity, which, under the Commission's theory, reflects the rate they need to attract capital. That means that the zone of reasonableness is composed of the full range of returns that comparable utilities need to attract capital, with the top of the zone equaling the highest return required by any comparable utility. The Commission then sets the particular ROE at a point within that zone that reflects characteristics influencing the utility's or utilities' ability to attract capital, such as its risk profile.⁵⁰

28. By keeping the total ROE within that zone, the Commission's current approach to capping incentives ensures that total ROE does not exceed the return required by the comparable utility with the *highest* cost of equity. Under that approach, a transmission owner can use incentive ROEs to increase its returns relative to comparable utilities, but cannot use incentive ROEs to earn an overall ROE higher than *all* comparable utilities' cost of equity. It is hard not to see the consumer protection logic of an approach that prevents a transmission owner from using incentives to earn an ROE higher than *any* of its peers require.

29. I encourage commenters to address this issue in detail. I am open to reforming the cap on transmission owners' overall ROE, including potentially pursuing the fixed-basis-point approach proposed in the NOPR. But, in adopting any such cap, the Commission must explain how that cap adequately protects customers and ensures that the resulting

⁴⁷ *Id.* PP 78-79.

⁴⁸ *Id.* P 78.

⁴⁹ *Id.* (emphasis added) (internal quotation marks omitted); see *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (holding that the ROE a regulated utility is permitted to earn "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital").

⁵⁰ *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698-700 (D.C. Cir. 2007) (discussing this process and noting the importance that the Commission places on relative risk profiles when setting an ROE).

rates remain just and reasonable, as section 219(d) requires. That is particularly important given the NOPR's proposal to make more incentives automatic,⁵¹ which could mean that the Commission may not so explicitly review the total "incentive package as a whole" to ensure that it is appropriate for the particular project in question, as we currently do when addressing a request for section 219 incentives.⁵²

30. In addition, I encourage commenters to assume, for the sake of argument, that the Commission will adopt a fixed-basis-point cap like that proposed in the NOPR and to address whether 250 basis points is an appropriate level and, if not, what the Commission should choose instead. The record supporting 250-basis-points is thin, to put it mildly. As a result, I am eager for stakeholders' perspective on whether and how the proposal might work in practice.

VII. The Section 219(b)(3) Incentive and Grid-Enhancing Technologies

31. I am also concerned by the NOPR's seemingly tepid enthusiasm for incentivizing transmission technologies or, as we sometimes call them, "grid-enhancing technologies."⁵³ FPA Section 219(b)(3) requires the Commission to establish an incentive to "encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities."⁵⁴ Unfortunately, section 219(b)(3) has never received the same pride of place as other aspects of section 219 in the Commission's incentive program.⁵⁵

⁵¹ NOPR, 170 FERC ¶ 61,204 at PP 4, 43, 59.

⁵² Order No. 679, 116 FERC ¶ 61,057 at P 2.

⁵³ See NOPR, 170 FERC ¶ 61,204 at P 23.

⁵⁴ 16 U.S.C. § 824s(b)(3).

⁵⁵ See WATT Coalition Comments at 2-3. As the Commission notes, under its 2012 Incentive Policy Statement, the Commission lumped advanced technologies in with the general category of factors it would consider when evaluating what incentives were appropriate in light of a project's risks and challenges. See NOPR, 170 FERC ¶ 61,204 at P 100. Similarly, Order No. 679 declined to incentivize particular technologies, noting instead that "new technologies will be adopted when they are cost effective." Order No. 679, 116 FERC ¶ 61,057 at P 288. Putting aside the accuracy of that statement, it would seem to fall short of Congress' directive to "encourage deployment" of technologies and other measures that can increase the capacity and efficiency of existing transmission facilities and improve their operations. See 16 U.S.C. § 824s(b)(3).

32. The NOPR continues that trend. The Commission’s primary proposal is to create an ROE adder for advanced technologies that meet certain requirements.⁵⁶ But an ROE boost seems unlikely to create the impetus needed to get these projects deployed to a degree consistent with Congress’s creation of a specific incentive under section 219(b) (3). As multiple groups noted in response to the notice of inquiry and the Commission’s recent technical conferences on the topic, grid-enhancing technologies often cost a small fraction of a conventional transmission solution, but are not being deployed either because they do not provide the same return on equity as the conventional solution or because they are viewed as unfamiliar or unproven.⁵⁷ Given the low capital cost of these projects, handing out extra basis points, even a hundred extra basis points, is unlikely to do much to encourage small-capital investments that enhance the existing grid. In light of those facts, I continue to believe that getting grid-enhancing technologies deployed may require a more creative approach than simply doling out an additional ROE. A number of commenters have proposed ways of doing that and I encourage them, in their comments on this NOPR, to continue addressing how those and other creative solutions fit within the proposed framework for evaluating incentive requests.

33. Given the potential that many of these technologies—including, for example, dynamic line ratings, topology optimization, and power flow control—have to reduce congestion and enhance reliability at a fraction of the cost of conventional solutions, I strongly believe that the Commission’s mandates under FPA sections 205, 206, and 219, require us to break down the barriers to getting these technologies deployed.⁵⁸ As noted,

⁵⁶ NOPR, 170 FERC ¶ 61,204 at PP 103, 105. The Commission also proposes to offer regulatory asset treatment for transmission owners’ first foray into certain advanced technologies. *See id.* at PP 108-109. While potentially helpful and worth considering, this proposal is, like the ROE adder, unlikely to move the needle toward getting these technologies deployed.

⁵⁷ *See, e.g.* WATT Coalition Comments at 4; *see also* Public Interest Organizations Post-Conference Comments, Docket No. AD19-19-000, at 2 (“[A] ROE adder is insufficient to incentivize the relatively low-cost capital investments that are typical of many [grid-enhancing technology (GETs)] projects. The returns to transmission owners are simply too low to be worthy of the time and effort to develop and implement GETs.”); Smart Wires Post-Conference Comments, Docket No. AD19-19-000, at 2 (“Traditional regulatory financial recovery mechanisms primarily reward transmission owners on the size of their capital investment. This exclusive cost-of-service ratebase approach to regulation includes no incentive to the transmission owner for improving system efficiency.”); Smart Wires Post-Conference Comments, Docket No. AD19-19-000, at 4 (“For projects with . . . a relatively small capital requirement, an ROE adder approach is very challenging because the ROE required to make these projects comparably attractive to business-as-usual approaches is exceedingly high.”).

⁵⁸ *See, e.g.*, WATT Coalition Comments, Appendix D (white paper discussing

I am eager to review the record assembled in response to this NOPR for ideas on how best to do so. But if the “carrot” provided by incentives is not doing the trick, then we will have to at least consider the “stick” of requiring their deployment or mandating their formal consideration in the planning process. I encourage parties, to the extent applicable, to address how we might pursue those approaches as well.

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

sample deployment experiences and benefits of certain technologies).