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April 19, 2021

FERC Issues Supplemental Proposed Rulemaking on Incentives for Transmission Investment

On April 15, 2021, the Federal Energy Regulatory Commission supplemented the notice of proposed rulemaking (Supplemental NOPR) for transmission incentives it issued last year (2020 NOPR). In its Supplemental NOPR, FERC focused on one hotly contested incentive—the return on equity (ROE) adder for transmitting and electric utilities that join a regional transmission organization, independent system operator, or similar entity (Transmission Organization) and abandoned its proposal in the 2020 NOPR to increase the incentive from 50 basis points to 100 basis points. FERC also proposed to sunset the ROE adder three years after the recipient transfers control of its transmission facilities to a Transmission Organization.

This Supplemental NOPR follows on then-Commissioner Glick's dissent from the 2020 NOPR in which he argued whether "it is just and reasonable to require customers to pay hundreds of millions per year in higher rates to get transmission owners to join and remain in a Transmission Organization." Then-Commissioner Glick had also stated that "[n]othing about Congress' emphasis on the decision to join a Transmission Organization suggests that Congress intended the incentive to apply to all RTOs members in perpetuity." In announcing the Supplemental NOPR, Chairman Glick noted that the Commission "cannot lose sight of the fact that it is our job to make sure consumers are getting their money's worth in transmission investment," noting that Section 219 of the Federal Power Act (FPA) mandates the Commission to "ensure that all incentives are just and reasonable." He also praised the Supplemental NOPR highlighting that the proposed changes will save ratepayers more than \$350 million per year.

In revising the Supplemental NOPR to codify FERC's current practice of granting a standardized 50-basis-point increase in ROE adder for joining a Transmission Organization and sunsetting the ROE adder after three years, the Commission reasoned that the FPA mandates an incentive for entities that are *joining* a Transmission Organization and not an incentive for *remaining* in a Transmission Organization. The Commission affirmed its authority under the FPA to revise incentives, as needed, consistent with the intent of the FPA, which is to encourage mainly joining a Transmission Organization. In dissent, Commissioner Chatterjee responded that the "majority merely offers a conclusory statement that a new interpretation is reasonable" and "provides no basis for its subtle but meaningful contortion of the statu[t]e, which, as noted above, requires that the Commission 'provide for incentives to each ... utility that joins a Transmission Organization' and does not—as the majority would have you believe—require the Commission 'to provide an incentive for joining rather than remaining in a Transmission Organization.'"

The Commission is seeking comment on whether three years or another time period is the appropriate duration for the incentive. The Commission also seeks comment on whether 50 basis points is the appropriate level for this incentive and whether there are alternative, non-ROE incentives that are more appropriate for the Transmission Organization Incentive.

Citing increased challenges at the Commission and in litigation in federal courts on the issue of voluntarily joining a Transmission Organization, the Supplemental NOPR seeks stakeholder input on whether the proposed incentives should be limited to transmitting utilities that voluntarily join a Transmission Organization. If the answer is yes, the Commission seeks further comment on how it should apply the voluntary standard and, in particular, how it should determine whether a transmitting utility's decision to join a Transmission Organization is voluntary. The Commission also seeks comment on whether the incentive should include exceptions to a voluntariness requirement and the demonstration necessary to qualify for the exception by an applicant.

FERC encouraged stakeholders to submit comments 30 days after publication of the supplemental NOPR in the Federal Register and reply comments 45 days after publication in the Federal Register.

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