No. _____

IN THE
Supreme Court of the United States

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Zachary C. Schauf
Counsel of Record
Arjun R. Ramamurti
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

QUESTIONS PRESENTED

Regional transmission organizations ("RTOs") operate the interstate electricity grid independently, to foster competition, improve reliability, and lower prices. Congress in the Federal Power Act ("FPA") mandated that the Federal Energy Regulatory Commission ("FERC") "shall have jurisdiction over all facilities for [interstate] transmission," 16 U.S.C. § 824(b)(1), and that RTO membership remain "voluntary," *id.* § 824a(a). Congress also directed FERC to provide incentives "to each ... utility that joins" an RTO. *Id.* § 824s(c).

Petitioner committed to join an RTO, and Ohio then passed a law purporting to require membership. Below, the Sixth Circuit held that Ohio could mandate RTO membership. And it denied Petitioner an incentive by reading into the federal incentive statute a nontextual exclusion for utilities subject to a state RTO mandate. The questions presented are:

1. Whether the Sixth Circuit correctly held that the FPA does not preempt Ohio's RTO mandate, where the grounds for Sixth Circuit's decision—that FERC lacks exclusive jurisdiction over interstate transmission facilities, and that Ohio's law primarily regulates *intrastate* transmission—conflict with decisions by the Third, Fifth, Eighth, Ninth and D.C. Circuits recognizing that FERC's jurisdiction is exclusive and with settled law that transmission facilities operating as part of the interstate grid (as Ohio's do) constitute interstate transmission.

2. Whether RTO mandates render utilities ineligible for incentives under 16 U.S.C. § 824s(c) (as the Sixth Circuit held) or not (as two FERC Chairmen found).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner American Electric Power Service Corporation ("AEPSC") provides the following disclosures:

AEPSC is a corporation organized and existing under the laws of the State of New York. AEPSC is a wholly owned subsidiary of American Electric Power Company, Inc. ("AEP").

AEPSC petitions for review in its own name and on behalf of its public utility affiliates Ohio Power Company and AEP Ohio Transmission Company, Inc. Ohio Power Company is a corporation organized and existing under the laws of Ohio. Ohio Power Company is a wholly owned subsidiary of AEP. AEP Ohio Transmission Company, Inc. is a corporation organized and existing under the laws of Ohio. Prior to June 5, 2025, AEP Ohio Transmission Company, Inc.'s ultimate parent was AEP.

On June 5, 2025, a transaction was consummated whereby a special purpose entity controlled by investment funds managed by or affiliated with Kohlberg Kravis Roberts & Co. L.P. ("KKR") and Public Sector Pension Investment Board ("PSP") acquired a non-controlling, 19.9% indirect minority interest in AEP Ohio Transmission Company, Inc. The remaining 80.1% indirect interest in AEP Ohio Transmission Company, Inc. remains owned and controlled by AEP. Thus, AEP Ohio Transmission Company, Inc.'s ultimate parents are AEP, KKR, and PSP.

AEP is a New York corporation whose common stock is held by the public and traded on the NASDAQ Stock Market. AEP has no parent company. Certain institutional investors including Vanguard may from time to time hold 10 percent or more of the outstanding shares of AEP, but to AEP's knowledge no publicly held company has a 10 percent or greater ownership interest in AEP.

LIST OF PARTIES AND PROCEEDINGS

Petitioner is American Electric Power Service Corporation, on behalf of itself and its Ohio affiliates, Ohio Power Company and AEP Ohio Transmission Company, Inc.

Respondents are the Federal Energy Regulatory Commission ("FERC") and the Office of the Ohio Consumers' Counsel.

Duke Energy Ohio, Inc., Dayton Power & Light Company, FirstEnergy Service Company, PJM Interconnection, L.L.C., and the MISO Transmission Owners were aligned with petitioner on some or all issues in the court of appeals and are not included in the case caption. The MISO Transmission Owners include Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Illinois, and Ameren Transmission Company of Illinois; American Transmission Company LLC; Cleco Power LLC; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; Entergy Texas, Inc.; Indianapolis Power & Light Company; International Transmission Company d/b/a ITCTransmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company LLC; Northern States Power Company, a Minnesota corporation; and Northern States Power Company, a

Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Indiana Gas & Electric Company (d/b/a CenterPoint Energy Indiana South); and Wolverine Power Supply Cooperative, Inc.

Buckeye Power, Inc. and the Public Utilities Commission of Ohio were adverse to petitioner in the court of appeals and are not included in the case caption.

This petition arises from the same judgment as the petition in *FirstEnergy Service Company v. FERC* et al., No. 24-___. There are no other related proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

ADMINISTRATIVE RULINGS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

American Electric Power Service Corporation, on behalf of itself and its Ohio affiliates Ohio Power Company and AEP Ohio Transmission Company, Inc. (collectively, "AEP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

This case raises important questions about the allocation of federal and state jurisdiction over interstate transmission and incentives for transmission investment, on which the circuits and FERC itself are divided. First, the Sixth Circuit held that Ohio could require utilities to join a regional transmission organization ("RTO"), rejecting AEP's argument that the Federal Power Act ("FPA") preempts states from dictating who operates federally regulated transmission facilities. The Sixth Circuit's rationale—that FERC's jurisdiction over interstate transmission is not exclusive and the Ohio statute primarily regulates *intrastate* transmission—cries out for review. It conflicts with decisions from at least four circuits recognizing that FERC's jurisdiction is exclusive, as well as Congress's express command that RTO membership remain "voluntary." 16 U.S.C. § 824a(a). It upends settled law that transmission facilities operating as part of the interstate grid (as Ohio's do) constitute interstate transmission. And it will create chaos in electricity regulation, including by inviting states to create their own rules governing who operates interstate transmission facilities and how those facilities operate.

Second, the Sixth Circuit rewrote Congress's command that FERC provide an incentive "to each transmitting utility ... that joins" an RTO. *Id.* § 824s(c). The Sixth Circuit blue-penciled the statute to add a nontextual voluntariness requirement, and it applied this invented requirement to hold that Ohio's RTO membership mandate—which it should have deemed preempted—renders AEP's membership not voluntary. This holding, too, merits review. It revises the statutory text Congress enacted. It undermines the incentives Congress aimed to provide. And it invites states to try to manipulate the federal rate by creating their own RTO mandates. For all of these reasons, this issue has generated controversy at FERC in recent years. And this Court's review is especially urgent today given the issue's broad significance and the bipartisan consensus that our country is in an energy emergency and that promoting transmission investment is essential.

Electricity generally is produced and delivered in three steps: generation, transmission, and distribution. Under the FPA, FERC has "jurisdiction over all facilities for [interstate] transmission." 16 U.S.C. § 824(b)(1). Exercising this jurisdiction, FERC has encouraged the development of grid operators known as RTOs. *See Reg'l Transmission Orgs.*, Order No. 2000, 89 FERC ¶ 61,285 (1999) ("Order No. 2000"). By operating the grid on a nondiscriminatory basis, RTOs can make service more competitive, reliable, and affordable. But for utilities, the decision to join is momentous: They must give over operational control of their facilities and follow different and more onerous rules. Yet recognizing the potential for increased transmission investment that

comes with RTO participation, Congress directed in Section 219 of the FPA that FERC "shall[] ... provide" an adder—a higher rate of return on equity—"to each ... utility that joins" an RTO. 16 U.S.C. § 824s(c) ("Section 219(c)").

Here, American Electric Power Service Corporation's Ohio affiliates joined an RTO more than a decade ago, became entitled to the adder, and received the adder in settlement rates approved by FERC for several years. In the orders under review, however, FERC stripped these Ohio affiliates of their adders, even though they remained RTO members. It did so because after AEP voluntarily committed to join an RTO, Ohio enacted a law purporting to require transmission owners to "transfer[] control" of their Ohio facilities to "one or more qualifying transmission entities," such as an RTO. Ohio Rev. Code Ann. § 4928.12(A). FERC gave effect to this law and concluded that it rendered AEP's Ohio affiliates ineligible for the adder Congress had provided "to each utility ... that joins" an RTO. Per FERC, Congress *really meant* to provide an adder to each utility that joins *voluntarily*. And applying this newly minted requirement, FERC concluded that Ohio's post hoc law rendered the Ohio utilities' membership involuntary. The Sixth Circuit affirmed.

Both of the Sixth Circuit's fundamental errors merit this Court's review.

The Sixth Circuit, to begin, should have held that the FPA preempts Ohio from exercising jurisdiction over who operates AEP's federally regulated transmission

facilities, and its contrary decision splits with myriad circuits and throws the FPA's jurisdictional scheme into disarray. According to the Sixth Circuit, the "FPA's text does not grant FERC exclusive jurisdiction over interstate transmission," and Ohio's law is permissible because it "primarily regulates intrastate transmission" (on the theory, it appears, that the transmission facilities are physically within Ohio). Pet. App. 39a-40a.

This holding conflicts with decisions of the Third, Fifth, Eighth, Ninth, and D.C. Circuits, which have properly applied this Court's teachings to recognize that FERC's jurisdiction over the interstate transmission of electricity is "exclusive," and that nearly all facilities in the continental United States—outside of a portion of the grid in Texas—operate in interstate commerce. Nor can the Sixth Circuit's novel jurisdictional test, asking whether a state law "primarily" regulates intrastate transmission, be squared with the FPA's text. Congress expressly provided that states retain jurisdiction solely over "facilities used ... *only*"—not "primarily," as the Sixth Circuit incorrectly held—"for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).

Then, the Sixth Circuit wrongly blessed FERC's rewriting of Section 219(c) to impose a voluntariness requirement. In a classic example of the problems that felled *Chevron*, FERC itself has vacillated and divided on this question. For more than a decade after Congress enacted Section 219(c), FERC properly awarded the adder to all RTO members, regardless of whether states had purported to mandate RTO membership. But in the prior Administration, FERC flip-flopped, overreading a

Ninth Circuit decision as requiring it to impose a voluntariness requirement and rejecting the warnings of FERC Chairmen Danly and Chatterjee that this requirement flouted the statutory text and Congress's clear intent. *E.g.*, *Elec. Transmission Incentives Pol'y Under Section 219 of the Fed. Power Act*, 175 FERC ¶ 61,035 at P5 (2021) (Danly, Comm'r dissenting). As they properly recognized, the atextual reading of the FERC majority and the Sixth Circuit cannot be squared with this Court's bedrock rule that the "legislature says ... what it means and means ... what it says." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) (ellipsis in original) (quotation marks omitted).

These issues are of national importance, and this case is a good vehicle. The President has declared an emergency based on the "precariously inadequate and intermittent energy supply, and an increasingly unreliable grid." Exec. Order No. 14156 § 1, 90 Fed. Reg. 8433 (Jan. 20, 2025). And there is rare bipartisan consensus on the imperative of encouraging the generation and transmission of electricity to meet the challenges of artificial intelligence, big data, electrification, and greater penetration of renewables. The decision below is an enormous step in the wrong direction, at the worst possible time.

The Sixth Circuit's holdings taken together undermine the incentives that Congress by statute sought to provide, create an uneven playing field for investment, and invite states to hijack federal transmission policy. Any state that wants to reduce utilities' rate of return can just enact a statute purporting to mandate RTO membership, even if its

utilities are already RTO members and have no intention of leaving. Several states have already enacted RTO mandates, and several more are considering such mandates—a growing trend that the decision below is bound to encourage and that underscores this case's significance.

The Sixth Circuit's preemption holding risks even farther-reaching consequences. If FERC's jurisdiction over interstate transmission is not exclusive, states could encroach on federal jurisdiction in many other ways, including by setting their own rules governing who operates interstate transmission facilities and how they do so. Moreover, the law governing preemption now differs across the circuits. States in the Sixth Circuit may seek to regulate interstate transmission on the theory that FERC's jurisdiction is not exclusive and that states may enforce laws that "primarily" regulate intrastate transmission—arguments that will not fly in the Third, Fifth, Eighth, Ninth or D.C. Circuits. Such division would always militate in favor of review. Here, it does so with particular force because the law of preemption now differs across the same RTO (which encompasses the Third, Sixth, and D.C. Circuits), and because FERC decisions can always be appealed to the D.C. Circuit—meaning that the governing law will depend on where litigants sue. Absent intervention, the Circuits will remain hopelessly confused, the certainty investment requires will evaporate, and our country will lose ground at a time that could not be more critical.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-66a) is reported at 126 F.4th 1107 (6th Cir. 2025). The orders of the Federal Energy Regulatory Commission (Pet. App. 67a-167a) are reported at 181 FERC ¶ 61,214 (2022) (initial order) and 183 FERC ¶ 61,034 (2023) (rehearing order).

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its decision on January 17, 2025. On March 3, 2025, AEP timely filed a petition for Sixth Circuit rehearing or rehearing en banc. On March 26, 2025, the Sixth Circuit issued an order denying panel rehearing or rehearing en banc. This court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the appendix. Pet. App. 170a-181a.

STATEMENT

A. Legal Background

1. The FPA allocates authority over electricity generation, transmission, and distribution between the federal government and the States. Congress provided that FERC "shall have jurisdiction" over the "transmission of electric energy" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Today, it "is only in Hawaii and Alaska and on the 'Texas Interconnect' ... that electricity is distributed entirely within a single State"; elsewhere, "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly

moving in interstate commerce." *New York v. FERC*, 535 U.S. 1, 7 & n.5 (2002). FERC has exercised its exclusive authority to regulate the cost of transmission service, who pays, and terms and conditions. *See e.g.*, *S.C. Pub. Serv. Auth.*, 762 F.3d 41, 50-54 (D.C. Cir. 2014).

States have jurisdiction over retail sales, "generation," and "local distribution" facilities, and "facilities used ... only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). States also retain jurisdiction over certain traditional state concerns, including siting. *S.C. Pub. Serv. Auth.*, 762 F.3d at 62.

2. FERC came to recognize that electricity can be delivered more efficiently and reliably if a neutral grid operator coordinates transmission regionally. FERC thus encouraged the formation of "[r]egional [t]ransmission [o]rganizations" and "independent system operators." Order No. 2000, 1999 WL 33505505, at *2-3. These RTOs confer "significant benefits" for consumers, including "improve[d] efficiencies" and "improve[d] grid reliability." *Id.* at *29; *see id.* at *37. But for utilities, joining an RTO is a momentous decision: they must cede to the RTO operational control of their facilities—facilities that represent a significant portion of their invested capital. *E.g.*, 18 C.F.R. § 35.34(f), (k)(7). Congress thus made clear that a utility's choice to join an RTO was to remain "voluntary." 16 U.S.C. § 824a(a).

3. In 2005, Congress enacted Section 219 of the FPA. 16 U.S.C. § 824s. "Section 219 reflect[ed] Congress' determination that the Commission's traditional ratemaking policies may not be sufficient to encourage new transmission infrastructure." *Promoting*

Transmission Investment through Pricing Reform, Order No. 679, 116 FERC ¶ 61,057 at P 5 (2006) ("Order No. 679"), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006) ("Order No. 679-A"), *order on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007). In the three decades before Section 219's enactment, "investment in transmission facilities in real dollar terms declined significantly," and the "growth rate in transmission mileage" in the years immediately before Section 219's passage was "not sufficient to meet" the "expected ... growth in consumer demand." *Id.* at P10.

Congress thus directed FERC to "establish, by rule, incentive-based (including performance based) rate treatments" for interstate transmission, 16 U.S.C. § 824s(a), and identified several general goals FERC's rule should pursue, *id.* § 824s(b). Congress also enacted a more specific mandate, requiring that FERC "shall[] ... provide for incentives to each transmitting utility or electric utility that joins" an RTO. *Id.* § 824s(c).

To implement Section 219, FERC issued Order No. 679. Order No. 679, 116 FERC ¶ 61,057. One way to induce transmission investment is to boost the rate of return on equity ("ROE"). Regulated utilities make money by earning a return on their invested capital, and ROE is one part of the overall rate. So a higher ROE will, all else equal, incentivize investment in transmission over other uses.

FERC specified that it would approve "[return on equity]-based incentives for public utilities that join and/or continue to be a member of" an RTO. *Id.* at P326. The "basis for the incentive" was a "recognition of the benefits that flow from [RTO] membership." *Id.* at P331.

And even as FERC noted that "continuing membership is generally voluntary," it rejected a proposal to make utilities categorically ineligible if state law required membership. *Id.*; *see id.* at P316. FERC emphasized that the "best way to ensure that [consumer] benefits are spread to as many consumers as possible" is to "provide an incentive that is *widely available* to" member utilities. Order No. 679-A, 117 FERC ¶ 61,345 at P86 (emphasis added).

B. Proceedings Below

1. Petitioner AEP's affiliates Ohio Power and AEP Ohio Transmission Company, Inc. are based in Ohio and own transmission lines and related facilities in Ohio. In 1998, AEP voluntarily committed to join an RTO as part of a merger. *Am. Elec. Power Co.*, Opinion No. 442, 90 FERC ¶ 61,242 at 61,788 (2000), *on reh'g*, 91 FERC ¶ 61,129 (2000), *aff'd sub nom. Wabash Valley Power Ass'n v. FERC*, 268 F.3d 1105 (D.C. Cir. 2001). FERC then allowed the AEP East Companies, including Ohio Power, to join PJM Interconnection, L.L.C ("PJM"), an RTO covering 13 States and the District of Columbia. *New PJM Cos.*, Opinion No. 472, 107 FERC ¶ 61,271 at P129 (2004) ("Opinion No. 472").

2. In 1999, Ohio enacted a law mandating membership in a transmission entity such as an RTO. *See* Ohio Rev. Code Ann. § 4928.12(A) ("no entity shall own or control transmission facilities as defined under federal law and located in [Ohio] unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities").

3. In 2008, the AEP East Companies amended their rates to include the RTO adder. *Am. Elec. Power Serv.*

Corp., 124 FERC ¶ 61,306 at P30 (2008) ("*AEPSC*"). In 2010, other PJM-member affiliates, including AEP Ohio Transmission, did the same. *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at P21 (2010). With FERC approval, AEP settled both cases and retained the adder. *Am. Elec. Power Serv. Corp.*, 133 FERC ¶ 61,007 (2010); *AEP Appalachian Transmission Co.*, 135 FERC ¶ 61,066 at P12 (2011). In 2018, AEP entered another settlement, again retaining the adder for its PJM affiliates.

3. After granting the adder to all RTO members for more than a decade, FERC abruptly changed course. It did so after the Ninth Circuit's decision in *California Public Utilities Commission v. FERC*, 879 F.3d 966, 978-79 (9th Cir. 2018). That case was a classic arbitrary-and-capricious remand: The Ninth Circuit believed that FERC had not adequately explained how its practice of uniformly awarding the adder to RTO members squared with an observation in Order No. 679 that RTO membership is "generally voluntary" and with its statements that it would consider the adder on a case-by-case basis. *Id.* That decision did not interpret the text of Section 219(c) or examine whether that provision itself included a voluntariness requirement. Indeed, the Ninth Circuit itself has recognized as much, emphasizing that this decision "addressed only FERC's refusal to consider California's arguments that [RTO] membership is involuntary" and that its decision "address[ed] only" this "procedural issue." *Cal. Pub. Utils. Comm'n v. FERC*, 29 F.4th 454, 462 (9th Cir. 2022). Nonetheless, FERC has read that decision to hold that Section 219(c) requires voluntary participation in an RTO to receive

the adder, and that utilities mandated to do so by state law are no longer entitled to the adder.

In the consolidated cases below, a divided Commission applied that mistaken view to Ohio utilities. By a 3-2 vote, FERC denied the adder to the Dayton Power & Light Company ("Dayton") on the ground that the Ohio law mandates RTO membership and the adder is available only to utilities that join an RTO voluntarily. *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 at P 14 (2021), *modified on denial of reh'g*, 178 FERC P 61,102 (2022), *aff'd sub nom. Dayton Power & Light Co. v. FERC*, 126 F.4th 1107 (6th Cir. 2025). As the Commission explained, "given Ohio law, Dayton does not qualify for" the adder because "(1) Order No. 679 as interpreted in *CPUC* requires a showing of *voluntary* membership in such a Transmission Organization, and (2) Dayton's membership in a Transmission Organization is not voluntary because the Ohio statute requires it." *Id.* (footnote omitted).

Commissioners Danly and Chatterjee dissented. Commissioner Danly explained that the "Federal Power Act does not limit incentives to only those utilities that 'voluntarily' join a transmission organization," and that the Ninth Circuit's decision "did not interpret section 219(c) of the Federal Power Act." *Id.* at PP1, 4 (Danly, Comm'r, dissenting). Commissioner Chatterjee emphasized the "RTO Adder's critical importance in attracting and maintaining RTO/ISO membership, the substantial benefits RTOs/ISOs provide to consumers, and the vital role RTOs/ISOs will play in advancing the energy transition." *Id.* at P1 (Chatterjee, Comm'r, dissenting).

FERC then relied on its *Dayton* decision to eliminate the adder from the rates charged by AEP's Ohio affiliates. Pet. App. 101a-106a. FERC explained that "[a]s with Dayton, Ohio Power and AEP Ohio Transmission are required to join a Transmission Organization under Ohio law"; and "[a]s such, Ohio Power and AEP Ohio Transmission do not qualify for an RTO Adder ... because Order No. 679, as interpreted in *CPUC*, requires a showing of voluntary membership in a Transmission Organization." Pet. App. 105a. FERC rejected AEP's arguments that Section 219(c) does not impose a voluntariness requirement and refused to consider AEP's argument that the FPA preempts state RTO mandates. Pet. App. 120a-122a.

Then-Commissioner Danly—later Chairman, and now Deputy Secretary of Energy—again dissented. He explained that the "plain statutory text" did not limit the adder to "only those utilities 'that "voluntarily" join[]' a transmission organization" and concluded that the FERC majority had "improperly added this non-statutory requirement in Order No. 679," which it "had no authority to do ... then or now." Pet. App. 124a-125a (Danly, Comm'r, dissenting); *see also* Pet. App. 125a (concluding that the Commission had "work[ed] an amendment of unambiguous law and only Congress—not FERC—has the authority to pass and amend statutes"); *Elec. Transmission Incentives*, 175 FERC ¶ 61,035 at P5 (Danly, Comm'r, dissenting) (explaining that FERC's prior "consistent interpretation of the statute since its inception [had been] correct").

4. FERC denied rehearing. It rejected AEP's argument that the "Commission's voluntariness

requirement is inconsistent with the plain text of Section 219." Pet. App. 160a. And it again declined to consider preemption. Pet. App. 162a-163a.

5. AEP petitioned for review, and the Sixth Circuit consolidated several petitions from utilities objecting to the denial of their adders. The Sixth Circuit then denied AEP's petition for review.

The Sixth Circuit agreed with the utilities that FERC had erred in declining to consider preemption, but it held that Ohio's law was not preempted. Pet. App. 32a-43a.

The Sixth Circuit concluded that Ohio's law was not field preempted because the "FPA's text does not grant FERC *exclusive* jurisdiction over interstate transmission facilities." *Id.* at 39a. Rather, it "primarily regulates" and "targets" "*intrastate* transmission—an area explicitly reserved for [S]tates by the FPA in § 824(a) and § 824(b)(1)." Pet. App. 40a. The Sixth Circuit also thought that Ohio's RTO mandate was not conflict preempted and that it was consistent with the FPA's requirement that RTO membership remain "voluntary," 16 U.S.C. § 824a(a). It concluded that this requirement binds only FERC and that states can exercise authority over federally regulated facilities that Congress withheld from the agency it created to regulate those facilities. Pet. App. 35a-37a.

The Sixth Circuit also held that Section 219(c) includes a voluntariness requirement. Pet. App. 24a-32a. It read the word "join" and "incentive" to carry "connotation[s] of voluntariness," *id.* at 26a, and regarded the broader statutory context as reinforced that view, *id.* at 26a-32a.

The Sixth Circuit denied multiple petitions for rehearing en banc. Pet. App. 168a-169a.[1] It did, however, grant FirstEnergy's motion to stay the court's mandate pending this Court's disposition of FirstEnergy's petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD REVIEW THE SIXTH CIRCUIT'S PREEMPTION HOLDING, WHICH SPLITS FROM OTHER CIRCUITS AND UPENDS FPA JURISDICTION.

Due to the decision below, States in the Sixth Circuit may seek to regulate interstate transmission on the theory that FERC's jurisdiction is not exclusive and that states may enforce laws that "primarily" regulate intrastate transmission—which the Sixth Circuit seems to have understood to cover facilities physically located within the regulating state, even if they are part of the interstate transmission grid. These regulations will not fly in the Third, Fifth, Eighth, Ninth or D.C. Circuits, which correctly recognize that FERC's jurisdiction over interstate transmission is exclusive and very few facilities fall within the FPA's carve-out for state regulation of "facilities used ... only for the transmission of electric energy in *intra*state commerce." 16 U.S.C. § 824(b)(1). The Court should grant certiorari to address that division, correct the Sixth Circuit's error, and hold Ohio's RTO mandate preempted.

---

[1] Judge Moore dissented on grounds not relevant to the questions presented. *See* Pet. App. 59a-66a (Moore, J., dissenting).

A. The Decision Below Conflicts with Decisions of Other Courts of Appeals.

The Sixth Circuit's conclusion that the FPA "does not grant FERC *exclusive* jurisdiction over interstate transmission facilities," Pet. App. 39a, conflicts with the law in several other courts of appeals. The D.C. Circuit, Third Circuit, Fifth Circuit, Eighth Circuit, and Ninth Circuit have all recognized that FERC's jurisdiction over the interstate transmission of electricity is exclusive. Thus, the D.C. Circuit recently concluded that the FPA "grants FERC exclusive jurisdiction of the transmission and wholesale sale of electricity in interstate commerce." *Green Dev. LLC v. FERC*, 77 F.4th 997, 1000 (D.C. Cir. 2023). That is merely the most recent in a long line of cases recognizing the same point. *See, e.g.*, *id.* (recognizing specifically that the "Commission has exclusive jurisdiction of transmission facilities"); *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 700 (D.C. Cir. 2017) (referring to "interstate transmission" as "falling squarely within FERC's exclusive [FPA] authority").

Other courts of appeals have reached similar conclusions. The Third Circuit has held that the "federal government has exclusive control over interstate rates and transmission." *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 247 (3d Cir. 2014). The Fifth Circuit has also concluded that the FPA "gives FERC exclusive jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce." *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006). And the Eighth Circuit has recognized that "FERC is vested with exclusive

jurisdiction" over these matters. *Cent. Iowa Power Co-op v. Midwest Indep. Transmission Sys. Operator, Inc.* , 561 F.3d 904, 907-08 (8th Cir. 2009) (citing *AEP Tex.*, 473 F.3d at 584).

Finally, the Ninth Circuit has repeatedly recognized FERC's exclusive jurisdiction over interstate transmission, including specifically interstate transmission facilities. As the Ninth Circuit has succinctly concluded, "[i]nterstate transmission [of electricity] is clearly a federal matter." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1173 (9th Cir. 1997). Thus, the Ninth Circuit has concluded that "FERC's exclusive jurisdiction extends over all facilities for [interstate] transmission or sale of electric energy." *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) (quoting *Duke Energy Trading & Mktg. L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir. 2001)).

The Sixth Circuit's conclusion that FERC's jurisdiction over interstate transmission is not exclusive contradicts this wall of precedent. Worse, the Sixth Circuit compounded the division by concluding that Ohio's law could be understood as a permissible state regulation of a facility in "*intrastate* commerce." Pet. App. 39a (quotation marks omitted). That conclusion, too, cannot be reconciled with precedent from other courts of appeals, which has correctly recognized that "electrons flow freely without regard to state borders" and that, accordingly, transmission facilities that operate as part of the interstate grid are *interstate* facilities, even though they are physically located in a

particular state. *North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016). Indeed, that conclusion is the only one consistent with decades of precedent from this Court recognizing that nearly all electricity transmission in the continental United States occurs in interstate commerce. Thus, in *New York v. FERC*, this Court explained that transmission "[i]n the rest of the country" outside of Hawaii, Alaska, and parts of Texas, is "part of a vast pool of energy that is constantly moving in interstate commerce." 535 U.S. at 7 & n.5. And in *Hughes v. Talen Energy Marketing, LLC*, the Court recognized that once electricity enters the interconnected national grid, its transmission becomes interstate commerce. 578 U.S. 150, 154 (2016). Indeed, this fundamental proposition about how electricity is transmitted has been settled for nearly fifty years. *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 468-69 (1972).

B. The Decision Below Is Wrong.

The Sixth Circuit's decision is wrong on the merits. The FPA's plain text broadly provides FERC with "jurisdiction over *all* facilities for [interstate] transmission," and for the "sale of electric energy [at wholesale]." 16 U.S.C. § 824(b)(1). By contrast, the FPA limits state jurisdiction to "facilities used ... *only* for the transmission of electric energy in intrastate commerce." *Id.* It thus follows that AEP's transmission facilities at issue here, which are connected to the interstate grid, operate in interstate commerce and are subject to FERC's exclusive jurisdiction. And with the Sixth Circuit's errors corrected, its preemption holding cannot stand. When Ohio commands utilities to turn over the operation of their federally regulated facilities to an

RTO, and operate those facilities within a particular regulatory construct, Ohio is asserting *jurisdiction* over those facilities—jurisdiction that Congress has vested exclusively in FERC (yielding field preemption). And Ohio is doing so in clear conflict with Congress's command that RTO membership remain voluntary (yielding conflict preemption).

The Sixth Circuit's contrary reasoning flies in the face of this Court's precedent. This Court has repeatedly recognized that FERC's jurisdiction over interstate transmission facilities is exclusive. More than 40 years ago, this Court explained that the FPA "delegated to the Federal Power Commission, now [FERC], *exclusive* authority to regulate the transmission ... of electric energy in interstate commerce." *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982).

In *New York*, this Court made clear that the FPA "authorized federal regulation of electricity in areas beyond the reach of state power" and "also extended federal coverage to some areas that previously had been state regulated." 535 U.S. at 6. The Court then explained that "[s]pecifically, in § 201(b) of the FPA, Congress recognized the [Federal Power Commission's] jurisdiction as including 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *Id.* at 6-7 (quoting 16 U.S.C. § 824(b)).

More recently still, *Hughes* confirmed the same conclusion. That case concerned FERC's parallel authority—conferred in the very same sentence—over interstate wholesale sales and held that "[u]nder the FPA, FERC has *exclusive authority* to regulate 'the

sale of electric energy at wholesale in interstate commerce.'" 578 U.S. at 154. And if FERC's authority over wholesale sales is exclusive (which it is), its authority over interstate transmission cannot be different: Congress conferred those two parallel authorities in the same breath, and this Court has previously recognized that FERC's jurisdiction over transmission is, if anything, *broader* than its jurisdiction over wholesales sales. *See New York*, 535 U.S. at 17, 19-20; *see also S.C. Pub. Serv. Auth.*, 762 F.3d at 63 (recognizing that FERC "possesses greater authority over electricity transmission than it does over sales").

Moreover, the Sixth Circuit simply misread the statute in a crucial respect. The Sixth Circuit stated that the FPA "restrict[s] [FERC's] authority over 'facilities used for ... transmission ... in intrastate commerce.'" Pet. App. 39a. But what the statute *actually* says is that FERC has restricted authority over "facilities used ... *only* for" intrastate transmission. 16 U.S.C. § 824(b)(1) (emphasis added). And other than facilities in parts of Texas that are not operated as part of the interstate grid, *all* transmission facilities in the contiguous forty-eight states—including Ohio—operate in interstate commerce and therefore cannot be said to be used "only" for intrastate transmission. *See, e.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020).

The Sixth Circuit also concluded that FERC's jurisdiction is not exclusive because the FPA generally "teem[s] with references to state involvement." Pet. App. 39a. But that general observation is irrelevant to the specific question at hand. The point of the FPA is to

allocate jurisdiction between the federal government and the States. So the FPA, unsurprisingly, contains many references to state jurisdiction. And no one doubts that States play *some* role, including over the building of in-state transmission infrastructure via siting, permitting, and construction authorities. *See, e.g.*, *S.C. Pub. Serv. Auth.*, 762 F.3d at 62. But the Sixth Circuit ignored the only question that matters here—whether states can regulate the terms and conditions of interstate transmission itself, by dictating who will operate federally regulated transmission facilities, which rules will apply, and whether RTO membership will be mandatory despite Congress's instruction that it remain "voluntary." 16 U.S.C. § 824a(a). As to that question, nothing supports the Sixth Circuit's conclusion.

Congress's command that RTO membership remain voluntary not only conflicts with Ohio's RTO mandate, but also underscores that Ohio has intruded on the federal field. "When the federal government completely occupies a given field or an identifiable portion of it, …the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13 (1983) (citation omitted). Section 824a(a) shows that RTO membership is part of the federal field. And with Congress having withheld authority to mandate RTO membership even from its designated federal regulator, it beggars belief to think that Congress intended to permit states to regulate this issue. *Cf.* Pet. App. 37a (averring that the FPA's

voluntariness requirement precludes only FERC from enacting RTO mandates).

Indeed, state RTO mandates make it impossible for FERC to do *its* job under the FPA. If states mandate RTO participation, FERC cannot "divide the country into regional districts for … *voluntary* interconnection." 16 U.S.C. § 824a(a) (emphasis added). If utilities have no choice but to join RTOs, FERC cannot " promote and encourage such [voluntary] interconnection." *Id.* And if states may enact RTO membership, FERC cannot fulfill its duty to encourage voluntary interconnection in "such district[s]" that "in the judgment of the Commission" "can economically be served by such interconnection"—because states may mandate membership in RTOs encompassing different areas.

The Sixth Circuit also invoked the FPA's general statement limiting federal authority "only to those matters which are not subject to regulation by the States." Pet. App. 39a (quoting 16 U.S.C. § 824(a)). But this Court has long held that this language is "a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction." *New York*, 535 U.S. at 22 (internal quotation marks omitted).

Finally, the Sixth Circuit pointed to Congress's express conferral of authority on FERC to exempt utilities from state laws "hindering voluntary utility coordination," suggesting that this authority presupposes that states may regulate interstate transmission. Pet. App. 41a (citing U.S.C. § 824a-1(a)(2)). But this merely gives FERC a new authority, which it would otherwise lack, to directly abrogate conflicting state laws that hinder voluntary utility coordination—

obviating the need to seek an injunction in trial court. Moreover, some state laws, such as certain approval requirements concerning state-jurisdictional issues, may regulate within states' domain but nonetheless prevent voluntary coordination. *E.g.*, Opinion No. 472, 107 FERC ¶ 61,271 at P71 (invoking this provision based on Virginia's delayed consideration of AEP's application to join PJM). Congress did not, by authorizing FERC to address such barriers, imply that states may regulate interstate transmission directly.

There thus can be no question here that the "*target* at which the state law *aims*," *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015), is the federal field of interstate transmission. Concluding otherwise, the Sixth Circuit shrugged off the Ohio law's effects as "incidental" and "indirect." But it is hard to imagine a more direct assertion of jurisdiction than regulating *who* operates federally regulated transmission facilities and *how* those facilities must be operated. Indeed, Ohio's statute expressly applies to "transmission facilities *as defined under federal law* and located in this state." Ohio Rev. Code § 4928.12(A).

Because Ohio's law targets interstate transmission facilities over which FERC has exclusive jurisdiction, and conflicts with Congress's determination that RTO membership should be voluntary, Ohio's law is both field- and conflict-preempted.

II. THIS COURT SHOULD REVIEW WHETHER THE SIXTH CIRCUIT CORRECTLY ADDED A NONTEXTUAL VOLUNTARINESS REQUIREMENT TO SECTION 219(c).

A. Review Is Warranted to Address FERC's About-Face to Impose a Voluntariness Requirement, After Rejecting that View for More than a Decade.

This Court's review is also needed to address the Sixth Circuit's rewriting of the adder statute in a manner that two FERC Chairmen have correctly recognized conflicts with Congress' intent and FERC's own understanding in the wake of Section 219's passage, which FERC maintained until 2021. This issue is of immediate national importance, as explained in Part III, and it warrants resolution now.

When FERC promulgated Order No. 679—the rule implementing Section 219(c)—FERC rejected a suggestion from commenters that transmission owners should be categorically ineligible if their RTO participation was mandated by state law. *See* Order No. 679, 116 FERC ¶61,057 at P316. And for more than a decade, FERC granted the adder to utilities that belong to an RTO, including in states with laws purporting to compel RTO membership. *See, e.g.*, *AEPSC*, 124 FERC ¶ 61,306 at P22; *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at P21; *see also Pac. Gas & Elec. Co.*, 148 FERC ¶ 61,245 at P30 (2014), *rev. granted and remanded sub nom. California Public Utilities Commission v. FERC*, 879 F.3d 966 (9th Cir. 2018); *MISO Inc.*, 150 FERC ¶ 61,004 at PP39-44 (2015); *PPL Elec. Utils. Corp.*, 123 FERC ¶ 61,068 at P35 (2008).

FERC only reversed course after overreading a 2018 decision from the Ninth Circuit. *See Cal. Pub. Utils. Comm'n*, 879 F.3d at 974-75. There, the Ninth Circuit interpreted Order No. 679 and held that while RTO membership confers a presumption of eligibility for an adder, the presumption could be rebutted by showing that membership was in fact involuntary. *Id.* The Ninth Circuit did not interpret Section 219(c), nor even hold that California law in fact required RTO membership. *Id.* at 978 n.5, 980; *supra* at 11.

Nonetheless, FERC has relied on the Ninth Circuit's decision to deny adders to utilities subject to a state RTO mandate. In so doing, FERC itself has divided. *E.g.*, *Elec. Transmission Incentives*, 175 FERC ¶ 61,035 at P5 (Danly, Comm'r, dissenting); 175 FERC ¶ 61,035 at P 2 (Chatterjee, Comm'r, dissenting). Yet the Commission is now set in its determination that Section 219(c) includes a voluntariness requirement—often simply cross-referencing its recent decisions to that effect in new matters raising the issue. This Court's intervention is needed to return the Commission to its earlier, correct position on an issue of critical national importance.

B. The Decision Below Is Wrong.

The Sixth Circuit's decision cannot be reconciled with Section 219(c)'s plain text or this Court's "preeminent canon of statutory interpretation"—that the "'legislature says in a statute what it means and means in a statute what it says there,'" and that courts' inquiry "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citation omitted).

Here, Section 219(c) provides that FERC "*shall[]*" issue a "rule" that "provide[s] for incentives *to each* transmitting utility or electric utility *that joins* a Transmission Organization." 16 U.S.C. § 824s(c) (emphases added). Congress thus confirmed, re-confirmed, and re-confirmed again that FERC should award the adder without inquiry into whether the utility joined freely.

Yet the Sixth Circuit ignored the word "shall," which imposes a mandatory duty, *cf.*, *e.g.*, *Maine Community Health Options v. United States*, 590 U.S. 296, 310 (2020), and the obligation to provide the adder "to *each*" utility. And the Sixth Circuit declined to place weight on Congress's choice to use the phrase "*that* joins," which directs FERC to look only to the fact of joinder and not why utilities did so. Worse, the Sixth Circuit added the word "voluntarily"—a limitation "Congress could have established ... but … did not." Pet. App. 125a (Danly, Comm'r, dissenting). Courts may not "add words … to the statute Congress enacted." *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024).

The Sixth Circuit concluded that the word "join" "*connote[s]* voluntary action," Pet. App. 25a (emphasis added), but it does not. A soldier drafted into the army has no less "joined," and an employee may "join" a union even if doing so is required. *E.g.*, *Pa. R.R. Co. v. Rychlik*, 352 U.S. 480, 492-94 (1957). The Sixth Circuit also relied on the word "incentives," but the definition it invoked—something that "incites or tends to incite action," Pet. App. 26a (quotation marks omitted)—does not support its position. The "rule" that Congress directed FERC to issue can still "tend[] to incite" RTO membership even if

some states mandate RTO membership. Across its applications, the rule still tends to incite RTO membership, as well as investment in transmission infrastructure by RTO members.

The Sixth Circuit also violated another blackletter rule of statutory interpretation—the imperative to "give effect, if possible, to every clause and word of [the] statute." *Fischer v. United States*, 603 U.S. 480, 486 (2024) (quotation marks omitted). Whereas AEP's interpretation gives meaning to every word of Section 219(c), the Sixth Circuit's reading effectively erases Congress's command to provide an incentive "to each" utility "that joins" an RTO.

Moreover, the Sixth Circuit had no adequate answer to how Section 219(c) *does* incentivize voluntary behavior on AEP's reading. It encourages increased transmission investment by RTO members, reflecting Congress's understanding that RTOs are especially efficient in driving well-designed transmission infrastructure. Order No. 679-A, 117 FERC ¶ 61,345 at P86. The Sixth Circuit doubted that "Congress created Section 219(c) to promote construction rather than RTO membership." Pet. App. 31a. But that misses the point: Congress in Section 219(c) wanted to incentivize *a combination*—increased transmission investment by RTO members. The adder makes such investment more attractive by increasing the ROE for utilities in RTOs.

These same points dispose of the Sixth Circuit's arguments based on "statutory context." Pet. App. 26a. Indeed, the Sixth Circuit's arguments veer into policy, including that an adder for a utility whose RTO participation "is mandated by state law [would] give the

utility an unearned windfall." Pet. App. 28a-29a. But even if policy could substitute for text, utilities get no windfall from an adder that encourages enhanced transmission investment, especially given the burdens of RTO membership. The Sixth Circuit's interpretation, meanwhile, undermines Congress's goals. If States may eliminate the adder via mandates, utilities will have less incentive to join. The investment playing field will also become uneven, with arbitrary differences in state law determining whether utilities in the same multi-state RTO receive the adder or not. Indeed, as described in Part III, the decision below invites states to enact RTO mandates for the sole purpose of manipulating the federal rate—a result Congress cannot have intended.

III. THE QUESTIONS PRESENTED ARE OF NATIONWIDE IMPORTANCE AND THIS CASE IS AN IDEAL VEHICLE.

This Court has previously granted certiorari to clarify the FPA's division of authority between federal and state jurisdiction—and it has done so even where, unlike here, there is no division of authority. *See, e.g.*, *FERC v. EPSA*, 577 U.S. 260 (2016); *Hughes*, 578 U.S. 150. The Court should grant review here as well. The Sixth Circuit's errors, if uncorrected, threaten enormous disruption to the FPA's jurisdictional scheme and immense practical harm to the transmission investment that Congress has determined is urgently needed.

First, the Sixth Circuit's preemption holding upends settled principles governing federal and state authority by carving out a zone of state jurisdiction over supposedly *intrastate* transmission, when that transmission is in fact in *interstate* commerce. Now,

under the guise of regulating supposedly intrastate transmission, states could try to leap beyond their FPA-designed sphere (siting, permitting, and construction) to impose onerous obligations on the interstate transmission of electricity itself. States could seek to add their own terms and conditions or to alter rates for what the Sixth Circuit has deemed "intrastate" transmission. For example, states could try to require wholesale transmission customers to enter "contracts for differences" for transmission services within their states, effectively altering FERC-jurisdictional rates. *Cf. Hughes*, 578 U.S. at 163. Or states could be even more aggressive and seek to directly set their own rates for point-to-point transmission service between facilities located within the state and then contend that FERC lacks jurisdiction over such rates entirely.

Meanwhile, if states can decide who operates transmission facilities within their borders (as the Sixth Circuit held), states could seek to mandate that utilities join or leave *particular* RTOs, join or form other sorts of organizations for the interstate transmission of electricity, or simply hand over control of parts of the interstate transmission grid to another party selected by the state. The Sixth Circuit's preemption holding thus sows confusion, invites litigation, threatens reliability, and undermines the certainty Congress aimed to achieve by vesting exclusive jurisdiction in FERC.

This disruption, moreover, is especially pernicious because of the disuniformity the decision below has wrought. States in the Sixth Circuit may seek to regulate interstate transmission on the theory that FERC's jurisdiction is not exclusive and that states may

enforce laws that "primarily" regulate intrastate transmission—arguments that will not be available in the Third, Fifth, Eighth, Ninth or D.C. Circuits, which correctly recognize that FERC's jurisdiction is exclusive. Such division would always militate strongly in favor of review. And here, it does so with particular force because the law of federal preemption now differs across the same RTO (which encompasses the Third, Sixth, and D.C. Circuits), and because FERC decisions can always be appealed to the D.C. Circuit—meaning the governing law will depend on where litigants sue.

Second, enormous consequences loom from the Sixth Circuit's holding that Section 219(c)'s incentive turns on whether states have decided to mandate RTO membership (in combination with its holding that such mandates are not preempted). Several states have enacted such mandates, including Colorado, Illinois, Michigan, Nevada, Virginia, and Wisconsin. Colo. Rev. Stat. Ann. § 40-5-108; 220 ILCS 5/16-126(a), (b), (*l*); Mich. Comp. Laws Ann. 460.10w; Nev. Rev. Stat. Ann. § 704.79886; Va. Code Ann. § 56-577(A)(1); Wis. Stat. Ann. § 196.485. And at least two more states are considering similar legislation. *See* S. 237, 221st Leg., Sess. (N.J. 2024); H.R. 782, 2023-2024 Reg. Sess. (Pa. 2025).

Across all these states, the Sixth Circuit's holding threatens to undermine the incentives Congress sought to provide. And it does so at the worst possible time, during a national energy emergency due to "a precariously inadequate and intermittent energy supply, and an increasingly unreliable grid." Exec. Order No. 14156 § 1, 90 Fed. Reg. 8433 (Jan. 20, 2025).

Moreover, these consequences are even more troubling because of the distortions the decision below creates. As one FERC Commissioner pointed out in dissent in *Dayton*, "permitting some RTO/ISO members to receive the RTO Adder, while prohibiting other members from receiving that same incentive, creates an uneven playing field in the competition for investment capital." 176 FERC ¶ 61,025 at P 2 n.4 (Chatterjee, Comm'r, dissenting). The Sixth Circuit's holding will discourage investment in Ohio and other states that have RTO mandates, and money will instead flow to transmission owners in states that do not have such mandates, for reasons having nothing to do with transmission needs or sound planning principals.

Finally, the decision below invites states to simply manipulate transmission returns on equity—by enacting RTO mandates that have the effect of reducing those returns. Some states may do so because they disagree with Congress's policy choice in Section 219(c) to encourage transmission investment by RTO members, preferring instead lower rates even at the cost of needed transmission investment. Or states may simply use the decision below to pick winners and losers for the states' own reasons, enacting RTO mandates that target only the returns of certain disfavored utilities, while leaving other utilities untouched. Indeed, after the Ninth Circuit held that California's three largest utilities were entitled to the RTO adder, the legislature enacted a new statute, directed at those utilities, that FERC read to make their membership involuntary and to render them ineligible for the adder. *See* Cal. Pub. Util. Code § 362(c); *Pac. Gas*

& Elec. Co., 187 FERC ¶ 61,167 at PP36-40 (2024).[2] If the Sixth Circuit's decision is permitted to stand, states will predictably seek to seize the chance to take transmission policy into their own hands, further undermining the uniform incentives Congress enacted.

This Court's intervention is necessary to restore uniformity to the FPA's jurisdictional framework and to restore the uniform incentive that Congress by statute provided, at a moment that could not be more important for our country's energy future.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[2] The utilities maintain that the revised statute does not mandate RTO membership and that they may withdraw with the permission of their state regulator; the Ninth Circuit recently heard argument on a petition for review of FERC's decision. *See Pac. Gas & Elec. Co. v. FERC*, Nos. 24-2527, 24-3876 (9th Cir. argued June 4, 2025). However the Ninth Circuit ultimately interprets the California statute, the key point for present purposes is that the reading of Section 219(c) adopted by FERC and the Sixth Circuit would allow states to manipulate the federal rate by enacting an RTO mandate.

Respectfully submitted,

ZACHARY C. SCHAUF
Counsel of Record
Arjun R. Ramamurti
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
zschauf@jenner.com

June 24, 2025

APPENDIX

TABLE OF CONTENTS

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAYTON POWER & LIGHT COMPANY, dba AES Ohio, American Electric Power Service, DUKE ENERGY OHIO, INC., and FIRSTENERGY SERVICE COMPANY (21-4072/22-3351); AMERICAN ELECTRIC POWER SERVICE CORPORATION (22-3196/23-3366); OFFICE OF THE OHIO CONSUMERS' COUNSEL (23-3324/3417), *Petitioners*, *v.* FEDERAL ENERGY REGULATORY COMMISSION, *Respondent.*	Nos. 21-4072 /22-3351 /23-3196 /3324 /3366 /3417

On Petitions for Review of Orders the Federal Energy Regulatory Commission.

Nos. ER20-1068-000; ER20-1068-003; EL22-34-000; EL22-34-001.

Argued: May 8, 2024

Decided and Filed: January 17, 2025

Before: MOORE, NALBANDIAN, and BLOOMEKATZ, Circuit Judges.

COUNSEL

ARGUED: Matthew E. Price, JENNER & BLOCK LLP, Washington, D.C., for Petitioners. Carol J. Banta, FEDERAL ENERGY REGULATORY COMMISSION, Washington, D.C., for Respondent. Thomas G. Lindgren, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Intervenor Public Utilities Commission of Ohio. **ON BRIEF**: Matthew E. Price, Zachary B. Cohen, JENNER & BLOCK LLP, Washington, D.C., William M. Rappolt, AES US SERVICES, LLC, Arlington, Virginia, William M. Keyser, STEPTOE & JOHNSON LLP, Washington, D.C., Morgan E. Parke, P. Nikhil Rao, FIRSTENERGY SERVICE COMPANY, Akron, Ohio, Sanford I. Weisburst, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York, for the Dayton Power & Light Co. et al. Petitioners. Carol J. Banta, FEDERAL ENERGY REGULATORY COMMISSION, Washington, D.C., for Respondent. Thomas G. Lindgren, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Intervenor Public Utilities Commission of Ohio. Denise C. Goulet, Wendy Simon Pearson, MCCARTER & ENGLISH, LLP, Washington, D.C., for Petitioner Office of the Ohio Consumers' Counsel in 23-3324 and 23-3417 and as an Intervenor in 21-4072, 22-3351, 23-3196, and 23-3366. Paul M. Flynn, Ryan J. Collins, WRIGHT & TALISMAN, P.C., Washington, D.C., for Intervenor PJM Interconnection, L.L.C. Cynthia S. Bogorad, David E. Pomper, Jeffrey M. Bayne, Lauren L. Springett, SPIEGEL & MCCIARMID LLP, Washington, D.C., for Intervenor Buckeye Power. Heather M. Horne, DUKE

ENERGY CORPORATION, Washington, D.C., Matthew A. Fitzgerald, MCGUIREWOODS LLP, Richmond, Virginia, for Intervenor Duke Energy Ohio, Inc. Sanford I. Weisburst, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York, Morgan E. Parke, P. Nikhil Rao, FIRSTENERGY SERVICE COMPANY, Akron, Ohio, for Intervenor FirstEnergy Service Company in 23-3324, 23-3366, and 23-3417.

BLOOMEKATZ, J., delivered the opinion of the court in which NALBANDIAN, J., concurred, and MOORE, J., concurred in part. NALBANDIAN, J. (pp. 35–39), delivered a separate concurring opinion. MOORE, J. (pp. 40–45), delivered a separate opinion concurring in part and dissenting in part.

OPINION

BLOOMEKATZ, Circuit Judge. In 2005, Congress amended Section 219 of the Federal Power Act (FPA), directing the Federal Energy Regulatory Commission (FERC) to make the country's electric grid more efficient, reliable, and affordable for consumers. Among other measures, Congress mandated that FERC "provide for incentives to each . . . electric utility that joins" a regional transmission organization (RTO). 16 U.S.C. § 824s(c). RTOs operate regional electricity grids and facilitate competition, efficiency, and reliability. They also lower consumer prices. Following Congress's instruction, FERC promulgated a rule allowing utilities to charge higher wholesale electricity rates as an

incentive for joining an RTO. *See Promoting Transmission Investment Through Pricing Reform*, 116 FERC ¶ 61,057 (2006). We call that surcharge the "RTO adder." Consistent with Congress's goal of encouraging RTO participation, FERC ultimately determined that a utility can qualify for the higher rate only if it *voluntarily* joins an RTO. FERC thus excludes utilities that are required to join an RTO by state law because the extra payment cannot "incentivize" membership.

Ohio law requires utilities to join an RTO, so FERC denied the application of Dayton Power, an Ohio utility, for an RTO adder. Then, prompted by a challenge from the Ohio Consumer's Counsel (OCC), FERC removed the adder from another Ohio utility, AEP. But FERC left the adder intact for two others, Duke and FirstEnergy. Duke's and FirstEnergy's rates came from comprehensive settlement agreements, and FERC viewed the adder as inseparable from those settlements.

These consolidated appeals of FERC's rulings in the Dayton Power and OCC proceedings raise two main questions. *First*, was it arbitrary and capricious for FERC to deny RTO adders to utilities in states requiring RTO membership, either because FERC's voluntariness requirement conflicts with the FPA or because those state laws are preempted and therefore should pose no obstacle to FERC approving the RTO adder? *Second*, assuming FERC's interpretation stands, was it arbitrary and capricious for FERC to remove the adder from AEP's rates, but not from Duke's and FirstEnergy's? We conclude that the best reading of the relevant FPA provision supports FERC's determination that utilities must voluntarily participate

in an RTO to receive the RTO adder. We also hold that state laws mandating such participation are not preempted by the FPA. Therefore, we affirm FERC's determination in the Dayton Power proceeding. Yet we conclude that FERC treated AEP differently than Duke and FirstEnergy without a meaningful distinction. Based on the Dayton Power proceeding, the adder should have been excised from all three companies' rates. Accordingly, we vacate FERC's determination in the OCC proceeding and remand for further proceedings consistent with this opinion.

BACKGROUND

The legal questions in this case arise from the complex statutory and regulatory scheme governing the electricity market in the United States. We begin by describing relevant parts of the market and legal scheme. *See Louisville Gas & Elec. Co. v. FERC*, 988 F.3d 841, 843 (6th Cir. 2021) (providing a "simplified" overview of the "interstate wholesale electricity market" because it's "not exactly everybody's cup of tea").

I. Overview of the Wholesale Electricity Market[1]

Electric service has three primary steps: generation, transmission, and distribution. Energy Primer at 47. Power plants first generate electricity using coal, natural gas, nuclear fuels, or renewable energy. *Id.* at 48.

---

[1] Our overview draws from FERC's "Energy Primer" and "Reliability Primer." *See* FERC, Staff Report, Energy Primer: A Handbook of Energy Market Basics (2020), https://perma.cc/GGF6-BGFJ; FERC, Reliability Primer (2020), https://perma.cc/LFJ2-L84G.

Next, large transmission lines carry electricity over long distances from plants to cities and towns across the country, forming electricity grids. *Id.* at 36–37, 47; Reliability Primer at 16. Finally, transmission lines connect to local distribution lines that deliver electricity directly to homes and businesses. Energy Primer at 47. Each step of the process involves different entities and subsidiaries. Together, they deliver power to consumers.

Most people, when they pay their electric bill, are buying electricity from a retail energy supplier. Those transactions form the retail electricity market. But before electricity reaches consumers, it gets traded on a wholesale market and transmitted across the electrical grid. *Id.* at 35. The wholesale electricity market consists of generators, transmission utilities, and other entities that buy and sell electricity in bulk so that consumers can then access electricity on-demand. *Id.* at 36–37. Here, we focus on laws and regulations affecting the wholesale market for electricity.

Regional wholesale markets don't work particularly well unless the entities involved coordinate and share transmission lines. *See id.* Consider what would happen if they didn't. Each utility would need to pay to build its own lines or use other companies' lines to transmit electricity long distances, creating a high barrier to market entry. *See Louisville Gas*, 988 F.3d at 844. Utilities would face severe limitations on where they could deliver electricity, hindering competition. *See* Energy Primer at 37, 39. And they would need to maintain substantial power reserves to avoid outages. *See id.* at 36–37. These challenges would result in higher

prices to customers. Coordination addresses those problems. For instance, by sharing transmission lines, utilities can borrow from one another's reserves as needed to prevent unnecessary outages without having to keep huge reserves. *See id.* Coordination affects whether consumers can access electricity on demand and what they ultimately pay down the line to power their homes. *Id.*

Given these benefits, Congress acted to facilitate sharing and coordination of electric transmission. Before Congress got involved, some utilities entered bilateral agreements, and others joined multilateral arrangements called "power pools." *Id.* at 38–39. Some of these power pools evolved into autonomous transmission organizations called Independent System Operators (ISOs) or Regional Transmission Organizations (RTOs). *Id.* at 39. RTOs (which are the focus of this case) and ISOs are nonprofit entities that take over operational control of transmission lines from the utilities that own them. *Id.* One of the largest RTOs in the country is PJM Interconnection (PJM), which coordinates the movement of wholesale electricity across a region that includes Ohio and all or parts of 12 other states plus the District of Columbia. *Id.* at 85; PJM Br. at 6. Utilities in an RTO submit bids or offers for generation directly to the RTO, which evaluates and matches buyers and sellers. This process creates competition in the wholesale electricity market and ensures a balanced, coordinated flow of electricity across the grid. Energy Primer at 39, 61. The result: a more reliable power supply and competition leading to lower rates. *Id.*

But RTO membership comes with significant hurdles. Because RTOs operate independently of their members, to join one, utilities that own and operate transmission lines must cede operational control to the RTO. *Id.* Then they must compete for business in a structured market environment. *Id.* at 39, 62–66.

II. The Statutory and Regulatory Scheme

Congress gave FERC power to regulate the wholesale electricity market. The FPA gives FERC authority over "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," including any rates and charges. 16 U.S.C. § 824(a). It also explicitly preserves states' power to oversee *intra*state transmission of electricity. *Id.* § 824(a), (b)(1).

Return on Equity (ROE). As part of its authority, FERC approves the wholesale rates at which entities sell electricity. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016) (citing 16 U.S.C. § 824d(a)). FERC sets rates by considering how much, on balance, a utility would need to earn to continue to attract investment. *See Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967 (D.C. Cir. 1984) (citing *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)); *Emera Me. v. FERC*, 854 F.3d 9, 19–21 (D.C. Cir. 2017). That figure is known as the "return on equity," or ROE. But FERC must also ensure that the utility's rate is "just and reasonable." *Emera Me.*, 854 F.3d at 19 (quoting 16 U.S.C. §§ 824d(a), 824e(a)). To set a utility's rate, FERC compiles the ROEs of a "proxy group of comparable publicly traded companies," removes outliers, and "assembles a zone of reasonable ROEs on

which to base a utility's ROE." *Id.* at 21 (cleaned up). That range is called the "zone of reasonableness." *Id.* Within the zone, FERC determines a utility's precise rate based on its specific circumstances.

Section 219. Congress also gave FERC authority to encourage RTO membership. Although RTOs benefit customers, some utilities have hesitated to join them. *See* Energy Primer at 39. As mentioned, membership in an RTO requires a utility to relinquish operational control of its transmission capabilities, 18 C.F.R. § 35.34(f), and request permission if it ever wants to withdraw, *see Louisville Gas*, 988 F.3d at 845.

Understanding this challenge, in 2005, Congress amended Section 219 of the FPA to direct FERC to establish incentives for utilities that join an RTO. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961 (codified as amended at 16 U.S.C. § 824s). Congress did not mandate RTO membership. Rather, it gave FERC broad authority to "establish, by rule, incentive-based (including performance-based) rate treatments" to improve transmission of electricity. 16 U.S.C. § 824s(a). Congress mandated that FERC promulgate one specific type of incentive-based rate treatment in Section 219(c), stating that FERC "shall . . . provide for incentives to each transmitting utility or electric utility that joins [an RTO]." *Id.* § 824s(c).[2] In requiring FERC to create this and other "incentive-

[2] Section 219(c) covers utilities that join "Transmission Organization[s]" generally, but we refer only to RTOs because no other type of transmission organization is relevant to this appeal. *See* 16 U.S.C. § 824s(c).

based" rate treatments, Congress's stated "purpose [was] benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." *Id.* § 824s(a). With incentives, perhaps Congress could overcome some of the barriers to RTO membership. Congress further ordered that any incentive-based rate treatment given be "just and reasonable and not unduly discriminatory or preferential." *Id.* § 824s(d).

Order 679. To implement Congress's directive to "provide for incentives" to each utility that joins an RTO, FERC promulgated Order 679. *Id.* § 824s(c); *Promoting Transmission Investment Through Pricing Reform*, 116 FERC ¶ 61,057 (2006) (codified at 18 C.F.R. § 35.35) (Order 679).[3] FERC created an "adder" for utilities that join an RTO, which permits them to charge a premium above their baseline ROEs. It also allowed utilities to recoup "prudently incurred costs associated with joining" an RTO. 18 C.F.R. § 35.35(e). The practical upshot: utilities garner an above-market return on equity, a cost borne initially by wholesale purchasers but ultimately shouldered by consumers via higher electric bills.

In Order 679, FERC decided to grant RTO adders on a "case-by-case basis" by reviewing individual applications from utilities that had joined RTOs. Order 679 ¶ 326. It rejected comments urging that all utilities with membership in an RTO should "automatically

---

[3] FERC affirmed its rule on rehearing. *See Promoting Transmission Investment Through Pricing Reform*, 117 FERC ¶ 61,345 (2006) (Order 679-A).

qualify" for the adder. *Id.* ¶¶ 318, 326–27. It also rejected comments suggesting "that the incentive should not apply where a transmission owner is ordered to join [an RTO] by statute or has agreed to join [an RTO] as a condition of receiving approval for a merger, market-based rates, or because of other regulatory actions." *Id.* ¶ 316. FERC instead explained that "[a] prior contractual commitment or statute may have a bearing" on its "evaluation of individual applications." Order 679-A ¶ 122. Rather than create categorical eligibility criteria, FERC decided that it could "fulfill[] the Congressional mandate" by considering incentives "on a case-by-case basis" and approving them "when justified." Order 679 ¶ 326. A utility would "be presumed to be eligible for the incentive" if it could "demonstrate that it has joined an RTO." *Id.* ¶ 327. But it was just that—a presumption, not an entitlement. *See id.*

FERC also stated it would allow utilities that had joined an RTO before it promulgated Order 679 to qualify for the adder if they maintained their membership. *Id.* ¶ 331. FERC reasoned that "[t]he 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*." *Id.* (emphasis added); *see also* Order 679-A ¶ 86 & n.142. In response to criticisms of this policy, Order 679-A ¶¶ 80–81, FERC explained that offering the adder as an "inducement for utilities to join, and remain in" RTOs served Section 219's goal of "ensuring reliability and reducing the cost of delivered power," *id.* ¶ 86. FERC worried that without the adder, existing RTO members "with the option to withdraw" would have "no

inducement to stay." *Id.* "[I]ncentives," FERC reasoned, "are equally important in inducing utilities to join and remain" in RTOs. *Id.* ¶ 86 n.142.

III. The RTO Adder at the Ninth Circuit

Even though Order 679 mandated a case-by-case approach, in practice FERC "summarily granted" requests for a 50-basis-point RTO adder.[4] *Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 972 & n.3 (9th Cir. 2018) (*CPUC I*). It routinely approved adders for some utilities that were RTO members without scrutinizing their individualized circumstances. This practice continued until a 2018 Ninth Circuit decision—known to the parties as *CPUC I*—prompted FERC to begin examining the "specific circumstances" underlying utilities' requests for RTO adders. *See id.* at 979.[5]

In that case, the California Public Utilities Commission (CPUC) challenged Pacific Gas & Electric's

---

[4] A "50-basis-point" adder refers to a 0.5% upward adjustment to a utility's base ROE, or the rate of return a utility would ordinarily receive as determined by the market cost of production. As far as the record demonstrates, the RTO adder has always been 50 basis-points. Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act, 86 Fed. Reg. 21972, 21973 (proposed Apr. 26, 2021) (to be codified at 18 C.F.R. pt. 35). While FERC could adjust this figure in its case-by-case review, it hasn't. *Id.* (noting that FERC has RTO adders of 50 basis points, not more and not less, "without modification"); Order 679 ¶ 326.

[5] According to FERC, the question of whether utilities are eligible for the RTO adder if state law requires them to join an RTO did not "come up" and was not challenged until *CPUC I*. *Dayton Power* Oral Arg. at 34:00.

(PG&E) application for an RTO adder.[6] *Id.* at 972. It argued that a CPUC order mandated PG&E's continued participation in the RTO, and "granting it incentive adders would reward PG&E for doing something it was already required to do," needlessly increasing costs for consumers. *Id.* FERC summarily granted the adder, pointing to Order 679. *Id.* CPUC petitioned the Ninth Circuit to reverse FERC, arguing that it was arbitrary and capricious for FERC to grant PG&E an incentive adder without considering whether it had *voluntarily* continued to participate in the RTO. *Id.* at 972–73.

The Ninth Circuit agreed, deeming FERC's approval "plainly erroneous and inconsistent with" Order 679. *Id.* at 974. It emphasized two main points. *First*, FERC violated Order 679 by not examining "incentives on a case-by-case basis" as required "even for utilities that have demonstrated ongoing membership" in an RTO. *Id.* (citation omitted). Rather than undertaking individualized review, FERC had summarily approved adders for PG&E solely based on its RTO membership. *Id.* at 978–79. *Second*, FERC hadn't considered whether PG&E joined the RTO voluntarily, which Order 679 required. *Id.* at 974–75, 978. The Ninth Circuit emphasized that FERC created the adder as "an *inducement* for utilities to join[] and remain in" RTOs, justified by "*the fact that continuing membership is generally voluntary*." *Id.* at 974 (citations omitted). As a result, the court concluded that the adder

---

[6] Although the *CPUC* litigation concerned membership in an ISO rather than an RTO, for simplicity's sake, we refer to RTOs throughout. *See* Energy Primer at 39 (referring to RTOs and ISOs interchangeably).

is "presumably not justified" when membership is involuntary. *Id.* And by rubberstamping PG&E's adders, FERC had departed from its "longstanding policy that incentives should only be awarded to induce voluntary conduct." *Id.* at 978.

On remand, FERC reaffirmed its approval of PG&E's RTO adder. *Cal. Pub. Utils. Comm'n v. FERC*, 29 F.4th 454, 458 (9th Cir. 2022) (*CPUC II*). FERC determined that, despite CPUC's claims, California law did not mandate RTO participation. *Id.* at 461. The Ninth Circuit affirmed, clarifying that *CPUC I* had not definitively ruled on whether state law required membership. *Id.* at 462–63. Because federal law is the source of the right to the incentive adder, the court saw no need to defer to California's interpretation. *Id.* at 463–64. And, the court reasoned, because FERC's interpretation of California law was correct, it properly granted PG&E the adder. *Id.* at 466–68. So PG&E kept its adder, but the decision served as a wake-up call for FERC to engage in an individualized review of each RTO adder application and even reevaluate existing adders.

PROCEDURAL HISTORY

The consolidated petitions before us arise from two separate FERC proceedings. In the first, FERC denied an application from Dayton Power & Light Company, a transmission utility based in Ohio, for an RTO adder. Following *CPUC I*, FERC determined that utilities could be eligible for the RTO adder only if they voluntarily joined an RTO. This interpretation excludes all transmission utilities operating in Ohio, including Dayton Power, since state law compels their RTO

membership. Ohio Rev. Code § 4928.12.[7] The Ohio Consumers' Counsel (OCC)—the state entity that represents the interests of Ohio residential utility customers before courts and regulatory bodies—initiated the second proceeding. It challenged existing RTO adders charged by three other Ohio transmission utilities, American Electric Power Service Corporation (AEP), FirstEnergy Service Company, and Duke Energy Ohio, Inc. FERC rejected OCC's petition to subtract the RTO adder from Duke's and FirstEnergy's rates but granted it with respect to AEP's. We detail both proceedings.

I. *Dayton Power* Proceeding

In the *Dayton Power* proceeding, FERC formally adopted the view that, under Order 679, a utility that is legally required to join an RTO is ineligible for the RTO adder. In early 2020, Dayton Power applied for a package of incentives, including the RTO adder for its membership in PJM. *See Dayton Power & Light Co.*, 172 FERC ¶ 61,140 (Aug. 17, 2020), JA96. It claimed presumptive eligibility for the adder and argued the incentive would help finance new transmission projects. But it did not tie its request for the RTO adder to any project. Instead, it noted that its current transmission rates predated its RTO membership, it had not had a rate case since then to request an RTO adder, and even

[7] In the FERC proceeding, the parties disputed whether Ohio law mandates RTO membership. *Dayton Power & Light Co.*, 172 FERC ¶ 61,140 P 19 (Aug. 17, 2020), JA102. On appeal the utilities did not challenge's FERC's conclusion that it does, so we do not consider the question.

without any infrastructure projects, it was eligible for the RTO adder given its participation in PJM. OCC opposed the application, stressing Ohio's mandatory RTO membership law and the *CPUC I* ruling.

FERC concluded that Dayton Power was ineligible for the RTO adder under Order 679 because Ohio law required it to join an RTO. *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 (July 15, 2021) (*Dayton I*), JA173. Order 679, FERC emphasized, said an adder could be "appropriate for entities that choose to remain" in an RTO because "continuing membership is generally voluntary." *Id.* at JA183 (cleaned up). But for Dayton Power, continued membership wasn't voluntary. And, as *CPUC I* held, the adder could function as an "incentive" or "inducement" only if membership is voluntary. *Id.* at JA183–84 (citing *CPUC I*, 879 F.3d at 974–79). FERC therefore held that "a showing that RTO membership is voluntary is a prerequisite to granting . . . an RTO Adder," making Dayton Power ineligible. *Id.* at JA184.

FERC rejected both of Dayton Power's main arguments. Pointing to the FPA, Dayton Power argued that "section 219 does not explicitly require voluntariness." *Id.* at JA182. FERC disagreed because, as explained in Order 679 and *CPUC I*, Section 219(c) tasks FERC with providing "incentives," which can induce only voluntary behavior. *Id.* at JA182–86. Alternatively, Dayton Power argued that it technically joined an RTO voluntarily, because the FPA preempts the Ohio law requiring membership. Dayton Power urged FERC either to interpret the Ohio law as nonmandatory to avoid preemption concerns or to treat the statute as federally preempted. FERC determined

that Ohio law did require RTO membership but declined to address preemption arguments. It declared that it lacked the authority to nullify a state statute, which only a federal court could do. So, the ratemaking proceeding was an inappropriate vehicle for addressing preemption.

FERC later dismissed Dayton Power's petition for rehearing, maintaining its stance that Order 679 made voluntary membership a prerequisite for the RTO adder. *Dayton Power & Light Co.*, 178 FERC ¶ 61,102 (Feb. 17, 2022) (*Dayton II*), JA280. FERC again rejected Dayton Power's argument that the voluntariness requirement conflicted with Section 219(c)'s text and deemed it an improper collateral attack on Order 679. And it reiterated that federalism principles prevented it from considering the utility's preemption arguments.

II. *OCC* Proceeding

Following *Dayton Power*, OCC filed a complaint seeking to remove the RTO adders for AEP, Duke, and FirstEnergy.[8] *OCC v. AEP, et al.*, 181 FERC ¶ 61,214 (Dec. 15, 2022) (*OCC I*), JA464–65. OCC argued that these Ohio utilities could no longer charge the adder because, like Dayton Power, their RTO participation is legally mandated. AEP, Duke, and FirstEnergy responded that their rates resulted from settlement

[8] AEP, Duke Energy, and FirstEnergy are transmission-owning utilities that operate (or own subsidiaries that operate) in Ohio and are members of the PJM RTO. *OCC I* at JA467–68. Although American Transmission Systems Inc. (ATSI) was a party in the Commission proceedings, we refer to ATSI by the name of its parent company, FirstEnergy, which intervened in this case to defend the ruling with respect to ATSI.

negotiations and removing the adder would undermine those agreements.[9] *Id.* at JA476–77, 484–85. FERC agreed as to Duke and FirstEnergy, but not for AEP. *Id.* at JA485.

Starting with AEP, FERC stressed that it independently approved its RTO adder in 2008 and 2010 *before* settlement negotiations about AEP's ROE. *Id.* at JA486. Because FERC "specifically evaluated and granted RTO Adders" to AEP's Ohio affiliates "on a single-issue basis, separate from all other ROE issues," FERC reasoned that it could "reevaluate and revise those specific incentives on a single-issue basis" too. *Id.* AEP argued that a settlement produced its overall rate structure, and removing the RTO adder would disrupt that agreement. But FERC remained unconvinced. It explained that it "granted the adder prior to setting the base ROE," so "when the parties entered into settlement discussions, they knew they were negotiating *only* the base ROE." *Id.* at JA486 n.123 (emphasis added). Thus, the RTO adder constituted a distinct, excisable component of the settlement.

By contrast, FERC never approved a standalone RTO adder for Duke or FirstEnergy. Instead, FERC

---

[9] The utilities also argued that because their operations span multiple states that do not mandate RTO participation, FERC could not uniformly remove a 50-basis-point adder from all their transmission service rates. *OCC I* at JA479–80, 485, 492. OCC responded by explaining that interstate operations could impact "the scope of the remedy," but did not justify dismissing the complaint entirely. *Id.* at JA482–83. The utilities do not reassert this argument on appeal. Because the scope of the remedy is not before us, we do not address it here.

approved rates that emerged from complex settlements the utilities negotiated with consumer groups. Both utilities' negotiated rates appeared to include RTO adders. Duke's approved settlement explicitly incorporated "a 10.88% base cost of common equity and a 50-basis point ROE adder," and FirstEnergy's settlement specified that "the agreed-upon ROEs were inclusive of any incentive adder for RTO participation." *Id.* at JA488. But FERC had approved the settlements as a whole, not piecemeal. And it declined to "disturb one aspect of these comprehensive settlements absent a showing that the resulting overall ROEs are unjust and unreasonable." *Id.* at JA489.

AEP and OCC requested rehearing. AEP contended that FERC arbitrarily distinguished its case from Duke's and FirstEnergy's and disregarded its earlier finding (in an unrelated proceeding) that AEP had voluntarily joined PJM. *See OCC v. AEP, et al.*, 183 FERC ¶ 61,034 (Apr. 20, 2023) (*OCC II*), JA590–92, 594–95. OCC argued that FERC improperly kept Duke's and FirstEnergy's RTO adders. *Id.* at JA583–86. FERC denied both requests.

ANALYSIS

Dayton Power, AEP, FirstEnergy (referred to collectively as "the utilities"), and Duke petitioned for review of the *Dayton Power* orders.[10] *See* Notice of Appeal, No. 21-4072, D. 1. AEP and OCC petitioned for

[10] Duke initially petitioned for review of the *Dayton Power* orders, but it did not join the opening brief filed by Dayton Power, AEP, and FirstEnergy and did not advance any arguments related to the *Dayton Power* proceeding. *See* Utilities' Br. at 65–66.

review of the *OCC* orders. *See* Notice of Appeal, No. 23-3366, D. 1; Notice of Appeal, No. 23-3417, D. 1. We consolidated the cases and granted several organizations' requests to intervene. *See* Order, No. 21-4072, D. 33; Order, No. 21-4072, D. 50.

I. Standard of Review

In reviewing FERC's decisions, we examine questions of law de novo. *Louisville Gas*, 988 F.3d at 846. We further review agency decisionmaking to determine whether it is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). This scope of review is "extremely narrow." *Oakbrook Land Holdings, LLC v. Comm'r*, 28 F.4th 700, 720 (6th Cir. 2022) (quoting *Navistar Int'l Transp. Corp. v. EPA*, 941 F.2d 1339, 1352 (6th Cir. 1991)). For arbitrary and capricious review, we may not substitute our judgment for FERC's. *Id.* (citing *Greenbaum v. EPA*, 370 F.3d 527, 542 (6th Cir. 2004)). FERC, however, must have "articulate[d] a satisfactory explanation" for its orders, "including a rational connection between the facts found and the choice made." *Louisville Gas*, 988 F.3d at 846 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). We must examine whether FERC considered "relevant factors" or whether it made "a clear error of judgment." *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). The core of the analysis is whether FERC engaged in "reasoned decisionmaking." *Louisville Gas*, 988 F.3d at 846 (quoting *State Farm*, 463 U.S. at 52).

II. The *Dayton Power* Proceeding

We begin with the many challenges to the *Dayton Power* proceeding. Our analysis proceeds in three main parts. *First*, we examine the lawfulness of Order 679's voluntariness requirement, addressing both the utilities' ability to bring this challenge and the correct interpretation of Section 219(c). *Second*, we analyze the utilities' preemption arguments, considering whether FERC should have addressed them in the first instance and whether the FPA supersedes Ohio law. *Third*, we evaluate whether FERC arbitrarily denied Dayton Power's RTO adder application given its past practice of granting the adder to similarly situated utilities.

A. Lawfulness of Order 679

The utilities challenge FERC's conclusion that voluntariness is a prerequisite to obtaining an RTO adder. Before us, they do not challenge FERC's view (and the Ninth Circuit's) that Order 679 requires voluntary membership. Instead, they argue that Order 679's voluntariness requirement directly contradicts Section 219(c) of the FPA and therefore cannot stand. According to the utilities, Section 219(c) requires FERC to award RTO adders "to each" utility "that joins" an RTO, regardless of whether their participation was voluntary. Utilities' Br. at 28–30 (quoting 16 U.S.C. § 824s(c)).

FERC and its supporting intervenors offer two responses—one procedural and one substantive. On procedure, FERC argues that the utilities may not, now, collaterally attack Order 679's legality. On substance,

the intervenors contend that Order 679 aligns with Section 219(c). We consider these issues in turn.

1. Impermissible Collateral Attack

Before examining the utilities' Section 219 challenge, we must resolve a predicate procedural question: Is this challenge an impermissible collateral attack on Order 679? In general, parties may not collaterally attack agency rules. *See Flat Wireless, LLC v. FCC*, 944 F.3d 927, 930–31 (D.C. Cir. 2019). A collateral attack occurs when a party challenges a rule's legality in a later proceeding, rather than contesting it directly after its issuance. *E.g.*, *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008) (barring a challenge to FERC's RTO study requirement as an impermissible collateral attack). Here the utilities challenged Order 679's validity in the *Dayton Power* ratemaking proceeding—not directly after FERC promulgated it—making this is a collateral attack.

But not every collateral attack is impermissible. The Second, Fifth, Ninth, and D.C. Circuits ask whether "a reasonable party in the petitioner's position would have perceived a very substantial risk that the order meant what the Commission now says it meant." *City of Redding v. FERC*, 693 F.3d 828, 837 (9th Cir. 2012) (citation omitted); *see Dominion Res., Inc. v. FERC*, 286 F.3d 586, 589 (D.C. Cir. 2002); *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 509 (5th Cir. 2016); *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 105 (2d Cir. 2015). If not, these circuits allow the collateral attack. We haven't defined what constitutes an "impermissible" collateral attack, but we do so here, adopting the "very substantial risk" standard.

This standard follows from first principles. As the D.C. Circuit explained, "unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application." *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958). And "limiting the right" for parties to challenge the "underlying rule" to right after the agency promulgates it "would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Id.* Consider, too, if courts prohibited collateral challenges to agency orders altogether. Then regulated parties would have to challenge potentially unlawful interpretations preemptively without knowing their impact or understanding how the agency would apply them. That could also contravene constitutional standing requirements. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Thus, adopting a "very substantial risk" standard, as these circuits have done, makes sense. Under this standard, the relevant question is whether "a reasonable firm" in the utilities' position "would have perceived a very substantial risk" that Order 679 precluded the RTO adder for utilities legally required to join an RTO. *Dominion Res.*, 286 F.3d at 589 (quoting *ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1234 (D.C. Cir. 1993)).

The answer is "no." FERC did not substantially indicate, in either Order 679 or on rehearing, an intent to categorically reject applications based on compulsory RTO membership. For starters, FERC twice rejected comments that suggested the incentive should not be allowed for public utilities "ordered to join [RTOs] by statute." Order 679 ¶ 316; Order 679-A ¶¶ 83, 122. And

Order 679's reference to encouraging "generally voluntary" RTO membership doesn't suggest a "very substantial risk" that FERC would treat voluntary participation as a prerequisite for the RTO adder. Order 679 ¶ 331. Most significantly, FERC summarily approved adders for some RTO members in the years following Order 679, without considering whether their membership was voluntary. *See CPUC I*, 879 F.3d at 978–79. That practice dispels the notion that when FERC promulgated the rule, utilities should have known it would impose a strict voluntariness requirement. Indeed, until *CPUC I*, FERC paid little attention to individualized adder determinations. *See id.*; *Dayton Power* Oral Arg. at 33:32. With FERC's revised stance on Order 679, newly affected parties should get to seek redress. As we've explained, the general rule disfavoring collateral attack "does not foreclose subsequent examination of a rule" for "review of further Commission action applying it." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 785 (6th Cir. 2023) (quoting *Functional Music*, 274 F.2d at 546). Accordingly, we proceed to the merits.

2. Interpretation of Section 219(c)

Our task is to interpret Section 219(c) and determine whether FERC's voluntariness requirement is valid given the "best reading" of the statute. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). Since this case was argued, the precedents governing agency deference have shifted. *Id.* at 2272–73 (overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Under the new standard articulated in *Loper Bright*, we do not defer to an agency's reasonable

interpretation of a statute, but we may still "seek aid" from the agency and resort to its "experience and informed judgment" for guidance. *Id.* at 2262 (citation omitted). Deference would make no difference here. The "single, best" reading of Section 219(c) is that the RTO adder requires voluntary membership. *Id.* at 2266.[11]

Text. Our analysis of Section 219(c) starts with its text. *T.M. ex rel. H.C. v. DeWine*, 49 F.4th 1082, 1089 (6th Cir. 2022). Section 219(c) reads: "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 [an RTO]." 16 U.S.C. § 824s(c). This language implies that joining an RTO must be a voluntary act, not a mandatory one. Consider two key words: "joins" and "incentives." To join an organization is "to come into [its] company" or "to associate oneself with" it. *Join*, Merriam-Webster, https://perma.cc/TA9B-6XLU (last visited Sept. 10, 2024). Common dictionaries provide examples like "joined the church" and "joined the Army." *Id.*; *Join*, Collins, https://perma.cc/8FLE-N5LL (last visited Sept. 10, 2024). While the word alone doesn't preclude mandatory participation, these examples—especially in the context of organizational membership—connote voluntary action. *See Muscarello v. United States*, 524

---

[11] The Supreme Court recognized that Congress sometimes expressly delegates to an agency the authority to define a particular term, asks an agency to "'fill up the details' of a statutory scheme," or leaves the agency "flexibility." *Loper Bright*, 144 S. Ct. at 2263 (citations omitted). Because FERC's decision follows our reading of the statute, we need not decide here how much leeway Congress gave FERC to design its incentives.

U.S. 125, 131 (1998) (defining a statutory term by examining its ordinary usage); *cf. Dos Reis ex rel. Camara v. Nicolls*, 161 F.2d 860, 865 (1st Cir. 1947) (noting that to "join[]" the military implies "a voluntary act in contrast to induction under duress").

"Incentive" carries an even stronger connotation of voluntariness. An incentive is "[s]omething that incites or encourages action or production" or "spurs someone, esp[ecially] from self-interest, to seek an outcome." *Incentive*, Black's Law Dictionary (12th ed. 2024); *see also Incentive*, Collins, https://perma.cc/F48D-FJDQ (last visited Sept. 10, 2024) ("[S]omething that incites or tends to incite to action or greater effort."). Its synonyms include "impetus," "inducement," and "encouragement." *Incentive*, Merriam-Webster Thesaurus, https://perma.cc/K4SW-QQY6 (last visited Apr. 21, 2024). The very concept of inciting, inducing, or encouraging an action presumes the actor's freedom to choose whether to perform it. *CPUC I*, 879 F.3d at 974 ("An incentive cannot 'induce' behavior that is already legally mandated."). Indeed, an incentive can only induce joining an RTO if doing so is voluntary.

Statutory Context. The statutory context reinforces this reading. Section 219(c) must be read in conjunction with 219(a). The statute proceeds as follows. Section 219(a) broadly delegates to FERC the authority to create rate-based incentives to improve reliability and reduce the cost of electricity transmission. It instructs that, within a year, FERC must "establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce." 16 U.S.C. § 824s(a). Section 219(c)

then requires that FERC promulgate an incentive-based rate treatment for a particular action Congress wanted to incentivize: joining an RTO. It states: "In the rule issued under this section, the Commission shall . . . provide for incentives to each . . . electric utility that joins [an RTO]." *Id.* § 824s(c). Thus, while Section 219(c) identifies RTO membership as a target for incentives, any such incentive still must be in the form of an "incentive-based" rate treatment, as dictated by Section 219(a).

In the context of utilities, that term—"incentive-based" rate treatment—refers specifically to regulations offering an award to a utility that *voluntarily* takes some future action. *See* William P. Pollard, Nat'l Regul. Rsch. Inst., *Rate Incentive Provisions: A Framework for Analysis and a Survey of Activities* iii (1981) (listing "unifying ideas central to rate incentive provisions," including "motivat[ing] the utility's behavior" and addressing "aspects of a utility's performance under [its] control"); *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 138 (D.C. Cir. 2019) (affirming the "obvious proposition" that FERC cannot "create incentives to motivate conduct that has already occurred" (citation omitted)). As the statute indicates, one type of "incentive-based" rate treatment is a "performance-based" rate treatment. 16 U.S.C. § 824s(a). For a performance-based rate treatment, utilities get specified awards if they meet specific performance metrics. That is, they are encouraged to perform in a particular way by the contingent award. *See* Michael Schmidt, *Performance-Based Ratemaking: Theory and Practice* 15 (2000). Again, voluntariness is at the core.

Utilities are rewarded for taking optional steps that will achieve a particular improved outcome; they are not rewarded for performance that's already required.

Section 219(b) sheds even more light. It directs FERC to provide a different "incentive-based" rate treatment, this one to "promote[]" capital investment and "encourage[]" use of technology to improve facilities' operation and capacity. 16 U.S.C. § 824s(b). Under this provision, FERC increases a utility's rate if it undertakes approved improvement projects. But FERC can "promote" or "encourage" only voluntary choices to invest, not mandatory ones. *See San Diego Gas*, 913 F.3d at 137–38. So too with RTO membership. Voluntariness is a necessary predicate to an "incentive-based" rate treatment.

The statute's final subsection reinforces our reading as well. Section 219(d) requires that all "incentive-based" rate treatments under Section 219 be "just and reasonable." 16 U.S.C. § 824s(d) (incorporating 16 U.S.C. §§ 824d, 824e). As FERC determined in the *OCC* proceedings, it is unjust and unreasonable to grant an increased rate to a utility mandated by law to join an RTO, when the RTO adder would not (and could not) incentivize anything. *OCC I* at JA487. Nor would it further Section 219's stated goals. Congress explicitly stated that FERC's transmission incentives should "benefit[] consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. § 824s(a). It did not write a blank check to utilities; it asked FERC to use a carefully calibrated tool to achieve these goals. Giving an RTO adder to a utility that is mandated by state law to

participate in an RTO would only increase the rate for that utility's transmission services—not "reduc[e] the cost"—and give the utility an unearned windfall. *Id.* Such an interpretation would not only fail to advance the statute's goals but actively subvert them.

The utilities and their intervenors do not convince us otherwise. The utilities respond that the statute unambiguously "directs that an adder be given to 'each transmitting utility or electric utility that joins [an RTO],' period." Utilities' Reply Br. at 2 (quoting 16 U.S.C. § 824s(c)). In their view, the motivation behind a utility's decision to join is irrelevant because the adder must be granted "to each" participating utility "that joins"—without exception. Utilities' Br. at 31. They contend that if Congress intended to require voluntary participation, it would have used language covering utilities "that elect to join" instead of "that join." *Id.* at 30.

This reading of Section 219(c) rests on a slender reed. The utilities place too heavy an emphasis on Congress's choice of one word—*that* joins rather than *to* join—while reading the word "incentives" out of the statute. *Dayton Power* Oral Arg. at 11:07–11:30. In doing so, they also ask us to treat the word "join" as "agnostic" to voluntariness despite its plain meaning in context, which as discussed above, connotes choice. Utilities' Br. at 30. The sole example the utilities provide to demonstrate that "joining" an organization does not imply voluntary action shows just the opposite. Perhaps, as the utilities proffer, when a child "joins the Cub Scouts, one doesn't ask whether the parents required the child to join, or whether the child joined voluntarily." *Id.* But joining the

Cub Scouts is a voluntary act. Parents effectuate voluntary choices for their children all the time. And if you asked a child whose parents forced him, "Did you join the Cub Scouts?" expect the retort, "My parents made me go."

When they finally wrestle with the word "incentives," the utilities' interpretation is unpersuasive and inconsistent. They contend that "the incentive is what the transmission owner gets" if it's a "utility *that joins*" an RTO. *See* Utilities' Reply Br. at 6 (cleaned up). In that light, an "incentive" is an award or payment for status—here, RTO membership—not an inducement to undertake an action. That definition would contradict the plain meaning of "incentive," discussed above. For those utilities, it also would not constitute an "incentive-based" or "performance-based" rate treatment, as Section 219(a) requires. And it cannot "promote owners' membership in an RTO," which is what the utilities themselves tell us "Congress sought to . . . [do] through FPA Section 219(c)." Utilities' Br. at 1; *see also id.* at 11 (Congress added Section 219(c) "[t]o encourage RTO membership").

The utilities then backtrack, recharacterizing the RTO adder as an incentive for construction and investment in new transmission, not RTO membership. *Compare* Utilities' Br. at 1, 11, *with* Utilities' Reply Br. at 6, *and Dayton Power* Oral Arg. at 8:57–9:13 ("The behavior [Congress] was trying to incentivize was investing money, not joining an RTO."). The utilities argue that this construction-oriented view of the RTO adder aligns with the statute's goals by bolstering grid reliability and encouraging competition to drive down

costs. But there are myriad problems with calling the RTO adder a construction "incentive" and not a membership inducement. Most concerning, it suffers from the same fundamental flaw as above—the utility does not have to undertake any voluntary action to get the "incentive." If the utilities were correct, utilities that simply joined an RTO (voluntarily or not) could receive an "incentive" for new investments without constructing new lines or making new investments. Nothing would stop them from using the revenue from the adder for other purposes, such as increasing shareholder dividends. Moreover, the idea that Congress created Section 219(c) to promote construction rather than RTO membership strains credulity, as Section 219(c)'s text explicitly articulates Congress's goal of encouraging RTO membership. Even the utilities concede that "Congress amended the FPA" to add Section 219(c) "[t]o encourage RTO membership." Utilities' Br. at 11. If Congress wanted to encourage transmission expansion, it would have provided the incentive "to each" utility that makes tangible investments in new infrastructure, not each utility "that joins" an RTO.

Notably, Congress did ask FERC to promote investment in transmission infrastructure irrespective of RTO membership, just not in Section 219(c). Section 219(b), discussed above, directs FERC to "promot[e] capital investment" in transmission facilities and to "provide a return on equity that attracts new investment in transmission facilities." 16 U.S.C. § 824s(b)(1)–(2). FERC accordingly promulgated rules, including incentive-based treatments, that provide funds for utilities that voluntarily invest in new

transmission projects. *See*, *e.g.*, 18 C.F.R. § 35.35(d), (g); Order 679 ¶¶ 91–94, 191, 270–72. Dayton Power applied for (and received) some of these construction incentives in the same proceeding at issue here. And RTO membership, voluntary or otherwise, does not affect a utility's eligibility for the new-projects adder, so the utilities here still have an incentive to engage in new transmission development. Order 679 ¶¶ 4, 49, 55, 84, 91–94, 333; Order 679-A ¶ 87 (explaining that the RTO incentive under Section 219(c) "is separate from the construction incentives" in Section 219(b)). Given Section 219(b) and the utilities' own description of Congress's goals, it makes little sense to read Section 219(c) as a mandate for FERC to motivate transmission construction, rather than RTO membership.

The statutory text and structure demonstrate that the "best reading" of Section 219(c)—one that gives full effect to both the letter and context of the law—is that the RTO adder is reserved for those utilities that voluntarily choose to join an RTO.

B. Preemption

Several utilities mount a second and independent challenge to FERC's *Dayton Power* decisions: preemption. They argue that, even assuming that voluntariness is a required or permissible consideration for approving the RTO adder, their participation in PJM was voluntary because Ohio cannot force them to join an RTO. That is, any such state law requiring RTO membership—here, Ohio Rev. Code § 4928.12(A)—is preempted by federal law. Citing federalism concerns, FERC declined to address the substance of this argument below and urges us not to address it on appeal.

We disagree. FERC should have addressed preemption arguments in the *Dayton Power* proceeding as it has done in others. The issue has now been briefed, the utilities have asked us to address it, the State of Ohio has weighed in as amicus, and FERC told us during oral argument that it does not want us to remand for its views and that its views would not be entitled to deference. *But see Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (holding that we may accord weight to agency views on how state law impacts federal schemes depending on agency's thoroughness, consistency, and persuasiveness). Therefore, we consider the utilities' preemption argument and hold that the FPA does not preempt state laws requiring RTO membership.

1. FERC's Abstention

The parties first dispute whether it is even appropriate for us to address preemption. FERC says we should abstain from wading into preemption questions, while the utilities ask us to resolve preemption in their favor. FERC refused to address preemption in the *Dayton Power* proceeding, reasoning that because only federal courts could make "the ultimate determination" on preemption, ratemaking proceedings were "not an appropriate procedural vehicle" for the argument. Dayton I at JA204. On appeal, FERC highlights that neither of the Supreme Court's energy preemption decisions cited by the utilities—*Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015) and *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150 (2016)—began in agency proceedings. Rather, they began in federal district and state courts.

FERC's argument against our addressing preemption is unpersuasive for several reasons. As the utilities demonstrate, FERC has decided preemption questions in analogous settings. *See, e.g.*, *New Eng. Ratepayers Ass'n*, 168 FERC ¶ 61,169 (2019) (concluding that a New Hampshire law was preempted); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (2010) (concluding that California administrative orders were preempted); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 (1997) (concluding that Iowa administrative orders were preempted). And FERC discarded California's interpretation of its own law in proceedings underlying the *CPUC* cases. *CPUC II*, 29 F.4th at 461, 463–64. There, FERC decided not to defer to California's interpretation because the RTO adder was a creature of federal law, not state law. And FERC ultimately decided that CPUC's interpretation was incorrect and that California utility companies were not required to join an RTO, making them eligible for the adder. *Id.* at 461. Likewise, FERC already interpreted Ohio law in issuing its decision in the *Dayton Power* proceeding, and its ratemaking decision presumes the validity of the Ohio law. FERC's sudden federalism concerns are difficult to reconcile with its past practices, given that it has not hesitated to resolve the state law questions that lie at the heart of ratemaking proceedings.

The utilities, moreover, are asking FERC to ignore the Ohio law in agency ratemaking proceedings, not invalidate it writ large. That may seem like a thin distinction, but it is an important one. In *CPUC II*, for example, FERC did not believe it needed to hew to the California agency's interpretation of California law

when evaluating a federal rate incentive. CPUC II, 29 F.4th at 461, 463–64. But it didn't make a pronouncement that would have impact beyond its jurisdiction; a California court could rule differently. FERC just had the authority to interpret the law relevant to its impact on the RTO adder. Likewise, FERC can interpret the validity of Ohio law as necessary to carry out its ratemaking function. Its determination does not extend beyond those confines.

Accordingly, we next consider whether the FPA preempts Ohio law.

2. Conflict Preemption

To begin, the utilities argue that the FPA preempts Ohio law because the two conflict. A state law conflicts with federal law if "it is impossible for a private party to comply with both state and federal law" or if the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (citation omitted). The utilities' continued membership in PJM, a FERC-approved RTO, demonstrates that compliance with both Ohio law and the FPA is possible. No party disputes that. The question, then, is whether Ohio's law stands as an obstacle to federal law or frustrates its purpose. The Supreme Court has recognized that this analysis is "a matter of judgment." *Id.* at 373. We examine whether, considering state law, the "purpose of the act cannot otherwise be accomplished," *id.* (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)), and whether state laws "directly interfere[] with the operation" of a federal

program, *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 604 (2011).[12]

This is a high bar. Several justices view obstacle preemption with more skepticism because, unlike other types of preemption, it doesn't require an express statutory basis or clear legal conflict. *See Hillman v. Maretta*, 569 U.S. 483, 499–500 (2013) (Thomas, J., concurring) (criticizing obstacle preemption because it "looks beyond the text of enacted federal law and thereby permits the Federal Government to displace state law without satisfying . . . the Bi-cameral and Presentment Clause"); *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 777–79 (2019) (lead opinion of Gorsuch, J.); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (calling obstacle preemption "potentially boundless" and "inadequately considered"). Recognizing these concerns, the Supreme Court has cautioned that analyzing obstacle preemption "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," which "would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Whiting*, 563 U.S. at 607 (cleaned up). And it has stated that finding

---

[12] Reviewing courts also assume that "the historic police powers of the States" are not preempted "unless that was the clear and manifest purpose of Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983) (citation omitted). Historically, regulation of electricity transmission began as a state enterprise, *id.*, so FERC's intervenors urge us to apply preemption sparingly, *see* OCC Br. at 28; Ohio Br. at 8–9. We need not consider any presumption against preemption because even without it we conclude that the FPA does not preempt Ohio law mandating RTO participation.

obstacle preemption requires meeting "a high threshold." *Id.* (citation omitted).

This case does not meet that high bar. As discussed earlier, one of Congress's purposes in enacting Section 219 was to increase membership in RTOs. The Ohio law does precisely that. The utilities argue that Congress designed RTO membership to be voluntary, even as it sought to expand participation. They stress that in 2015, Congress directed FERC to "divide the country into regional districts for the *voluntary* interconnection and coordination of facilities." 16 U.S.C. § 824a(a) (emphasis added). In other words, the utilities argue, Ohio law "conflicts with federal law by mandating what Congress determined should be voluntary," Utilities' Br. at 37, and "frustrates the federal model of voluntary membership," *id.* at 44–45. The problem is that the utilities do not show that Congress "wanted to pursue" its voluntary model at "all costs," or at least at the expense of state law. *See Wyeth*, 555 U.S. at 601 (Thomas, J. concurring) (quoting *Geier*, 529 U.S. at 904 (Stevens, J., dissenting)). Congress's decision not to mandate RTO membership federally doesn't necessarily imply an intent to prevent states from imposing such requirements, especially when the state laws further Congress's overall goal of increasing RTO participation. Congress may have wanted to prevent FERC from mandating membership via rule, not prevent Ohio from doing so. To accept the utilities' argument would be to engage in the "freewheeling judicial inquiry" the Supreme Court forbids. *Whiting*, 563 U.S. at 607 (citation omitted).

3. Field Preemption

Next, the utilities argue that Congress has preempted the entire field, eliminating Ohio's authority to mandate RTO participation. Field preemption exists where Congress legislates broadly enough "to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). The core question is whether the "scheme of federal regulation" is "so pervasive as to make reasonable the inference that Congress left no room to supplement it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citation omitted); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 507–08 (1996). For example, the Supreme Court has ruled that Congress, through its extensive schemes, preempted state immigration and nuclear-safety laws. *See Arizona v. United States*, 567 U.S. 387, 401 (2012); *Pac. Gas*, 461 U.S. at 212–13.

The utilities, which bear the burden of demonstrating preemption, *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912–13 (6th Cir. 2007), argue that Congress has occupied the field of interstate electric transmission, including coordination through RTOs and similar organizations. The utilities ground this argument in two sources: (1) the FPA; and (2) a Supreme Court case, *Hughes v. Talen Energy Marketing, LLC*. Neither demonstrates that Congress preempted the entire field of interstate energy transmission.

We first turn back to the FPA. It states that FERC "shall have jurisdiction over all facilities for [interstate]

transmission or sale of electric energy [at wholesale]." 16 U.S.C. § 824(b)(1). And it directs FERC to divide the country into regional districts to coordinate electric transmission. *Id.* § 824a(a). In arguing that Ohio law trespasses on this field, the utilities note that Ohio specifically regulates "transmission facilities as defined under federal law," Ohio Rev. Code § 4928.12(A), and requires transmission owners with assets in Ohio to transfer operational control over to a transmission organization approved by FERC, *id.* § 4928.12(B)(1).

This argument is unconvincing. As an initial matter, the FPA's text does not grant FERC *exclusive* jurisdiction over interstate transmission facilities. Instead, it recognizes states' role in transmission regulation. Indeed, the sections of the FPA the utilities cite teem with references to state involvement. Congress, in a single sentence, both granted and limited FERC's jurisdiction. It authorized FERC's oversight "over all facilities for such transmission or sale of electric energy," while restricting its authority over "facilities used for the generation of electrical energy," "local distribution," "transmission . . . in intrastate commerce," and "transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. § 824(b)(1). Furthermore, § 824(a) limits FERC's regulatory power over transmission, generation, and wholesale rates "only to those matters which are not subject to regulation by the States." Thus, Congress explicitly preserved state authority over certain transmission-related areas, including intrastate transmission and facilities supplying electricity to the transmitting entity itself.

Ohio's law fits within this scheme because it primarily regulates intrastate transmission. While state efforts to improve intrastate transmission reliability, efficiency, and costs may affect interstate transmission, such indirect impacts don't trigger field preemption. *Pacific Gas* illustrates this idea. There, the Supreme Court balanced its prior ruling on federal preemption of nuclear safety against Congress's explicit "authorization for states to regulate nuclear power plants for purposes other than protection against radiation hazards." *Pac. Gas*, 461 U.S. at 199 (cleaned up). The Supreme Court upheld a California law despite its incidental impact on nuclear safety regulation, reasoning that the law's purpose was to address economic planning issues for new nuclear plants rather than to regulate safety. *Id.* at 213–16; *see also Oneok*, 575 U.S. at 384–88 (rejecting notion that state antitrust laws with incidental effect on interstate wholesale rates were preempted because such preemption would nullify FERC's limited jurisdiction and Congress's express preservation of state authority over intrastate issues). The Supreme Court has "emphasize[d] the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." *Oneok*, 575 U.S. at 385. For that reason, state actions indirectly affecting a federally regulated field are not necessarily preempted.

The same is true here. The Ohio law targets intrastate transmission—an area explicitly reserved for states by the FPA in § 824(a) and § 824(b)(1), so it withstands the utilities' preemption challenges. The text of the Ohio statute reveals that the legislature's primary aim was to regulate transmission within Ohio's borders.

The statute repeatedly emphasizes its application to facilities and effects "located in this state" or "within this state." *See* Ohio Rev. Code § 4928.12(A), (B), (D). Moreover, the statute's attention to improving options and reliability for Ohio consumers also points to a primary concern with intrastate matters. *Id.* § 4928.12(B)(6). The statute highlights improving options and reliability for consumers and expresses concern for open competition "in the provision of retail electric service," *id.* § 4928.12(B)(5), which states (rather than FERC) regulate, *see Oneok*, 575 U.S. at 385–86 (determining that state law targeted "retail rates—which are firmly on the States' side" of the "dividing line" and therefore not field preempted (cleaned up)).

In exercising its intrastate authority, Ohio mandated membership in federally regulated entities and adopted federal standards. But, contrary to the utilities' argument, that doesn't demonstrate that Congress has preempted Ohio law. Instead, Ohio's incorporation of federal standards reflects an intent to cooperate with, rather than contradict, federal law.

The Public Utilities Regulatory Policy Act of 1978 (PURPA) further shows that Congress did not preempt all state laws intersecting with interstate transmission. PURPA allows—but does not require—FERC to exempt utilities from state laws hindering voluntary utility coordination. *See* 16 U.S.C. § 824a–1(a)(2). Leaving FERC the discretion to exempt utilities from these state laws shows that Congress knew about state laws affecting the coordination of electric utilities and chose not to preempt them. This framework tacitly acknowledges state authority over intrastate

transmission, even when it affects *interstate* transmission. It also indicates that Congress intended FERC to selectively exempt utilities from state laws to achieve specific policy goals, rather than wholly preempt state regulation in this domain.

The utilities' reliance on *Hughes* is also unavailing. In *Hughes v. Talen Energy Marketing, LLC*, the Supreme Court recognized that the FPA endows FERC with "exclusive jurisdiction over wholesale sales of electricity in the interstate market." 578 U.S. at 153. Unlike this case, however, *Hughes* addressed a Maryland program that set "an interstate wholesale rate." Id. at 163. The Maryland program required a utility to join PJM, but then, in order to encourage new in-state generation, guaranteed it a different rate than FERC's scheme did. *Id.* at 153, 158–59. As the Court held, that "invades FERC's regulatory turf" because "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland [did]." *Id.* at 164. Maryland's attempt to indirectly set an interstate wholesale rate is distinct from state laws targeted at areas outside wholesale ratemaking, but which may have incidental impacts on interstate wholesale rates. Unlike the Maryland program in *Hughes*, state laws mandating RTO membership do not set wholesale rates, directly or indirectly. And, in *Hughes*, the Supreme Court recognized cooperative federalism in the field of energy transmission outside of wholesale ratemaking, explicitly rejecting the notion that FERC is the sole regulator. *Id.* at 166; *see id.* at 167 (Sotomayor, J., concurring) (noting that the FPA "envisions a federal-

state relationship marked by interdependence" so "[p]re-emption inquiries" are "particularly delicate").

Moreover, the FPA's RTO regulations do not approach the extensive regulatory schemes in the Atomic Energy Act or Immigration and Nationality Act, which the Supreme Court concluded left "no room" for state action. *See Arizona*, 567 U.S. at 400–01; *Pac. Gas*, 461 U.S. at 203–07. In contrast, Congress not only permits but also anticipates state involvement in energy transmission regulation. Accordingly, we conclude that the FPA does not impliedly preempt Ohio's law requiring RTO membership.

C. Dayton Power's Arbitrariness Claim

Dayton Power raises one final objection to the proceeding. It argues FERC arbitrarily rejected its adder request, despite approving similar adders for transmission owners in PJM and nearby RTOs, "some of which are subject to state RTO membership mandates." Utilities' Br. at 63. FERC counters that Order 679 requires case-by-case evaluation of RTO adders, and attributes the inconsistency to differences in state law, not FERC policy. We hold that FERC's distinction between Dayton Power and other utilities is not arbitrary, thus this claim fails too.

FERC's differential treatment is justifiable, so we don't disturb it. Critically, Ohio law mandates Dayton Power's RTO membership. Other PJM utilities operate within state statutory schemes that do not mandate RTO participation. FERC was still reviewing the RTO adders of other PJM utilities in Ohio, which explains any perceived unfairness between the Ohio utilities. Indeed,

the *OCC* proceeding we discuss next tackles this topic head-on.

Dayton Power's monetary arguments are similarly unavailing. It claims that without the RTO adder, it is at a market disadvantage, particularly for capital improvements. The adder's purpose, however, is not to ensure competitiveness or capital attraction. Neither Order 679 nor Section 219(c) requires FERC to resolve economic disparities. By contrast, other existing ROE regulations are designed to address market fairness and access to capital. *Hope Nat. Gas Co.*, 320 U.S. at 603 (holding that an ROE must "be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital"); *see also supra* at 5–6 (discussing ROE calculation). Therefore, FERC's treatment of Dayton Power isn't arbitrary or capricious on these grounds.

III. The *OCC* Proceeding

FERC's ruling in the *Dayton Power* proceeding prompted a question about the rates of other utilities subject to Ohio law, including AEP, Duke, and FirstEnergy: did their rates include an RTO adder and, if so, what to do about it? Following *Dayton Power*, OCC petitioned FERC to revoke the RTO adder from each of these utilities. *OCC I* at JA464. FERC revoked AEP's adder but retained Duke's and FirstEnergy's. *Id.* at JA485. Both OCC and AEP appealed.

This challenge raises three questions. *First*, did FERC need to conclude that AEP's overall rate was unjust before striking the RTO adder? *Second*, did FERC arbitrarily strip the RTO adder from AEP's rate

while keeping it in Duke's and FirstEnergy's? And *third*, did a prior FERC finding that AEP voluntarily joined an RTO preclude FERC's contrary conclusion on the RTO adder? We address each question separately.

A. Procedural Predicates

AEP first argues that OCC must prove its overall rate (ROE + adder) was unjust and unreasonable before FERC can remove the adder. Neither FERC nor AEP cite any cases that address this question directly, but the FPA's text clarifies that FERC can revoke the adder without concluding that the entire rate is unjust.[13] Under Section 206, whenever FERC "find[s] that any rate, charge, or classification," or "any rule, regulation, [or] practice" is "unjust, unreasonable, unduly discriminatory or preferential," it "shall determine the just and reasonable" rate, charge, rule, or practice and "shall fix [it] by order." 16 U.S.C. § 824e(a). This includes the RTO adder. Following the plain language, because FERC concluded that its practice of granting RTO

---

[13] FERC cites *International Transmission Co. v. FERC*, in which the D.C. Circuit held that FERC may take away an incentive adder for standalone transmission companies granted pursuant to Order 679 because the utility no longer qualified for the adder. 988 F.3d 471, 485–86 (D.C. Cir. 2021). There, the petitioners argued FERC had "fail[ed] to find the existing adders to be unjust or unreasonable before reducing them," but the D.C. Circuit determined that FERC had done so, notwithstanding its failure to use the words "unjust and unreasonable." *Id.* at 485. So the arguments presented in that case don't directly address the question here. *Id.* Nevertheless, its holding demonstrates that other courts have upheld FERC's revocations on a single-issue basis in other proceedings.

adders to Ohio utilities was wrong, FERC "shall fix" it. Here, that's by removing the RTO adder.

The text belies AEP's assertion that FERC must deem AEP's entire rate unjust and unreasonable before revoking the RTO adder. The statute refers to "any" rate, charge, rule, regulation, or practice. The utilities' interpretation would allow a utility to abandon its RTO membership and retain its adder (in direct conflict with the goals of Section 219 and Order 679) as long as its overall rate remained within the zone of reasonableness. We refuse to adopt the utilities' atextual reading of Section 206. Instead, FERC must "fix" any unjust or unreasonable practices, even though the OCC has not proven that the utilities' overall rates are unreasonable. And we next look to whether FERC appropriately fixed its practice with respect to AEP, Duke, and FirstEnergy.

B. Treatment of Duke's, FirstEnergy's, and AEP's Adders

FERC decided to remove AEP's RTO adder, while leaving Duke's and FirstEnergy's transmission rates intact. And it justified its decision on differences in how these adders were integrated into the utilities' respective rates. For AEP, FERC approved its RTO adder separately from the rest of its rate in 2008 and 2010. FERC considered AEP's application for the adder "on a single-issue basis, separate from all other ROE issues." *OCC I* at JA486; *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 P 30 (2008); *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 P 21 (2010). After FERC approved the RTO adder, consumer groups challenged AEP's base ROE, and the parties reached a

settlement that didn't affect the adder. OCC II at JA590 n.95, 593. By contrast, FERC did not approve adders for Duke and FirstEnergy on a single-issue basis; the adders comprised a part of broader settlements with consumer advocacy agencies. Then FERC approved those negotiated rates as just and reasonable. *OCC I* at JA468, 488. Thus, FERC determined that the three utilities were not similarly situated. It could easily excise its approval of AEP's RTO adder. *Id.* at JA486–87. Removing Duke's and FirstEnergy's adders, however, would require disentangling them from multi-issue settlements. *Id.* at JA488–89. FERC would not "disturb one aspect of these comprehensive settlements" without a showing that the overall rates were unjust and unreasonable. *Id.* at JA489.

FERC's reasoning, though logical at first glance, crumbles under scrutiny. A closer look at the utilities' rates and settlements exposes the weakness in FERC's justification.

Duke's and FirstEnergy's settlements, by their terms, acknowledged that they included 50-basis-point RTO adders. Duke's settlement specified "a 10.88% base cost of common equity and a 50-basis point ROE adder." *Id.* at JA488. FirstEnergy's settlement stated that "the agreed-upon ROEs were inclusive of any incentive adder for RTO participation." *Id.* And even though the FirstEnergy settlement did not explicitly describe that the adder was for 50 basis points, FERC treats it as if it did. Recall that FERC determines an appropriate base ROE for a utility by examining the ROE of a proxy group. When it includes FirstEnergy in a proxy group, FERC uses a figure 50 basis points below FirstEnergy's

settled rate, suggesting it views the settled rate as including a 50-basis-point adder. *Id.* at JA482. Likewise, FirstEnergy's testimony in a separate proceeding that its base ROE is 9.88%, not the settled 10.38%, confirms a 50-basis-point adder. *Id.* at JA488–89. Thus, the evidence indicates that Duke's and FirstEnergy's rates parallel AEP's: a base negotiated ROE with a 50-basis-point RTO adder. *See also* Electric Transmission Incentives Policy, 86 Fed. Reg. at 21973 (noting FERC has always granted RTO adders of 50 points). Yet FERC treats these utilities disparately.

Contrary to FERC's assertion, whether it approved the RTO adder explicitly on a "single-issue" basis or impliedly as part of a settlement makes little difference to how the three utilities approached rate negotiations. At the time, FERC routinely granted a 50-basis-point adder to utilities joining an RTO, regardless of state law. *See* Background Section III, *supra*. Therefore, going into rate negotiations—with or without formal approval of the RTO adder—all parties (the utilities and the consumer groups) understood that AEP, Duke, and FirstEnergy alike would get a 50-basis-point adder for RTO membership. While FERC asserts that "no incentive is automatic," it concedes that at the time, Duke and FirstEnergy would likely have received the adders had they applied separately. FERC Br. at 61; *OCC II* at JA586–87 ("We recognize that, if Duke and ATSI had sought an RTO Adder at that time (i.e., prior to *CPUC*) outside the settlement context, an RTO Adder likely would have been granted."). And past practice shows that it was nearly automatic. *CPUC I*, 879 F.3d at 971–72. Thus, the fact that AEP Ohio

affiliates "went into [their rate settlement] negotiation with their previously granted [RTO adder] already in hand" is largely inconsequential. FERC Br. at 53.

FERC tells us it's difficult to understand how the adder impacted Duke's and FirstEnergy's settlements, including "the precise trade-offs and concessions made by the parties to those proceedings." *Id.* at 62 (citation omitted). Maybe so, but that's also true for AEP. AEP went into its negotiations with a 50-basis-point adder and may have agreed to a more modest base ROE or other concessions knowing the adder would be layered on the settled ROE. Therefore, AEP makes a valid case for equal treatment.

While AEP dismantles FERC's explanation for treating Duke and FirstEnergy differently, its logic doesn't warrant *preserving* the adder for all three utilities. If all three utilities' rates were based on settlements and can be separated into a base ROE and a 50-basis-point RTO adder, then, as with AEP—and to comply with Section 219(c) and Order 679—FERC must also remove the RTO adder for Duke and FirstEnergy. We conclude, therefore, that FERC acted arbitrarily and capriciously both by treating AEP differently from Duke and FirstEnergy, and by continuing to approve the adder (expressly or impliedly) to utilities that had not joined an RTO voluntarily.

C. Regulatory Estoppel

AEP's final argument is that FERC, in removing its RTO adder, arbitrarily departed from its 2004 finding that AEP voluntarily joined PJM. *See New PJM Cos.*, 107 FERC ¶ 61,271 PP 41–44 (2004); *New PJM Cos.*, 106

FERC ¶ 63,029 P 55 (2004). When FERC adjudicated that case, Ohio's law mandating RTO membership was already on the books, so AEP contends that circumstances have not changed such that FERC can now depart from its prior finding that AEP joined PJM voluntarily.

AEP's grasping onto a two-decades old order from a different context cannot save its RTO adder. In the 2004 adjudication, FERC evaluated whether AEP-East, which operates in six states, qualified for PURPA-based exemptions from a Virginia regulation that prevented it from joining PJM. *See New PJM Cos.*, 107 FERC ¶ 61,271 PP 1–2, 64–65. To qualify for an exemption, AEP-East needed to show "voluntary coordination" with other utilities, and FERC concluded that it had. *Id.* PP 31, 41–44. The analysis didn't specifically focus on AEP-East's Ohio affiliates; indeed, one of the two affiliates central to this case didn't exist in 2004. Rather, it addressed whether, under PURPA, FERC could exempt AEP-East from Virginia laws that were "stand[ing] in the way of AEP's integration into PJM." *Id.* P 2.

The question of whether an AEP parent company voluntarily integrated into PJM under PURPA and Virginia law differs fundamentally from whether AEP's Ohio affiliates were legally mandated to join a transmission organization under the FPA and Ohio law. These distinct inquiries justifiably led to different conclusions, especially considering developments in the law since 2004, like Congress amending the FPA to create Section 219, FERC promulging Order 679, the Ninth Circuit deciding *CPUC I*, and FERC deciding

Dayton Power. FERC's decision not to give the PURPA finding preclusive effect here was neither arbitrary nor capricious.

CONCLUSION

We affirm FERC's denial of Dayton Power's application for an RTO adder in the *Dayton Power* proceeding and its revocation of AEP's RTO adder in the *OCC* proceeding. We reverse FERC's order in the *OCC* proceeding declining to revoke the RTO adder from Duke's and FirstEnergy's adder-inclusive settlement rates and remand for further proceedings consistent with this opinion.

CONCURRENCE

NALBANDIAN, Circuit Judge, concurring. I join the majority opinion in full. Our task is to "exercise independent judgment" in finding the "single, best meaning" of Section 219(c) of the Federal Power Act. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262, 2266 (2024). The single, best meaning here is that adders, offered as "incentives" for joining transmission organizations, should not go to utilities already required to join those organizations. I write separately to underscore one point about so-called "*Skidmore* deference" and what weight, if any, we give an agency's interpretation of a statute now that the Supreme Court has overruled the *Chevron* doctrine. *See Loper Bright*, 144 S. Ct. at 2273 (overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

The point is this: the term "*Skidmore* deference" is, strictly speaking, a misnomer. Deference, as we mean it in the agency context, involves one interpreter yielding or submitting to another interpreter's views. But *Skidmore v. Swift & Co.* just directs courts reviewing agency action to consider the agency's views with respect, insofar as they are well-reasoned, consistent over time, and informed by the agency's expertise. 323 U.S. 134, 139–140 (1944). Properly understood, *Skidmore* recognizes that agencies have the "power to persuade," not the power to bind. *Id.* at 140. We would more accurately describe this doctrine as "*Skidmore* respect," not "*Skidmore* deference."

Decided two years before the enactment of the Administrative Procedure Act (APA), *Skidmore* dealt with a question of firefighters' overtime pay under the Fair Labor Standards Act. *Id.* at 135–36. In reaching its decision, the Supreme Court acknowledged the "considerable experience" of the Administrator of the Wage and Hour Division, whose legal arguments were "entitled to respect." *Id.* at 137, 140. But the Court also made clear that the Administrator's reading of the law did not bind reviewing courts. That reading was persuasive authority only. "The rulings, interpretations, and opinions of the Administrator," the Court explained, were "not controlling upon the courts," though they did "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 140. The weight a reviewing court gave to the executive branch would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* In other words, an agency's view is persuasive if it's persuasive. And it's not if it's not.

Skidmore thus fit comfortably into "the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." *Loper Bright*, 144 S. Ct. at 2262. It was a sort of restatement of the canon stretching back into English common law that longstanding, consistent expositions of a law by political actors deserved some weight, even considerable weight. *Id.* at 2257–59; Aditya Bamzai, *The Origins of Judicial*

Deference to Executive Interpretation, 126 Yale L.J. 908, 933–38, 979 (2017). So when the APA codified the traditional understanding of the judicial function, nothing displaced—or expanded—*Skidmore*'s instructions. *Loper Bright*, 144 S. Ct. at 2261–62.

Even when, decades later, *Chevron* began directing courts to defer to suboptimal but permissible agency interpretations, *Skidmore* hung around, a backstop of sorts for agency arguments that may not have merited full *Chevron* deference but that could nonetheless convince, if not bind. *See United States v. Mead*, 533 U.S. 218, 234–35 (2001). And with *Chevron* now scuttled, *Skidmore* has taken on new life. Citing *Skidmore*, *Loper Bright* pointed out that even fresh review of agency action will benefit from expert agency arguments. 144 S. Ct. at 2262. Following this lead, courts have invoked *Skidmore* both in accepting agency interpretations and in rejecting them. *Compare, e.g.*, *Lopez v. Garland*, 116 F.4th 1032, 1038–41 (9th Cir. 2024) (finding a Board of Immigration Appeals ruling "entitled to '*Skidmore* deference'"), *with In re MCP No. 185*, No. 24-7000, 2024 WL 3650468 (6th Cir. Aug. 1, 2024) (staying an FCC rule); *id.* at *5–6 (Sutton, C.J., concurring) (questioning, as to *Skidmore*'s consistency factor, the FCC's flip-flopping on a statute's meaning). In future cases, natural litigating incentives may lead agencies to make the most out of *Skidmore* and regulated parties to minimize it, emphasizing that we must check the agency's homework.

But make no mistake: *Skidmore* "respect" is just that. *Cf. Loper Bright*, 144 S. Ct. at 2258. Nothing more. It's a reminder that agencies often know what they're

talking about. Their views do not "supersede" ours, even if they do "inform" it. *Id.* And that has always been true. We carefully consider *any* litigant's reasoning and how compelling it is.

Others have put this point more bluntly. Justice Scalia, for one, described *Skidmore* respect as "an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers." *Mead*, 533 U.S. at 250 (Scalia, J., dissenting); *see also Mayfield v. U.S. Dep't of Labor*, 117 F.4th 611, 619 (5th Cir. 2024) ("[I]t seems that either the agency's interpretation is the best interpretation (in which case no deference is needed) or the agency's interpretation is not best (in which case it lacks persuasive force and is not owed deference)."). Much of the scholarly commentary agrees. *See* Adrian Vermeule, *Deference and Due Process*, 129 Harv. L. Rev. 1890, 1901 (2016) ("*Skidmore* just describes the attitude of any minimally sensible decisionmaker, who listens to any relevant arguments of well-informed parties when deciding what to do."); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 227 n.98 (suggesting that *Skidmore* means little more than "a court saying 'we will defer to the agency if we believe the agency is right'"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 686, 688 (1996) (calling *Skidmore* a "nonbinding version of deference" from courts "exercising independent judgment").

Skidmore respect thus roughly tracks how we consider the interpretations of other circuit courts. We

are not bound by the decisions of our sister circuits, but we look to them for guidance and thoughtful consideration. If we are persuaded by another court's reasoning, we adopt it. And if we're not, we don't. So too with agencies. As a practical matter, appellate courts are "likely to confer at least some mild epistemic authority on expert agencies, much in the way, for example, the Tenth Circuit likely treats Second Circuit opinions on securities litigation with more respect than those of a district judge in New Mexico." Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 Harv. L. Rev. 852, 884 n.170 (2020); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1019–20 (1992) ("In determining whether to follow nonbinding precedents in the judicial context, such as decisions of courts of coordinate jurisdiction, courts frequently consider how persuasive the reasoning of the other court is . . . . The same pattern is followed in the executive precedent context.").

Chevron deference, by contrast, required us to apply an agency's permissible reading of a statute even if we would have read it differently. The agency acted less like a sister circuit and more like a state court whose construction of a state statute we would accept. *See Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). That is why I suspect that speaking of *Skidmore*'s doctrine as one of "deference" (even mild deference or "deference lite!") may confuse more than it clarifies.

To be sure, there is much overlap between the *Chevron* and *Skidmore* (or *Loper Bright*) analyses. An agency that arrives at the best reading of a statute would win under yesterday's regime as well as today's,

and an agency that plainly strays beyond its authority would lose under both. In many cases, "either approach [would] lead to the same result." Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 229 (2006); *see also* Adrian Vermeule, *The Old Regime and the* Loper Bright *Revolution*, 2024 Sup. Ct. Rev. (forthcoming 2025) (manuscript at 9–12) (similar). So there's reason to be skeptical that all that much will change. But it still matters *how* we decide cases, as well as *what* we decide. And there will be cases that agencies now lose when they might have previously prevailed. *See, e.g.*, *In re MCP No. 185*, -- F.4th --, No. 24-7000, 2025 WL 16388, at *3–4 (6th Cir. Jan. 2, 2025) (finding the FCC's net neutrality order—previously upheld as "permissible" under *Chevron*—inconsistent with the Communications Act of 1934).

Whatever we call *Skidmore*'s lesson—"deference," "respect," "due respect," "weight," "consideration," "careful attention"—the label should not distract from the fact that its referent comes down to persuasion, not control; epistemic, rather than binding, authority. I suggest that we not worry about calculating what precise quantum of "deference" or "respect" *Skidmore* may call for. It seems to me more profitable to simply take *Loper Bright* at face value and tackle statutory interpretation questions head-on with our traditional judicial toolkit. Which includes, of course, consulting the expertise of the parties.

In this case, FERC argued that *Loper Bright* "does not preclude deference" to its interpretation. D. 109, FERC Resp. to 28(j) Letter. As the majority explains, any deference (or "respect," or what have you) would

make no difference because FERC already has the better reading of the statute. Maj. Op. 18–19. The agency's view coincides with ours. But moving forward, the language of "deference"—so familiar from the *Chevron* days—should not lead anyone astray. Our job is to interpret statutes and exercise independent judgment, with or without all the help we can get.

With these observations, I concur.

CONCURRENCE / DISSENT

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I join Parts I, II(A), II(B)(2), II(B)(3), II(C), and Parts III(A) and (C) of the majority's Analysis and incorporate its summary of the factual and procedural history in this case.[1] But, because FERC did not act arbitrarily and capriciously by allowing Duke and FirstEnergy to retain their RTO adders while stripping AEP's, I respectfully dissent from Part III(B) of the majority opinion's Analysis Section regarding the *OCC* Proceeding. And I do not join Part II(B)(1) of the Analysis Section on preemption because I agree with the majority's conclusion that the Ohio statute is not preempted and therefore find it unnecessary to analyze FERC's approach to preemption issues.

Section 205 of the FPA provides that FERC has jurisdiction over "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy," and that all such rates must be "just and reasonable." 16 U.S.C. § 824d(a)–(b), (e); *see* FERC Br. at 5. Section 206 of the FPA further authorizes FERC, on its own motion or on complaint by a third party, to determine whether a rate under its jurisdiction is "unjust, unreasonable, unduly discriminatory or

[1] I also adopt the majority's terminology and abbreviations for the various relevant entities, statutes, documents, and concepts.

preferential." 16 U.S.C. § 824e(a). In such a proceeding, the burden of proof is on the complainant. *Id.* § 824e(b). Section 219, which requires FERC to "provide for incentives to each transmitting utility or electric utility that joins a[n] [RTO]" incorporates the same standard, requiring that incentives like the RTO adder be "just and reasonable and not unduly discriminatory or preferential." *Id.* § 824s(c), (d).

Under the APA, this court may "set aside" a final agency if action if we find it to be "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (*State Farm*) (quoting 5 U.S.C. § 706(2)(A)). "When determining whether a final agency action is arbitrary or capricious, the scope of our review is 'an extremely narrow one.'" *Oakbrook Land Holdings, LLC v. Comm'r*, 28 F.4th 700, 720 (6th Cir. 2022) (quoting *Navistar Int'l Transp. Corp. v. EPA*, 941 F.2d 1339, 1352 (6th Cir. 1991)). "[A] reviewing court may not set aside an agency [action] that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *See State Farm*, 463 U.S. at 42–43.

In the instant context, FERC and the courts both have long taken the position that "settlements of rate proceedings are to be encouraged." *United Mun. Distrib. Grp. v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1984). Indeed, the APA expressly requires regulatory agencies to consider offers of settlement from interested parties. 5 U.S.C. § 554(c)(1). "The whole purpose of the informal settlement provision is to eliminate the need for often

costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Pa. Gas & Water Co. v. Fed. Power Comm'n*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). This "strong support of settlements" "giv[es] . . . parties certainty, and let[s] them receive the full benefits of their bargain." *State of Maine*, 91 FERC ¶ 61,213, 61,772 (2000). Such certainty is key in encouraging parties to resolve their disputes through settlement. As concluded by the D.C. Circuit, "it [is] obvious that [parties] might hesitate to enter rate settlements if" subsequent developments "could later pull the rug out from under them." *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005).

FERC's actions in the *OCC* proceedings were consistent with this pro-settlement policy, which provided a legitimate basis to distinguish between AEP on the one hand and Duke and FirstEnergy on the other. Although the Commission determined that AEP's RTO adder was unjust and unreasonable because AEP was mandated by state law to join an RTO and therefore did not do so voluntarily, the Commission reasonably held that it would not be unjust and unreasonable to leave Duke's and FirstEnergy's rates untouched because "Duke's and [FirstEnergy]'s ROEs, including any adders, were each embedded in a comprehensive settlement package submitted to the Commission to resolve a complex, multi-issue dispute among those entities, their customers, and other affected parties." *OCC I* at JA488; *see id.* at JA485–88. The Commission continued that it did "not know the precise trade-offs

and concessions made by parties to those proceedings during the settlement process and the terms to which and conditions to which those parties would have agreed with respect to Ohio transmission assets had the Commission policy on RTO Adders been different." *Id.* at JA488. Importantly, the Commission made clear that it did not affirmatively "f[ind] that Duke and [FirstEnergy] are entitled to an RTO Adder," only that, Ohio law notwithstanding, OCC had failed to carry its burden to show that Duke's and FirstEnergy's bargained-for RTO adders were unjust and unreasonable. *Id.* at JA489.

This result makes sense. If FERC had accepted OCC's invitation "to change unilaterally a single aspect of such a comprehensive settlement," *id.* at JA488, the Commission could have signaled to parties that their settlements could become *unsettled* as a result of later legal developments in which the parties had little say. This in turn would rob the settlement process of the certainty and predictability that incentivize settlements and thereby enhance administrative efficiency in support of the public good.

It was well within FERC's authority to balance these concerns in adjudicating the future of Duke's and FirstEnergy's RTO adders. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions." *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). "FERC thus 'enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.'" *LSP*

Transmission Holdings II, LLC v. FERC, 45 F.4th 979, 992 (D.C. Cir. 2022) (quoting *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). And, given our "extremely narrow" review of the way FERC chose to balance competing regulatory objectives—FERC's desire to incentivize voluntary RTO participation against its policy of encouraging settlements—I cannot say that FERC's retention of Duke's and FirstEnergy's RTO adders was arbitrary and capricious. *See Oakbrook Land Holdings, LLC*, 28 F.4th at 720 (quoting *Navistar Int'l Transp. Corp.*, 941 F.2d at 1352); *see also Morgan Stanley Corp. Grp. Inc.*, 554 U.S. at 532. It was within FERC's discretion as policy maker to determine that, in light of the important role settlement agreements play in FERC's adjudication of rate disputes, it would not be unjust or unreasonable to preserve the integrity of Duke's and FirstEnergy's agreements by declining to strip out each's RTO adder. *Brooklyn Union Gas Co.*, 409 F.3d at 407 ("FERC hardly abused its discretion in holding that a strong commitment to preexisting settlements would better serve the public interest than allowing modifications" not agreed to by all parties); *United Mun. Distrib. Grp.*, 732 F.2d at 209 (FERC acted in accordance with law when its action "serve[d] [its] salutary policy by preserving a settlement").

Nor, in my view, did FERC act arbitrarily or capriciously by treating AEP differently. Unlike Duke and FirstEnergy, AEP did not obtain its RTO adder through a comprehensive settlement, but instead sought and received specific evaluation and approval of its RTO adder. *OCC I* at JA486. Only then did AEP enter into a settlement agreement for its ROE, and so, the

Commission reasoned, "when the parties entered into settlement discussions, they knew they were negotiating only the base ROE." *Id.* at JA486 & n.123. As relevant to FERC's policy in favor of preserving settlements, AEP was not similarly situated to Duke and FirstEnergy because AEP's RTO adder did not come from (and the adder's removal could not disrupt) such a comprehensive settlement. FERC's disparate treatment of AEP was thus "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *State Farm*, 463 U.S. at 42.

The majority says otherwise. Its contention is that all three utilities would have gone into their respective settlement negotiations knowing that they would receive a 50-basis-point adder, the standard at the time. True enough, had each utility applied directly to FERC for its RTO adder (as AEP did), at the time, FERC would likely have granted each a 50-basis-points adder. *See Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 972 (9th Cir. 2018). But Duke and FirstEnergy did not do so, instead choosing to settle. And it does not necessarily follow that, just because FERC's practice at the time was to grant a standard 50-basis-point adder upon request, the parties could not have negotiated for a lower or higher adder in return for other concessions. After all, no one contends that FERC would not have approved a settlement with an RTO adder other than 50 basis points. I therefore do not find it legally relevant that the parties likely knew what RTO adder they would receive *outside* the settlement process, given that the purpose of settlements is to allow "the parties . . . to

reach a result of their own which the appropriate agency finds compatible with the public interest."[2] *Pa. Gas & Water Co.*, 463 F.2d at 1247. Such a result is unlikely to match precisely the result the parties would have received absent settlement. That is the reason parties settle in the first place.

The majority then reverses course to suggest that, just as with Duke and FirstEnergy, it was "difficult to understand how the adder impacted" AEP's settlement because "AEP went into its negotiations with a 50-basis-point adder and may have agreed to a more modest base ROE or other concessions knowing the adder would be layered on the settled ROE." Maj. Op. at 32. But, taken to its logical extreme, that statement is true of any agreement or contract. What a party is willing to give up or accept in negotiations is necessarily shaped by circumstances existing at the time of the negotiations.

The majority, believing that AEP is similarly situated to Duke and FirstEnergy (whether because the impact of each RTO adder was known or because it was

---

[2] Nor do I find it relevant that, as the majority writes, "[w]hen it includes FirstEnergy in a proxy group, FERC uses a figure 50 basis points below FirstEnergy's settled rate, suggesting it views the settled rate as including a 50-basis-point adder." Maj. Op. at 31. FERC uses proxy groups to calculate a *zone* of reasonableness, *id.* at 6, and so FERC's use of FirstEnergy's rates in such a calculation for another utility should not be taken as a definitive statement of the value of FirstEnergy's adder. FirstEnergy's settlement was silent as to the precise value of its RTO adder. *OCC I* at JA488. And regardless, the important variable is not the precise value of each utility's RTO adder, but the (known or unknown) impact of said adder on each utility's overall settlement terms.

unknown), would apply to Duke and FirstEnergy the same logic that formed the basis for the Commission's decision to strip AEP of its adder. But the majority does not explain why, in the first place, it was outside of FERC's power to preserve the finality of Duke's and FirstEnergy's comprehensive settlements. Even if the majority were correct that all three parties are similarly situated, the majority has not explained why all three parties should lose, rather than keep, their adders.[3] Although the majority suggests that the same standard should apply to all three utilities, it does not explain thoroughly what that standard should be.

As discussed above, AEP was not similarly situated to Duke and FirstEnergy. It was therefore not arbitrary or capricious for FERC to balance competing objectives by retaining Duke's and FirstEnergy's RTO adders in light of FERC's policy encouraging settlements while simultaneously removing AEP's adder, which did not arise from such a settlement.

Accordingly, I would **AFFIRM** each of the orders on review.

---

[3] I caution that, if the majority's reasoning were taken to mean that all three utilities should keep their adders, parties would be able preserve their previously granted adders by entering later, distinct settlement agreements and arguing that the substance of such settlements may have been influenced by the existing adder in unknown ways, effectively insulating the parties' rates from FERC's review.

Appendix B

181 FERC ¶ 61,214
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman; James P. Danly, Allison Clements, Mark C. Christie, and Willie L. Phillips.

Office of the Ohio Consumers' Counsel — Docket No. EL22-34-000

v.

American Electric Power Service Corporation, American Transmission Systems, Inc., and Duke Energy Ohio, LLC

ORDER ON COMPLAINT

(Issued December 15, 2022)

1. On February 24, 2022, pursuant to sections 206 and 306 of the Federal Power Act (FPA)[1] and Rule 206 of the Commission's Rules of Practice and Procedure,[2] the Office of the Ohio Consumers' Counsel (OCC) filed a complaint (Complaint) against American Electric Power

[1] 16 U.S.C. §§ 824e, 825e.

[2] 18 C.F.R. § 385.206 (2021).

Service Corporation (AEPSC),[3] American Transmission Systems, Inc. (ATSI), and Duke Energy Ohio (Duke) (together, Ohio TO) alleging that they are ineligible for a 50 basis point adder to the authorized return on equity (ROE) for participation in a Transmission Organization[4] (RTO Adder), provided for under Order No. 679,[5] because their participation is not voluntary under Ohio law. As discussed below, we grant the Complaint in part, deny it in part, and establish a refund effective date of February 24, 2022.

I. Background

2. In 2005, Congress amended the FPA to add a new section 219.[6] Section 219(a) directed the Commission to promulgate a rule providing incentive-based rates for electric transmission for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. In relevant part, section 219(c) states that the

---

[3] The Complaint is filed against AEPSC's affiliates, Ohio Power Company (Ohio Power) and AEP Ohio Transmission Company Inc. (AEP Ohio Transmission). These companies are all subsidiaries of American Electric Power Company, Inc. (AEP).

[4] A Transmission Organization is "a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities." 16 U.S.C. § 796(29); 18 C.F.R. § 35.35(e) (2021).

[5] *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).

[6] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241.

Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.[7] On July 20, 2006, the Commission issued Order No. 679, adding section 35.35 to the Commission's regulations, which includes, in relevant part, an incentive for utilities that "join and/or continue to be a member of an ISO, RTO, or other Commission-approved Transmission Organization."[8] The Commission declined to make a finding on the appropriate size or duration of the incentive, but noted that the basis for providing the incentive to existing members "is a recognition of the benefits that flow from membership in such organizations and the fact [that] continuing membership is generally voluntary."[9] The Commission also declined to create a generic ROE incentive for such membership, and instead decided that it would consider the appropriate ROE incentive when public utilities requested it on a case-by-case basis.[10]

3. In 2018, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) addressed Commission orders where, pursuant to section 219 and Order No. 679, the Commission summarily granted Pacific Gas & Electric Company's (PG&E) requests for an RTO Adder for its continuing membership in the California Independent

---

[7] 16 U.S.C. 824s(c).

[8] Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345, *order on reh'g*, 119 FERC ¶ 61,062.

[9] Order No. 679, 116 FERC ¶ 61,057 at PP 327, 331.

[10] *Id.* P 327.

System Operator (CAISO), notwithstanding California Public Utility Commission's argument that PG&E was ineligible for the incentive because California law required PG&E to participate in CAISO.[11] The Ninth Circuit in *CPUC* recognized that under Order No. 679, the presumption that a utility that has joined, and has ongoing membership in, a Transmission Organization is eligible for an RTO Adder may be rebutted by evidence that such membership is not voluntary.[12] Relying on the Commission's description of incentive adders as "an *inducement* for utilities to join, and remain in, Transmission Organizations,"[13] the Ninth Circuit concluded that, since an incentive cannot induce behavior that is already legally mandated, "the voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder."[14] The Ninth Circuit remanded the underlying proceedings and instructed the Commission to "inquire into PG&E's specific circumstances, i.e.,

---

[11] *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966 (9th Cir. 2018) (*CPUC*).

[12] *Id.* at 974-75 ("Order No. 679 provides that a utility demonstrating that it has remained in a transmission organization is 'presumed to be eligible' for an incentive adder… However, language throughout Order Nos. 679 and 679-A suggests that the presumption of eligibility may be rebutted by the arguments CPUC has made and that ongoing membership is not sufficient for an incentive adder… When membership is not voluntary, the incentive is presumably not justified.").

[13] *Id.* at 974 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86) (emphasis in original).

[14] *Id.* at 975 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86).

whether it could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO]."[15] On remand, the Commission concluded that California law does not mandate PG&E's participation in CAISO and that the RTO Adder induces PG&E to continue its membership, affirming its grant of an incentive *because* it found PG&E membership in CAISO to be voluntary.[16]

4. On August 17, 2020, in addressing the Dayton Power and Light Company's (Dayton) request for certain transmission rate incentives pursuant to sections 205 and 219,[17] the Commission accepted Dayton's requested RTO Adder for filing and suspended it for a five month period, subject to refund and the outcome of a paper hearing to explore whether Dayton had shown that its participation in PJM Interconnection, L.L.C. (PJM) or another Transmission Organization is voluntary, or if such participation is mandated by the Ohio Revised Code.[18]

---

[15] *Id.* at 979.

[16] *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038, at P 2 (2019) (*PG&E)*.

[17] 16 U.S.C. §§ 824d, 824s.

[18] *The Dayton Power & Light Co.*, 172 FERC ¶ 61,140, at P 22 (2020). Under the Ohio statute, "no entity shall own or control transmission facilities as defined under federal law and located in this state on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities …." Ohio Rev. Code, §§ 4928.12 (A).

5. On July 15, 2021, following briefing, the Commission found that Dayton did not qualify for the RTO Adder and therefore denied Dayton's request.[19] The Commission found that, given Ohio law, Dayton did not qualify for the RTO Adder under the Commission's current incentives policy because: (1) Order No. 679 as interpreted in *CPUC* requires a showing of voluntary membership in such a Transmission Organization; and (2) Dayton's membership in a Transmission Organization is not voluntary because the Ohio statute requires it.[20]

A. Ohio TOs' Affiliates and the RTO Adder

6. A number of PJM utilities provide service in Ohio and the rates for this service are set forth in the following rate zones: (1) the Dayton Zone, which is wholly located within Ohio; (2) the AEP Zone, which spans Ohio, West Virginia, Indiana, Michigan, Kentucky, Virginia, and Tennessee; (3) the Duke Zone (DEOK), which spans Ohio and Kentucky; and (4) the ATSI Zone, which spans Ohio and Pennsylvania.[21]

7. AEP has six public utility operating companies located in seven different states in the AEP Zone: Appalachian Power Company, Indiana Michigan Power Company, Ohio Power, Kentucky Power Company, Wheeling Power Company, and Kingsport Power Company (collectively, AEP East Companies). AEP

---

[19] *The Dayton Power & Light Co.*, 176 FERC ¶ 61,025 (2021) (Dayton Initial Order), *order on reh'g*, 178 FERC ¶ 61,102 (2022) (Dayton Rehearing Order) (together, Dayton Orders).

[20] Dayton Initial Order, 176 FERC ¶ 61,025 at P 14.

[21] Ohio Commission Comments at 5-6.

also has several transmission-only entities providing transmission service in PJM in the AEP Zone: AEP Appalachian Transmission Company Inc., AEP Indiana Michigan Transmission Company Inc., AEP Ohio Transmission, Kentucky Transmission Company Inc., and AEP West Virginia Transmission Company Inc. (collectively AEP East Transmission Companies). Ohio Power and AEP Ohio Transmission are the AEP companies owning and operating transmission facilities in Ohio.

8. The AEP East Companies and the AEP East Transmission Companies each separately have a combined transmission rate on file as Attachments H-14 and H-20 of the PJM Open Access Transmission Tariff (PJM Tariff), respectively.[22] Pursuant to section 219 and Order No. 679, the Commission separately granted the RTO Adder to the AEP East Companies and the AEP East Transmission Companies on the condition that the additional 50 basis points did not result in an ROE above the zone of reasonableness.[23]

9. Duke is a wholly-owned operating subsidiary of Duke Energy Corporation that provides transmission service in the DEOK Zone under Attachment H-22 of the PJM Tariff for Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc., who jointly own transmission facilities. In 2015, the Commission approved an uncontested

---

[22] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT Attachment H-14, (2.0.0); *see id.* H-20 (0.0.0).

[23] *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 30 (2008); *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075, at P 21 (2010), *order on reh'g*, 135 FERC ¶ 61,066 (2011).

settlement in connection with Duke's move from the Midcontinent Independent System Operator, Inc. (MISO) to PJM, the terms of which included, among other things, Duke's ROE on its revenue requirement for transmission service which is comprised of a 10.88% base cost of common equity and a 50 basis point RTO Adder.[24]

10. ATSI is a wholly-owned, direct operating subsidiary of FirstEnergy Transmission, LLC, which in turn is a wholly-owned subsidiary of FirstEnergy Corporation. ATSI provides transmission service in ATSI Zone under Attachment H-21 of the PJM Tariff. In 2015, the Commission approved a settlement, which included, among other things, the ROE on ATSI's revenue requirement for transmission service, "inclusive of any RTO Adder."[25]

II. Complaint

11. OCC asserts that the Commission has found that Ohio law mandates transmission owner participation in an RTO in order to be eligible to provide transmission service in Ohio.[26] In other words, OCC states, if the Ohio TOs did not belong to PJM or another qualifying Commission-approved transmission entity, they would be forbidden to own or control transmission facilities located in the State of Ohio. Thus, OCC argues that the

---

[24] *Duke Energy Ohio, Inc.*, 151 FERC ¶ 61,029, at PP 10, 14 (2015).

[25] *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,106, at P 3 (2015); *PJM Interconnection, L.L.C.*, Docket No. ER15-303-002 (Mar. 11, 2016) (delegated order).

[26] Complaint at 9.

Ohio TOs' participation in PJM or any other Transmission Organization is not voluntary, similar to how Dayton's participation is not voluntary because the Ohio statute requires it. OCC argues that, for the reasons explained in the Dayton Orders and *CPUC*, it is unreasonable to incent transmission owner activity that is already required by Ohio law.[27]

12. OCC states that the Ohio TOs all, either directly or indirectly through their affiliates, provide transmission service in Ohio.[28] OCC asserts that the Commission initially granted each of the Ohio TOs the right to include the RTO Adder in their rates, but those orders predate *CPUC* and the Dayton Orders.[29]

13. OCC argues that Ohio TOs' existing formula rates that include the RTO Adder are excessive, unjust, unreasonable, and unduly discriminatory.[30] OCC asserts that there are no material differences between Dayton

---

[27] *Id.* at 9-10.

[28] AEP serves Ohio consumers through its AEP Ohio affiliates. Those include Ohio Power (including Columbus Southern Power Company) and AEP Ohio Transmission. ATSI provides transmission service in Ohio through Ohio Edison Company, Toledo Edison Company and Cleveland Electric Illuminating Company. Duke Energy Ohio directly serves Ohio retail consumers.

[29] *See Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 30; *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at P 21, *order on reh'g*, 135 FERC ¶ 61,066; *Duke Energy Ohio, Inc.*, 151 FERC ¶ 61,029 at PP 10, 14; *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,106 at P 3; *PJM Interconnection, L.L.C.*, Docket No. ER15-303-002 (Mar. 11, 2016) (delegated order).

[30] Complaint at 11.

and the Ohio TOs such that the Ohio TOs should be allowed to continue charging the RTO Adder. OCC states that it would be unduly discriminatory to charge Ohio retail consumers in the service territories belonging to the Ohio TOs more for their transmission service than that provided in the Dayton service territory because of the RTO Adder.[31] OCC further states that allowing the Ohio TOs to retain the RTO adders results in unwarranted extra transmission profits (through formula transmission rates) that provide an unjust windfall to the Ohio TOs' shareholders.

14. OCC also argues that including the RTO Adder in Ohio TOs' transmission rates is unjust and unreasonable because it would result in Ohio consumers paying rates well above the Ohio TOs' actual cost to provide service.[32] While OCC states that it does not have the data to determine the financial effect of these overearnings, OCC explains that a ballpark estimate could be determined using the approximately $10.6 billion in Ohio transmission infrastructure costs over that 11-year period. OCC explains that a reduction of 50 basis points in the ROE for the Ohio utilities, if these costs consisted of 50% capital investment, would save Ohio consumers over $26 million annually.[33] OCC states that this estimate does not include investment in rate base prior

---

[31] *Id.* at 11-12.

[32] *Id.* at 12.

[33] *Id.* at 13.

to 2010; thus, actual savings could be significantly higher.

15. OCC argues that the Commission should direct the Ohio TOs to provide detailed data showing the impact on consumers in Ohio of a 50 basis point reduction in their ROE. OCC contends that, after verifying these amounts as accurate, the Commission should then require each of the Ohio TOs to eliminate the RTO Adder from its transmission formula rate.

16. OCC requests that the Commission require each of the Ohio TOs to refund the difference between rates in effect on the date of the filing of this Complaint and the lower rates sought in this Complaint.[34] OCC argues that refunds are appropriate because Ohio consumers have experienced significant increases in transmission service costs in recent years, primarily due to the increased investment in supplemental projects, including more than $7.5 billion over the past 11 years in Ohio.[35] OCC notes that supplemental projects receive no cost-of-service regulatory oversight in Ohio. OCC argues that the RTO Adder significantly increases the cost of this investment for Ohio consumers, all to encourage behavior that is already required under Ohio law.

III. Notice of Filing and Responsive Pleadings

17. Notice of the Complaint was published in the *Federal Register*, 87 Fed. Reg. 12,437 (March. 4, 2022), with interventions and protests due on or before March 16,

---

[34] *Id.* at 2-3.

[35] *Id.* at 14.

2022. On March 8, 2022, the Commission granted an extension to file to March 31, 2022.

18. AEPSC, Duke, and ATSI each filed answers to the Complaint. AEPSC and ATSI also filed motions to dismiss.

19. Notices of intervention were filed by the Public Utilities Commission of Ohio (Ohio Commission) (also filed comments), the Louisiana Public Service Commission, and the Pennsylvania Public Utility Commission. Timely motions to intervene were filed by American Public Power Association, Public Citizen, Inc., Monitoring Analytics, LLC, Old Dominion Electric Cooperative, Xcel Energy Services Inc., American Municipal Power, Inc., and MISO Transmission Owners.

20. Timely motions to intervene and comments were filed by Edison Electric Institute (EEI), PJM, WIRES, Buckeye Power, Inc. (Buckeye), Industrial Energy Users – Ohio (IEU-Ohio), and Northeast Ohio Public Energy Council (NOPEC).

21. OCC and Buckeye filed separate answers to: (1) AEPSC's motion to dismiss; and (2) answers and comments. ATSI, AEPSC, and Buckeye filed answers to answers.

IV. Motions to Dismiss

22. AEPSC argues that, while the Complaint names it as a respondent, AEPSC is not a public utility, does not have a transmission rate on file, and has not been awarded a transmission rate incentive pursuant to

Order No. 679.[36] Rather, AEPSC explains that it is a service company that provides management and professional services to AEP and its subsidiaries.[37] AEPSC argues that, pursuant to section 206 of the Commission's rules, a complaint must "identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements," whereas here the Complaint was filed only against AEPSC and no other AEP affiliate and therefore the Commission cannot grant the relief requested by the Complaint.[38] Accordingly, AEPSC argues that the Complaint is deficient as to AEPSC and should be dismissed.[39] AEPSC states that, while it has multiple utility affiliates that own and operate transmission facilities with transmission rates in the PJM Tariff, the Complaint fails to name any of them as respondents.[40]

23. AEPSC and ATSI also request dismissal of the Complaint for failing to meet the burden under section 206, asserting that OCC's arguments rely on a mere assumption that there are no material differences between Dayton and other Ohio transmission owners, with no evidence to support this claim.[41] ATSI further argues that the Commission should dismiss the

---

[36] AEPSC Motion at 1-2.

[37] *Id.* at 3.

[38] *Id.* at 4-5 (citing 18 C.F.R. § 385.206(b)(1)).

[39] *Id.* at 4.

[40] *Id.* at 5.

[41] *Id.* at 7; ATSI Motion at 10-13.

Complaint because the Commission did not specifically authorize a 50-basis-point RTO Adder for ATSI.[42]

24. OCC answers that the Complaint clearly names the transmission operating affiliates of AEPSC in Ohio as subject to the Complaint and the relief sought.[43] Additionally, OCC argues that the AEP Ohio transmission affiliates' formula transmission rates are posted on PJM's website under an "AEPSC" heading.[44] OCC states that the Commission has previously found that the filing of a complaint against the affiliate that makes the rate filings on behalf of its utility affiliates is appropriate even though the caption does not name the individual public utility affiliates so long as the text in the complaint makes clear the identity of those affiliates.[45] Buckeye adds that the Commission has long cautioned against attempts to elevate form over substance.[46] Buckeye also states that the Commission can waive any provision of Rule 206 for good cause.[47]

25. OCC also contends that the Complaint explicitly sets out the basis for finding that the current rates are unjust and unreasonable and demonstrates that AEPSC's Ohio transmission affiliates are similarly situated to Dayton because they too are required by Ohio law to join a

---

[42] ATSI Motion at 6-10.

[43] OCC April 12 Answer at 3.

[44] *Id.* at 4.

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

[46] Buckeye April 12 Answer at 3-4.

[47] *Id.* at 5.

Transmission Organization.[48] Buckeye argues that AEPSC's motion does not contest the factual foundation of the Complaint, admitting that certain AEP affiliates operate in Ohio, receive an RTO Adder, and are subject to the Ohio statute.[49]

26. In response, AEPSC reiterates that the Complaint fails to clearly identify an allegedly unlawful action because it fails to clearly identify a proper respondent. AEPSC argues that the Complaint should be dismissed, and, if OCC wishes to proceed, it should be required to file a new complaint, naming proper parties as defendants, with a new refund effective date.[50]

V. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2021), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept all answers filed by OCC, Buckeye, AEPSC, and ATSI

---

[48] OCC April 12 Answer at 9-10.

[49] Buckeye April 12 Answer at 2.

[50] AEPSC May 2 Answer at 14.

because they have provided information that assisted us in our decision-making process.

29. As an initial matter, we grant AEPSC's motion to dismiss it as a respondent because it is not a public utility regulated by the Commission. However, the complaint made clear that OCC's complaint was directed at AEPSC's two affiliates, Ohio Power and AEP Ohio Transmission, and we will address the complaint as addressed to these entities.[51]

30. We also deny AEPSC's and ATSI's motions to dismiss on grounds that OCC fails to present a *prima facie* case that the existing rate is unjust and unreasonable. As set forth in Rule 206(b) of the Commission's regulations, a complaint must, among other things, explain how the action or inaction violates the applicable statutory standards or regulatory requirements. OCC has done so here. The Complaint identifies the actions and the statutory and regulatory provisions alleged to have been violated by those actions, and it provides analysis and information to support the applicability of Commission precedent to those actions.

B. Substantive Matters

31. Under the first prong of FPA section 206, a complainant must first establish that an existing rate is unjust, unreasonable, unduly discriminatory, or preferential. If the Commission finds that a complainant has met that burden, the second prong of FPA section

---

[51] *See Middle S. Servs., Inc. v. Middle S. Utils.*, 15 FERC ¶ 61,302 at 61,661 (1981).

206 requires the Commission to establish a just and reasonable replacement rate. In this proceeding, we first must decide whether the formula rates of the Ohio TOs contain an RTO Adder granted by the Commission pursuant to section 219, and whether such RTO Adder is unjust, unreasonable, unduly discriminatory, or preferential. To the extent that we find that an Ohio TO has an RTO Adder that is unjust, unreasonable, unduly discriminatory, or preferential, we must establish a just and reasonable replacement rate.

1. Whether the Ohio TOs have an RTO Adder granted by the Commission pursuant to section 219 and whether such RTO Adder is unjust, unreasonable, unduly discriminatory, or preferential

a. Comments

32. Buckeye, IEU-Ohio, and NOPEC filed comments in support of the Complaint, arguing that the Commission's recent rulings in the Dayton Orders confirm that, because Ohio law mandates transmission owners to participate in a Commission-approved Transmission Organization, AEP, ATSI, and Duke's participation is not voluntary and therefore they do not qualify for an RTO Adder.[52]

33. Buckeye argues that there is no basis for distinguishing this proceeding from the Commission's decision in the Dayton Orders, as the Commission's RTO

[52] Buckeye March 31 Comments at 2; IEU-Ohio Comments at 2-3; NOPEC Comments at 4-5.

Adder policy has not changed, nor has the Ohio statute.[53] Buckeye argues that respondents are in the same position as Dayton: they participate in PJM in order to fulfill their obligation under Ohio law to be a member of a Transmission Organization. Buckeye argues that, in addition, it would be arbitrary and unduly discriminatory to require certain Ohio consumers to pay the RTO Adder to respondents for their compliance with state law, while (correctly) requiring that Dayton remove the RTO Adder from its rates.

34. The Ohio Commission agrees with the Dayton Orders that, based on current law and circumstances, a transmission owner that owns or controls transmission facilities solely in Ohio should not receive an incentive for participating in an RTO/ISO but states that the question remains whether, and to what extent, a transmission owner's facilities located in a PJM transmission zone or zones that cross state boundaries are subject to the Commission's findings regarding Ohio's law.[54]

35. EEI argues that OCC's reliance on the Dayton Orders is misplaced because, unlike Dayton's proposed rate, the Ohio TO's rates have already been found to be just and reasonable.[55] Moreover, EEI argues that OCC does not address whether it is just and reasonable to

---

[53] Buckeye March 31 Comments at 9.

[54] Ohio Commission Comments at 4.

[55] EEI Comments at 2-3.

treat some utilities that turn over operational control of their facilities to RTOs/ISOs differently than others.

b. Answers

36. Some parties argue that OCC has not met its burden in demonstrating that Ohio TOs' rates are unjust and unreasonable. AEPSC argues that, unlike the Dayton Orders, which involved a request by the utility to receive an RTO Adder for the first time, this case concerns a section 206 complaint seeking to strip AEP utilities of an incentive that the Commission previously approved.[56] Duke argues that OCC simplistically assumes that, because the Commission declined to grant Dayton an RTO Adder in a section 205 proceeding that the Commission must now affirmatively strip away Duke's adder because it owns transmission assets in the state.[57] AEPSC and Duke argue that OCC shows no changed circumstances or new facts to demonstrate that their existing rates are no longer just and reasonable or, for AEP, to counter the Commission's earlier finding that AEP's decision to join PJM was voluntary.[58] They

---

[56] AEPSC March 31 Answer at 14.

[57] Duke Answer at 4.

[58] AEPSC March 31 Answer at 15-17; Duke Answer at 5. AEPSC states that, when AEP initially sought to join PJM, two states attempted to prevent AEP subsidiaries in those states from joining. The Commission subsequently made a preliminary finding that "AEP's voluntary commitment to join PJM is designed to obtain economical utilization of facilities and resources in the Midwest and Mid-Atlantic areas, as set forth in Section 205(a) of the Public Utility Regulatory Policies Act (PURPA)" and later affirmed an initial decision that found AEP's decision to join PJM voluntary based on record evidence. AEPSC March 31 Answer at 15-17 (citing

assert that the Ohio law was in place when the Commission granted AEP the adder. Duke contends that the Complaint assumes that its rates are *per se* unjust and unreasonable simply because they were accepted before the Commission issued the Dayton Orders.[59]

37. AEPSC argues that, under section 206, OCC must, but does not, provide an analysis demonstrating that the ROE inclusive of the 50 basis points is unlawful.[60] Duke similarly argues that the Complaint does not include factual analysis normally required when the Commission evaluates existing ROEs, such as expert witness testimony, analysis of financial models or conditions, factual support, or a demonstration that its ROE, inclusive of the adder, lies outside the zone of reasonableness.[61] Duke further argues that OCC fails to make a good faith effort to quantify the financial impact or burden, arguing that the information provided by OCC is misleadingly presented, based on unknown assumptions, and entirely irrelevant to the subject matter of the Complaint.[62]

38. Duke states that its RTO Adder was not awarded for joining an RTO; rather, it was agreed to in a settlement

---

The New PJM Cos., 105 FERC ¶ 61,251, at P 1 (2003); *New PJM Cos.*, 107 FERC ¶ 61,271, at P 44 (2004)).

[59] Duke Answer at 5-6.

[60] AEPSC March 31 Answer at 19.

[61] Duke Answer at 6.

[62] *Id.* at 15-16.

between Duke and its customers after years of negotiations regarding the rates Duke could charge as a member of PJM after its move from MISO.[63] Duke argues that the RTO Adder was an important part of a settlement package that resolved numerous complex issues and resulted in Duke accepting a "greatly reduced level of recovery as compared to" what Duke had originally sought in its rate filings. Duke argues that granting the Complaint would undermine the Commission's goals of encouraging settlements and would undermine investor confidence in Commission decisions.

39. ATSI similarly argues that the only reference to an RTO Adder in its rates is in its 2015 ROE settlement agreement, which states that all ROE values in its formula rate "are inclusive of *any* incentive adder for RTO participation."[64] ATSI argues that the language in the settlement agreement makes it clear that any ROE adders would be subsumed into the settled effective ROE, and that any adders would be inseparable and indistinguishable from ATSI's base ROE.[65] ATSI states that extrinsic evidence to the settlement agreement supports its argument, noting that ATSI has never had or requested an ROE inclusive of the RTO Adder, even as a transmission owner in MISO.[66] ATSI argues that

---

[63] *Id.* at 14.

[64] ATSI March 31 Answer at 6-7 (citing ATSI Settlement Agreement, § II.C.1) (emphasis added).

[65] *Id.* at 7.

[66] *Id.* at 7-8.

separating the settled ROE into a discrete base and incentive components would be contrary to Commission precedent and policy, and that the settlement was a product of compromise rather than an application of the Commission's incentive policies.[67] ATSI contends that an attempt to isolate and extract an arbitrary amount of incentive adder for RTO participation from its settled ROE would deprive the settling parties of the benefit of their bargain, will result in avoidance of negotiated black-box type settlements in the future, and ultimately be contrary to the Commission's preference for resolution through settlement.[68]

40. Several parties also note differences between Dayton and the Ohio TOs, stating that, while Dayton operates solely in Ohio, Ohio TOs own and operate transmission facilities outside of Ohio, meaning that the Ohio law does not apply to all of the Ohio TOs' assets.[69] ATSI argues that, because a portion of its facilities are located in another state, the Ohio statute in question does not cause ATSI's participation in PJM to be involuntary.[70]

41. AEPSC states that OCC attempts to extend the Dayton Orders' holding to a very different circumstance, i.e., the AEP East Companies and the AEP East Transmission Companies do not have separately stated

---

[67] *Id.* at 8-9.

[68] *Id.* at 9-10.

[69] *See, e.g.*, Duke Answer at 6; ATSI March 31 Answer at 10-11.

[70] ATSI March 31 Answer at 11.

transmission rates for each state in which those entities operate, but a single rate that covers utilities from several different states within PJM.[71] AEPSC further states that AEP voluntarily made its decision to join PJM on a company-wide basis for all transmission owning affiliates, not only those located in Ohio, whereas, in contrast, both the Dayton Orders and *CPUC* involved a single utility that operated solely in a single state. AEPSC argues that this would allow the Commission to privilege one state's mandate over other another states' decision to leave RTO membership up to the utility.

42. ATSI argues that, if the Commission grants the Complaint, it would essentially allow the Ohio statute to dictate the application of the RTO adder in other states, which is impermissible under the dormant commerce clause.[72] ATSI states that, even if the Commission required it to remove an RTO Adder from its Ohio-based facilities, there are no legitimate grounds to distinguish between its Ohio and non-Ohio facilities in its formula rates.[73] ATSI contends that this requirement would essentially allow the Ohio statute to dictate Commission-jurisdictional rates by requiring ATSI to adopt a two-tier rate structure.[74] ATSI further argues that this outcome would be contrary to law as it leads to disparate treatment of similarly situated entities, in that two

---

[71] AEPSC March 31 Answer at 12.

[72] ATSI March 31 Answer at 11-12.

[73] *Id.* at 12.

[74] *Id.* at 12-13.

entities with identical risk are not eligible to receive the same returns.[75]

43. Duke argues that OCC's undue discrimination argument is also unsubstantiated, asserting that OCC is conflating the RTO Adder with the rate, without making any attempt to show that Duke's rate is actually higher, nor explaining how the Ohio TOs provide the "same electrical transmission service" as that provided by Dayton.[76] Duke argues that establishing a different ROE for Dayton does not make Duke's ROE "unduly discriminatory" merely because it is a different number. Duke argues that each transmission system is different, based on different investments, and serving different customers, and each of the Ohio TOs charges different transmission formula rates based on the specific investments of that utility. Duke also argues that OCC does not support the idea that a customer of one utility is similarly situated to a customer of a different utility simply because both utilities have operations in the same state, much less the idea that such customers are similarly situated when one utility operates wholly in that state but the other utilities operate in another state(s) as well.[77]

44. Additionally, AEPSC argues that the Commission should reconsider its finding that the Ohio law requires membership in a Transmission Organization, claiming that the Ohio statute only requires that an Ohio utility

---

[75] *Id.* at 20.

[76] Duke Answer at 7.

[77] *Id.* at 8.

become a member of and transfer control of its transmission facilities to a "qualifying transmission entity," which is not necessarily the same thing as a "Transmission Organization."[78] AEPSC asserts that the Commission's conclusion rested on dicta in an Ohio state supreme court case whereas, in a more recent Ohio supreme court case, the court never intimated that membership in a transmission organization was required.[79] AEPSC states that, in any event, centralized transmission planning is a requirement of RTO qualification and an important factor for the benefits that RTOs provide to customers, while a "qualifying transmission entity" that satisfies the requirements of the Ohio statute would not need to engage in centralized transmission planning. Duke states that a transmission entity that merely satisfies the criteria of the Ohio statute would not also qualify as an RTO because there is no central planning requirement in the Ohio statute, while an RTO or a Transmission Organization does have such a requirement.[80] Therefore, Duke argues that it has non-RTO options to comply with the Ohio statute, including contracting for independent transmission management services with an entity such as TranServ International and appointing a separate Reliability

---

[78] AEPSC March 31 Answer at 34. *See also* WIRES Comments at 8.

[79] *Id.* (*citing In re Application of Ohio Power Co.*, 20 N.E.3d 699, 701 (Ohio 2014)).

[80] Duke Answer at 9.

Coordinator or creating a state-wide coalition that meets the requirements of Ohio law.[81]

45. AEP and ATSI argue that OCC's reliance on the Dayton Orders and *CPUC* is misplaced.[82] AEP argues that *CPUC* does not impose a voluntariness requirement but only requires the Commission to undertake a "case-by-case analysis" that "inquire[s] into [the utility's] specific circumstances" in evaluating the appropriateness of the adder. AEP states that the Commission referred to the Ninth Circuit's finding that voluntariness is "logically relevant" to whether it is eligible for an adder, but that does not mean "required."[83] AEP argues that *CPUC* merely held that the Commission relied on an erroneous interpretation of Order No. 679 and thus that the Commission engaged in an unexplained and unacknowledged departure from its policy, which is arbitrary and capricious. ATSI states that *CPUC* involved a different fact pattern—that is, one with a utility with transmission facilities in a single state, whereas ATSI has facilities is more than one state (Pennsylvania and Ohio).[84] Moreover, ATSI argues that, even if RTO membership is not voluntary, that does not mean the RTO Adder should be denied to transmission

---

[81] *Id.* at 11.

[82] *See* AEPSC March 31 Answer at 30-31; ATSI March 31 Answer at 17.

[83] AEPSC March 31 Answer at 32.

[84] ATSI March 31 Answer at 17.

owners.[85] Lastly, ATSI states that nothing in *CPUC* indicated that voluntariness is a necessary condition for the RTO Adder or that the Commission may never award an RTO Adder for non-voluntary RTO participation.

c. OCC and Buckeye Answers to the Answers

46. In its answer, OCC states that providing Ohio TOs' Ohio affiliates and shareholders with an "incentive" for which they are not eligible is contrary to precedent and is *per se* unjust and unreasonable because there is no behavior to be encouraged.[86] Buckeye states that the FPA includes no requirement to demonstrate changed circumstances to challenge existing rates, only that existing rates are unjust and unreasonable.[87] Nevertheless, OCC and Buckeye argue that the Complaint demonstrates that circumstances have changed since the Commission granted the RTO Adder to the Ohio TOs in 2008, 2010, and 2015 because, in 2018, the Ninth Circuit determined that Order No. 679 and long-held Commission precedent imposed a "voluntariness" requirement to establish eligibility for a transmission incentive.[88]

---

[85] *Id.* at 18 (citing Order No. 679, 116 FERC ¶ 61,057; *CPUC*, 879 F.3d 966).

[86] OCC April 15 Answer at 4.

[87] Buckeye April 15 Answer at 5.

[88] OCC April 15 Answer at 5; Buckeye April 15 Answer at 6.

47. In response to the argument that the Commission cannot apply the reasoning of the Dayton Orders here because the Complaint is brought under section 206, OCC and Buckeye argue that the "'just and reasonable' lodestar is no loftier under section 206 than under section 205."[89] Buckeye states that, if Dayton's eligibility for an adder turned on whether its participation in PJM is voluntary or if it is required by Ohio law, then the same standard applies to the Ohio TOs' Ohio affiliates.[90]

48. OCC also sees no merit in the argument that its request for information turns the section 206 burden on its head, arguing that it is seeking information for quantifying the impact of the Complaint and not for establishing the basis for finding the Ohio TOs' rates unjust and unreasonable.[91]

49. OCC also states that it provided evidence that the impact of the RTO Adder is $26 million annually, which was a conservative estimate based only on the effect of the overearnings on the planned transmission investment incorporated into PJM's Regional Transmission Expansion Plan over the past 11 years. OCC asserts that, had it had the necessary data, it would have calculated a more accurate estimate, including historic investment in rate base, as well as planned

---

[89] *Id.* at 13-14; Buckeye April 15 Answer at 4 (citing *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353-54 (D.C. Cir. 2014)).

[90] Buckeye April 15 Answer at 4-5.

[91] OCC April 15 Answer at 14.

investment over the past 11 years.[92] It disagrees with Duke's claim that OCC should have used information from the annual formula updates, arguing that these updates do not provide sufficient information. OCC argues that mathematical precision is not required in determining the financial impact, only "a good faith effort," which it provided.[93]

50. In response to AEPSC's argument that the Commission has already found its participation in PJM to be voluntary, OCC states that AEP committed to join an RTO as part of a settlement of AEP's merger with Central and South West Corporation.[94] Thus, OCC argues that, while the Administrative Law Judge found that AEP's decision to enter into the settlement and commit to transferring control of its transmission facilities to an RTO was voluntary, once AEP accepted the Commission's conditions for the merger, the decision to join an RTO was no longer voluntary.[95] Buckeye adds that the Commission's statements regarding whether AEPSC acted voluntarily in joining PJM do not pertain to RTO Adders and are entirely unrelated to AEP's Ohio subsidiaries because they involved whether the Commission could allow AEP's subsidiaries in Virginia and Kentucky to join PJM without the approval of their

---

[92] *Id.* at 10.

[93] *Id.* at 10-11.

[94] *Id.* at 26.

[95] *Id.* at 26-27.

respective states under section 205(a) of the Public Utility Regulatory Policies Act.[96]

51. Noting Duke's argument that it "invested millions of dollars in its move from MISO to PJM," and that the RTO Adder was a piece of the settlement that resolved litigation surrounding that move, OCC states that the settlement was filed with the Commission in 2014, and Duke cannot have reasonably expected that an ROE deemed just and reasonable in 2014 would remain unchanged in 2022.[97]

52. Responding to ATSI's claim that the Complaint does not demonstrate that ATSI's rates include the RTO Adder, OCC points to an order authorizing an ROE for PG&E.[98] In that order, OCC states that, in determining the appropriate risk premium ROE for PG&E, the Commission included ATSI in the proxy group and used a base ROE that is 50 basis points lower than ATSI's ROE approved in the settlement agreement.[99] Buckeye

---

[96] Buckeye April 15 Answer at 7 (citing 16 U.S.C. § 824a-1(a)).

[97] OCC April 15 Answer at 27-28.

[98] *Id.* at 8-9 (citing *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,175, at app. D.2 (2022)).

[99] *Id.* at 9. Buckeye cites to other Commission orders that have similarly included risk premium models that show ATSI's "Base ROE" as 50 basis points less than the total ROE stated in the settlement agreement. Buckeye April 15 Answer at 17 (citing *DATC Path 15, LLC*, 177 FERC ¶ 61,115, at app. D (2021); *Constellation Mystic Power, LLC*, 176 FERC ¶ 61,019, at app. D, *order set aside in part*, 177 FERC ¶ 61,106 (2021) *order on reh'g*, 178 FERC ¶ 61,116 (2022); *Ass'n of Businesses Advocating Tariff v.*

argues that ATSI's affiliates have represented that ATSI's base ROE is 9.88% in several filings to the Commission.[100] Buckeye further argues that ATSI misreads the plain language of the settlement agreement, which states that the agreed upon ROE values "*are inclusive* of any incentive adder for RTO participation," meaning that the RTO Adder is *included* as part of the current 10.38% ROE.[101]

53. With respect to arguments that the Ohio TOs are not similarly situated to Dayton, OCC and Buckeye answer that Ohio TOs' Ohio affiliates, like Dayton, are all required by Ohio law to join a Commission-authorized Transmission Organization if they want to provide transmission services in Ohio.[102] They argue that the Ohio TOs have not explained how their Ohio affiliates are different from Dayton, nor that the same law does not apply to all transmission utilities in Ohio. Rather, they argue that the Ohio TOs are concerned about whether the removal of the incentive from their rates must be applied solely to their Ohio affiliates' rates or to

---

Midcontinent Indep. Sys. Operator, Inc., 173 FERC ¶ 61,159, at app. 1 (2020)).

[100] Buckeye May 13 Answer at 5 (citing *Jersey Cent. Power & Light Co.*, Docket No. ER20-227-000, Ex. No. JCP-207, at 5 (Oct. 30, 2019); *Jersey Cent. Power & Light Co.*, Docket No. ER17-217-000, Ex. No. JCP-13, at 5 (Oct. 28, 2016); PJM Interconnection, L.L.C., Docket No. ER21-265-000, Ex. KTC-208, at 2 (Oct. 30, 2020)) (listing an authorized return for ATSI as 9.88%).

[101] Buckeye April 15 Answer at 16.

[102] OCC April 15 Answer at 4-5, 11-13; Buckeye April 15 Answer at 8-9.

all affiliates operating in PJM, which pertains to the scope of the remedy but is not a reason to dismiss or deny the relief sought in the Complaint. They assert that the Ohio TOs should not be permitted to charge Ohio consumers an excessive ROE simply because of the way they have chosen to organize their operations and have out-of-state affiliates.

54. In response to ATSI's assertion that denying the RTO Adder to certain transmission owners based on the law of the state in which they operate would lead to disparate treatment of similarly situated entities, OCC states that transmission owners in states with membership mandates are not similarly situated to transmission owners in states without such mandates because only the latter can be swayed by the availability of an incentive.[103]

55. In response to arguments that the Commission should reconsider its decision that the Ohio law requires membership in a Transmission Organization and that *CPUC* does not impose a voluntariness requirement, OCC and Buckeye answer that the Commission has already rejected AEP's and Duke's arguments in the Dayton Orders and should reject these arguments as impermissible collateral attacks on its rulings.[104] Buckeye also states that the Ohio TOs provide no persuasive arguments for why the Commission should interpret Ohio law differently in this proceeding, noting that arguments that the Ohio TOs own transmission

---

[103] *Id.* at 28.

[104] *Id.* at 14-16; Buckeye April 15 Answer at 13, 15.

assets outside of Ohio are irrelevant to the scope of Ohio law as applied to their Ohio-based facilities.[105] Buckeye argues that, to the extent the Ohio TOs claim that the Commission's application of *CPUC* was in error, they are arguing for a change in Commission policy, which can be raised in the Commission's pending rulemaking on this topic.[106]

d. AEPSC and ATSI Additional Answers to Buckeye and OCC Answers

56. AEPSC reiterates that, unlike Dayton, AEP operates an integrated transmission system that spans and serves customers of multiple states.[107] AEPSC argues that customers in Ohio do not arrange service over just the facilities owned by Ohio utilities but over the entire AEP system, benefitting from the resiliency and reliability of an integrated system that spans multiple states, and pay one zonal transmission rate. AEPSC claims that it plans and operates its transmission system as an integrated unit, as well as makes policy and regulatory decisions based on the impacts to the system as whole, which results in significant benefits to its customers.[108]

57. AEPSC further states that, unlike Dayton, the Commission has already found the award of the RTO Adder to AEP's Ohio affiliates to be just and reasonable

---

[105] Buckeye April 15 Answer at 15.

[106] *Id.* at 13.

[107] AEPSC May 2 Answer at 5.

[108] *Id.* at 5-6.

and consistent with Order No. 679 and section 219 and also found that AEP's decision for its affiliates to join PJM together as an integrated multistate utility was voluntary.[109] AEPSC states that, while it may have initially joined PJM to satisfy a merger condition, that does not change the fact that AEP's decision to accept the merger condition was voluntary.[110] AEPSC also states that the Commission's findings regarding voluntariness were not limited to AEP's Virginia and Kentucky affiliates.[111] Finally, AEPSC disagrees that, notwithstanding that the Commission found AEP's decision to join PJM to be voluntary when it awarded the RTO Adder, the Ninth Circuit's decision in *CPUC* changed the circumstances.[112] AEPSC states that the Ohio statute was in effect at the time the Commission awarded the incentive to the AEP companies for participating in PJM and, despite the existence of that statute, the Commission found the AEP companies met the criteria in both Order No. 679 and section 219.

58. With respect to its settlement language, ATSI answers that the quoted provision does not state that the RTO Adder is included in the ROE values, only that the ROE values are "inclusive of any" RTO Adder.[113] ATSI states that the settlement reflects the fact that the

---

[109] *Id.* at 7.

[110] *Id.* at 7-8

[111] *Id.* at 8.

[112] *Id.* at 9.

[113] ATSI April 28 Answer at 3-4.

settling parties chose not to include any discernible RTO Adder in the ROE values in their black-box settlement. ATSI argues that the orders cited by OCC and Buckeye involved utilities other than ATSI and neither interpreted nor addressed the language in the ATSI settlement agreement.[114] ATSI states that it has never acquiesced in a disaggregation of its settlement ROE values into different components and the fact that the Commission used conservative values that, for purposes of its risk premium analysis, assumed the maximum amount of adder that could possibly be embedded in ATSI's black box ROE is legally irrelevant.

59. ATSI clarifies that it is a public utility that directly owns transmission facilities in both Ohio and Pennsylvania and operates those facilities as a fully integrated network with a single zonal rate; it is not a multi-state holding company, nor does not have a joint rate with any other affiliates.[115] ATSI states that, because a portion of its facilities is located outside of Ohio, the Ohio statute does not cause ATSI's participation in PJM to be involuntary with respect to all of ATSI's transmission assets and Ohio cannot dictate the application of the RTO Adder in other states.[116]

e. Determination

60. As discussed below, we find that OCC has shown that the rates for Ohio Power and AEP Ohio Transmission

---

[114] *Id.* at 5.

[115] *Id.* at 7.

[116] *Id.* at 7-8.

are unjust and unreasonable because the Commission specifically granted them an RTO Adder under section 219 and that their continued participation in a Transmission Organization is mandatory. We find that OCC has not met its burden of showing the rates for Duke and ATSI are unjust and unreasonable as the Commission did not specifically grant them an RTO Adder under section 219 and their rates were instead the products of comprehensive settlements.

61. Section 219(c) states that, "[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."[117] The Commission implemented this directive in Order No. 679, finding that an RTO Adder is appropriate for entities that choose to remain members of a Transmission Organization because, in relevant part, continuing membership is "generally voluntary."[118] The Commission determines a utility's eligibility for the RTO Adder separately from its analysis of the utility's base ROE, subject to the total ROE including the RTO Adder remaining within the zone of reasonableness.[119] In Order No. 679, the

---

[117] 16 U.S.C. § 824s(c).

[118] Order No. 679, 116 FERC ¶ 61,057 at P 331.

[119] *See*, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,166, at PP 11-13 (2015) (finding that applicants were eligible for the RTO Adder but had not shown that the overall ROE resulting from the application of the RTO Adder had not been shown to be just and reasonable and conditioning inclusion of the RTO Adder subject to the resulting ROE being within the zone of reasonable as determined in an existing complaint proceeding); *N.Y. Indep. Sys.*

Commission also found that single-issue ratemaking can support the infrastructure investment goals of section 219.[120] Accordingly, the Commission stated that it will allow applicants to make single-issue ratemaking filings to obtain the adder, and that the Commission will consider the potential need to combine or reconcile new and existing transmission rates when an applicant submits an incentive request.

i. Ohio Power and AEP Ohio Transmission

62. Ohio Power and AEP Ohio Transmission sought—and the Commission made—a specific determination on the RTO Adder incentive for each entity in accordance with section 219. In 2008 and 2009, respectively, Ohio Power and AEP Ohio Transmission submitted to the Commission, pursuant to section 205, revised tariff sheets establishing formula rates that included an RTO Adder. In accepting those formula rates, the Commission specifically evaluated and granted up to 50 basis points of incentive ROE to each entity, noting that the incentive was consistent with the stated purpose of section 219 and was based on the policy of encouraging

---

Operator, Inc., 151 FERC ¶ 61,004, at P 89 (2015) ("We clarify that in the hearing proceedings discussed below, NY Transco's zone of reasonableness will be established, as well as a determination of where within that zone its base level ROE should be set. The ROE incentive approved herein (50 basis points RTO adder) will be bounded by the upper end of the zone of reasonableness determined at hearing.").

[120] Order No. 679, 116 FERC ¶ 61,057 at PP 191-92.

utilities to join and remain in an RTO/ISO.[121] In the Complaint, OCC appropriately identified the specific RTO Adders approved by the Commission that are applicable to Ohio Power and AEP Ohio Transmission and made a good faith effort to quantify the financial impact of the RTO Adders with available data and information.[122] Because the Commission specifically evaluated and granted RTO Adders to Ohio Power and AEP Ohio Transmission on a single-issue basis, separate from all other ROE issues, we may reevaluate and revise those specific incentives on a single-issue basis in response to the changed circumstances raised in the Complaint.[123]

63. We agree with OCC that the RTO Adder, as approved by the Commission pursuant to section 219 for Ohio Power and AEP Ohio Transmission, is no longer just and reasonable.[124] As the Commission found in the

---

[121] *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 30; *AEP Appalachian Transmission Co.*, 130 FERC¶61,075 at P 21.

[122] 18 C.F.R. § 385.206(b)(4).

[123] The Commission granted the adder prior to setting the base ROE for hearing, so when the parties entered into settlement discussions, they knew they were negotiating only the base ROE. *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 20; *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at P 19.

[124] *See Int'l Transmission Co. v. FERC*, 988 F.3d 471, 485 (D.C. Cir. 2021) (finding the Commission had satisfied its section 206 burden to show an expressly granted adder independent of the underlying ROE became unjust and reasonable when the Commission found "the merger had reduced [the utility's] independence," which was the basis of granting the adder).

Dayton Orders, the Ohio statute mandates that an entity shall not "own or control transmission facilities… unless [it] is a member of, and transfers control of those facilities to, one or more qualifying transmission entities" that complies with nine criteria, one of which is that the qualifying transmission entity be approved by the Commission.[125] As with Dayton, Ohio Power and AEP Ohio Transmission are required to join a Transmission Organization under Ohio law.[126] As such, Ohio Power and AEP Ohio Transmission do not qualify for an RTO Adder under the Commission's incentives policy because Order No. 679, as interpreted in *CPUC*, requires a showing of voluntary membership in a Transmission Organization, which, as noted, they cannot make.[127] Therefore, we find that the RTO Adders

---

[125] Dayton Initial Order, 176 FERC ¶ 61,025 at P 56 (citing to Ohio Rev. Code, § 4928.12).

[126] Moreover, whether AEPSC's affiliates' decision to specifically join PJM was voluntary is irrelevant; their decision to join a Transmission Organization is required by Ohio law.

[127] We decline to address arguments that the Ohio statute does not mandate participation in a Transmission Organization and that *CPUC* does not impose a voluntariness requirement, as these arguments amount to impermissible collateral attacks on the Dayton Orders. *See* e.g., *NSTAR Elec. Co. v. ISO New England, Inc.*, 120 FERC ¶ 61,261 at P 33 (2007) ("[c]ollateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, thwart the finality and repose that are essential to administrative efficiency, and are strongly discouraged"); *see ISO New England Inc.*, 138 FERC ¶ 61,238, at P 17 (2012) ("[A] collateral attack is an attack on a judgment in a proceeding other than a direct appeal and is generally prohibited.").

granted to Ohio Power and AEP Ohio Transmission pursuant to section 219 are unjust and unreasonable.

ii. Duke and ATSI

64. We find that Duke and ATSI are not similarly situated to Ohio Power and AEP Ohio Transmission. Unlike the RTO Adders for Ohio Power and AEP Ohio Transmission, which the Commission evaluated and granted under section 219 as an incentive to encourage participation in an RTO,[128] Duke's and ATSI's ROEs, including any adders, were each embedded in a comprehensive settlement package submitted to the Commission to resolve a complex, multi-issue dispute among those entities, their customers, and other affected parties.[129] We do not know the precise trade-offs and concessions made by parties to those proceedings during the settlement process and the terms to which and conditions to which those parties would have agreed with respect to Ohio transmission assets had the Commission policy on RTO Adders been different. As such, we do not find it would be appropriate to change unilaterally a single aspect of such a comprehensive settlement, at least absent evidence that the overall ROE has become unjust and

---

[128] The Commission granted the RTO Adders separately from all other ROE issues. *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at PP 19, 21; *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 30.

[129] *Duke Energy Ohio, Inc.*, 151 FERC ¶ 61,029 at PP 10, 14; *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,106 at P 3.

unreasonable, which OCC has not adduced in this proceeding.[130]

65. We recognize that the parties in Duke's settlement agreed upon a 10.88% base cost of common equity and a 50-basis point ROE adder.[131] We also recognize that the ATSI settlement stated that the agreed-upon ROEs were inclusive of any incentive adder for RTO participation and that ATSI's affiliates testified in other proceedings that ATSI's base ROE is 9.88%, rather than the 10.38% ROE contained in the ATSI settlement.[132] But, as noted, those figures were agreed upon as part of

---

[130] *See Sithe/Indep. Power Part., L.P. v. FERC*, 165 F.3d 944, 951 (D.C. Cir. 1999) ("the Commission itself has, in the past, interpreted the § 206 burden scheme to require a customer seeking an investigation into existing rates to 'provide some basis to question the reasonableness of the overall rate level, taking into account changes in all cost components and not just [the challenged component]'") (citing to *Houlton Water Co.*, 55 F.E.R.C. ¶ 61,037, at 61,110 (1991); *City of Hamilton, Ohio v. Kentucky Power Co.*, 72 F.E.R.C. ¶ 61,158, at 61,785-86 (1995)); *see also Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (*Emera Maine*) ("The FPA, by requiring FERC to show that an existing rate is unlawful before ordering a new rate under section 206, provides a form of 'statutory protection' to a utility.") (citation omitted).

[131] Duke, Settlement Agreement, Docket No. ER12-91-000, at art. 3.3.a (filed Oct. 30, 2014).

[132] ATSI, Settlement Agreement and Offer of Settlement, Docket No. ER15-303-000, at § II.C.2 (filed July 20, 2015); *Jersey Cent. Power & Light Co.*, Docket No. ER20-227-000, Ex. No. JCP-207, at 5 (Oct. 30, 2019); *Jersey Cent. Power & Light Co.*, Docket No. ER17-217-000, Ex. No. JCP-13, at 5 (Oct. 28, 2016); PJM Interconnection, L.L.C., Docket No. ER21-265-000, Ex. KTC-208, at 2 (Oct. 30, 2020) (listing an authorized return for ATSI as 9.88%).

integrated, comprehensive settlements of the entire proceeding(s), and we cannot know what, if anything, the parties agreed to in exchange for settling on those ROE figures. For those reasons, we will not disturb one aspect of these comprehensive settlements absent a showing that the resulting overall ROEs are unjust and unreasonable.

66. We are not persuaded by OCC's argument that it would be unduly discriminatory for the Commission to allow certain entities, but not others, to retain the RTO Adder. Indeed, as explained above, we have not found that Duke and ATSI are entitled to an RTO Adder. We find only that OCC has failed in its burden under section 206 to show that Duke's and ATSI's ROEs are unjust and unreasonable because they were determined as part of an integrated settlement package rather than separately granted under section 219 and Order No. 679. Therefore, we find that OCC failed to meet its burden to demonstrate that allowing the Duke and ATSI settlements to stand results in unduly discriminatory rates, charges, or classifications.

2. Proposed Replacement Rate and Refunds

67. OCC argues the Commission should establish just and reasonable replacement rates for the Ohio TOs that exclude the RTO Adder and direct the Ohio TOs to provide credits or refunds to customers, including interest calculated pursuant to 18 C.F.R. § 35.19a, with a refund effective date as of the date the Complaint was filed.[133]

---

[133] Complaint at 16.

a. Comments in Support

68. Buckeye, IEU-Ohio, and NOPEC argue that the Commission should establish the refund effective date as February 24, 2022, the date the Complaint was filed, and should expeditiously order the Ohio TOs to file to revise their respective transmission formula rates to eliminate the RTO Adder.[134]

69. IEU-Ohio argues that, while PJM's Dayton transmission zone was exclusively within Ohio, and the AEP, DEOK, and ATSI transmission zones extend beyond Ohio, that fact does not prevent the Commission from requiring AEPSC, Duke, and ATSI to identify the revenue effect of removing the 50 basis point RTO Adder from their Ohio-based transmission facilities and reflect that reduction as a reduced revenue requirement for the transmission zone.[135] For example, IEU-Ohio argues that AEP's formula rate for the AEP transmission zone in PJM already separately identifies the transmission facilities owned by AEP's Ohio electric utility, Ohio Power Company. IEU-Ohio argues that, for transmission facilities that are not already clearly segregated and identified as Ohio assets, the Commission should direct AEPSC, Duke, and ATSI to identify any transmission assets reflected in their formula rate filings that are Ohio-based and to eliminate the RTO Adder to those facilities.[136]

---

[134] Buckeye March 31 Comments at 9-10; IEU-Ohio Comments at 4-5; NOPEC Comments at 7.

[135] IEU-Ohio Comments at 3.

[136] *Id.* at 3-4.

b. Answers

70. AEPSC argues that, to the extent that OCC seeks an Ohio-only remedy, such a solution is impracticable.[137] AEPSC argues that to implement such a remedy the Commission would need to require AEPSC to disaggregate its transmission operations, so that each state's transmission facilities would be subject to a different tariff with its own ROE. AEPSC claims that requiring AEP to restructure itself in this way would harm customers by eliminating the efficiencies that arise from a larger footprint, including access to lower-cost capital; reduced overhead; coordinated transmission planning; and fewer regulatory filings. AEPSC further asserts that OCC's requested remedy would be forcing one state's policy choice onto other states, which is not supported by the Dayton Orders.[138] AEPSC argues that it would be particularly inappropriate for the Commission to prioritize Ohio's policy because it is inconsistent with the principle of voluntary participation in regional transmission organizations from Order No. 2000.

71. ATSI argues that the Commission should deny OCC's request that the Ohio TOs provide detailed data showing the impact on consumers of a 50 basis point reduction in their ROEs, on the grounds that such a request turns the burden under section 206 on its head.[139] ATSI also claims that this request is nonsensical

---

[137] AEPSC March 31 Answer at 13-14.

[138] *Id.* at 12-13.

[139] ATSI March 31 Answer at 23-24.

when applied to ATSI because ATSI's ROE does not specify the inclusion of an RTO Adder.

c. Additional Answers

72. OCC states that the transmission rates Ohio consumers pay should be decreased by a 50 basis point reduction to their ROEs for their Ohio transmission investment to reflect the fact that AEPSC's, ATSI's, and Duke's Ohio affiliates are ineligible for the RTO Adder.[140] OCC states that the proper remedy is to fashion an Ohio-only remedy even if it would require the companies to file separate tariffs. OCC states that the fact that AEPSC's, ATSI's, and Duke's Ohio transmission affiliates share regional tariffs with other affiliates providing transmission service in PJM does not invalidate the need for a remedy for Ohio consumers.[141] OCC states that it is not asking to "privilege" the Ohio statute over other state statutes but rather is asking that the Ohio statute applies to Ohio's customers.

73. Buckeye argues that the Ohio TOs have not demonstrated any true burdens or inefficiencies that would necessarily result from a just and reasonable rate, but rather because AEPSC already has separate formula rate templates for its Ohio affiliates, any administrative burden of a potential Ohio-specific remedy should be minimal.[142]

---

[140] OCC April 15 Answer at 16.

[141] *Id.* at 17.

[142] Buckeye April 15 Answer at 9-10.

74. OCC states that if the rate decreases cannot occur on an Ohio-only basis, the Commission should apply the rate decrease throughout AEP's, ATSI's, and Duke's multistate service areas.[143] OCC states that, since at least one of the AEPSC, ATSI, and Duke affiliates serving in PJM must join an RTO to comply with Ohio law and, if these utilities operate under a single tariff with a single ROE, these Ohio affiliates' participation in PJM is still mandated by Ohio law.[144] OCC states that, even if only one state has mandated RTO participation, the reality is that the participation by all the affiliates in that RTO is not voluntary.[145] OCC states that, to the extent these utilities have decided to manage their corporate business on a company-wide basis over all their affiliates in PJM, these voluntary decisions cannot justify imposing unjust and unreasonable rates on Ohio consumers. OCC reiterates that its priority is to protect Ohio consumers from unjust and unreasonable rates.

75. AEPSC answers that carving out AEP's Ohio affiliates and treating them as if they are discrete facilities as opposed to facilities integrated within the entire AEP network ignores the purpose and design of AEP's transmission network that provides service to multiple states.[146] AEPSC states that to strip out the Ohio companies is inconsistent with the basis on which AEP joined PJM and would require AEP to reevaluate

---

[143] OCC April 15 Answer at 2.

[144] *Id.* at 19.

[145] *Id.* at 20-21.

[146] AEPSC May 2 Answer at 6.

its decision to operate an integrated system and may require the establishment of separate transmission zones or changes in RTO membership. AEPSC also states that there is no basis for OCC's alternative solution to remove the adder from all of AEPSC's affiliates, as no legal theory or precedent supports the removal of an incentive for an integrated, multi-state utility's decision to join an RTO just because one state within the multi-state utility's footprint purports to require RTO membership.[147]

d. Determination

76. Under the second prong of section 206, whether initiated by a complaint or *sua sponte*, the Commission has the burden to establish a just and reasonable rate to replace the rate it has found unjust and unreasonable.[148] The Commission need not adopt the best or perfect rate, as long as the Commission has explained its choice and chosen a just and reasonable rate.[149]

---

[147] *Id.* at 7.

[148] *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,134, at P 114 & n.173 (2020) (*PJM I*) (citing *FirstEnergy Serv. Co. v. FERC*, 758 F.3d at 353; *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011)), *order on reh'g*, 174 FERC ¶ 61,180 (2021) (*PJM II*)).

[149] *PJM II*, 174 FERC ¶ 61,180 at P 27 & n.75 (citing *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1169 (D.C. Cir. 1996) (per curiam) ("FERC correctly counters that the fact that AEPCO may have proposed a reasonable alternative to SFV rate design is not compelling. The existence of a second reasonable course of action does not invalidate an agency's determination."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 955 (D.C. Cir. 2007) ("We need not decide whether the Commission has adopted the best possible policy

77. We find that the just and reasonable replacement rate is the removal of the 50 basis point RTO Adder from the formula rates of Ohio Power and AEP Ohio Transmission, which the Commission previously granted pursuant to section 219 for the purpose of encouraging those entities to join and remain in PJM. We find this replacement rate to be just and reasonable because the RTO Adder does not provide an incentive for those entities to join or continue to participate in a Transmission Organization and it is inconsistent with Commission policy that membership in such organizations is generally voluntary.[150] Moreover, we find this replacement rate to be just and reasonable because, as the Commission found in the Dayton Orders, the Commission's decision pertaining to the RTO Adder is irrelevant to a utility's base ROE and financial integrity, credit ratings, and ability to attract investment.[151] Accordingly, we direct Ohio Power and AEP Ohio Transmission to make a compliance filing, within 30 days of the date of this order, to revise their ROE from 10.35% to 9.85% on Lines 156 and 138, respectively, of their formula rates, and revise Note S to clarify that the RTO Adder does not apply to these

---

as long as the agency has acted within the scope of its discretion and reasonably explained its actions."); *Cities of Batavia v. FERC*, 672 F.2d 64, 84 (D.C. Cir. 1982) ("[T]he billing design need only be reasonable, not theoretically perfect.")).

[150] Order No. 679, 116 FERC ¶ 61,057 at P 331.

[151] Dayton Initial Order, 176 FERC ¶ 61,025 at P 29.

affiliates.[152] Because we are dismissing the Complaint as to Duke and ATSI, we decline to address the arguments pertaining to proposed replacement rates for those entities.

78. We do not find persuasive AEPSC's argument that removing the RTO Adder would require AEP's Ohio utilities to restructure their operations so that each would file a separate transmission tariff with their own ROE or require AEP's Ohio utilities to operate on a stand-alone basis independent from their other transmission entities. We are also unpersuaded by AEPSC's argument that, because AEP operates an integrated system and its decision to join PJM[153] was made on a system-wide basis, its Ohio affiliates should not be treated differently than other AEP companies.[154] Ohio Power and AEP Ohio Transmission are the Ohio-

---

[152] Note S for both the Ohio Power and AEP Ohio Transmission Formula Rates states that "[i]t includes an additional 50 basis points for PJM RTO Membership" when describing the ROE. PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT Attachment H-14B Part I – (AEP East Companies) (8.0.0), at Note S; H-20B Part I – AEPTCo (5.0.0), at Note S.

[153] AEPSC states that AEP integrated its operating companies into PJM in 2004. AEPSC March 31 Answer at 7 (citing *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,318 (2004), *reh'g denied*, 110 FERC ¶ 61,395 (2005)). AEP has provided no reason why its transmission lines in Ohio could not become part of an RTO even if its other transmission lines were not.

[154] As discussed above, the Ninth Circuit's decision in *CPUC* and the Commission's decision applying *CPUC* to Ohio law in the Dayton Orders have created a change in circumstance that warrant treating Ohio Power and AEP Ohio Transmission different from other AEPSC affiliates.

only companies of AEP, and do not own or operate facilities outside of Ohio.[155] As such, for the reasons described above, it is just and reasonable for AEP to reduce the ROE component of its formula rate for Ohio Power and AEP Ohio Transmission without modifying the ROEs of the other AEPSC affiliates. We are similarly unpersuaded by AEPSC's suggestion that granting the Complaint would amount to giving priority to one state's policy over another state's policy. The replacement rate adopted herein appropriately removes the RTO Adder from the rates of AEP's Ohio-only affiliates because those affiliates' participation in an RTO are not voluntary and does not modify the ROE of entities that own or operate assets outside of Ohio. While our decision does not impact the ROEs of entities that own or operate facilities outside of Ohio, we recognize that, because Ohio Power and AEP Ohio Transmission are part of the AEP Zone, the removal of the RTO Adder from their rates will impact the zonal transmission rate. But that effect is no different from any effect on the zonal transmission rate resulting from any other cost change by a public utility in the AEP Zone. It is a function of the way in which the utilities have designed their rates.

79. Section 206(b) provides that, upon the filing of a complaint, the Commission must establish a refund effective date that is no earlier than the date of the complaint and no later than five months subsequent to

---

[155] *See*, Ohio Power's and AEP Ohio Transmission's 2021 FERC Form No. 1, submitted May 19, 2022, at 101, question 4, each stating that their operations are located solely in the State of Ohio.

the date of the complaint. In such cases, in order to give maximum protection to customers, and consistent with Commission precedent, the Commission has historically tended to establish the section 206 refund effective date as the earliest date allowed by section 206.[156] That date is the date of the Complaint, which is February 24, 2022. We therefore direct Ohio Power and AEP Ohio Transmission to provide refunds from February 24, 2022 until the date such refunds are made.[157]

3. Other Arguments

80. Several parties argue that the question of whether a utility is entitled to an RTO Adder under section 219 turns solely on whether that utility has joined an RTO, without regard to its reasons for joining, and that section 219 leaves no room for a voluntariness requirement.[158] These parties argue that OCC asks for an interpretation of Order No. 679 that is inconsistent with the plain language of the statute. OCC responds that the Ninth Circuit rejected the Ohio TOs' argument in *CPUC* as inconsistent with Order No. 679. OCC claims that the Ohio TOs regard the RTO Adder as an entitlement for being an RTO member, but under the plain wording of section 219, what is offered is not an entitlement or

---

[156] *See*, e.g., *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

[157] *See Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018).

[158] AEPSC March 31 Answer at 26; Duke Answer at 8; ATSI March 31 Answer at 15; EEI Comments at 4; WIRES Comments at 5; PJM Comments at 2-3.

reward but an "incentive." Thus, OCC argues that section 219 does contain a "voluntariness" requirement in that it only authorizes incentives or inducements to take action that is not otherwise mandated.[159] OCC states that it is consistent with longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced.[160]

81. Moreover, the Ohio TOs and WIRES argue that the Ohio statute is invalid under the doctrine of field preemption because the Commission has exclusive jurisdiction over interstate transmission and the sale of electricity.[161] The Ohio TOs and WIRES also argue that the Ohio statute conflicts with sections 202 and 219 of the FPA and the Commission's general policy on voluntary RTO participation and thus is invalid under the doctrine of conflict preemption.[162] OCC responds that the Ohio statute neither intrudes on a field where the state has no authority nor conflicts with the requirements of federal law or policy and is thus not preempted.[163] OCC argues that Congress has not legislated so comprehensively with regard to electric transmission that there is no room for the states to supplement federal law, pointing

---

[159] OCC April 15 Answer at 25.

[160] *Id.* at 26.

[161] AEPSC March 31 Answer at 20-23; Duke Answer at 12-13; ATSI March 31 Answer at 20-21; WIRES Comments at 6.

[162] AEPSC March 31 Answer at 24-26; Duke Answer at 13-14; ATSI March 31 Answer at 21-22; WIRES Comments at 7-8.

[163] OCC April 15 Answer at 21.

to state regulation over transmission siting and rates for unbundled retail transmission.[164] OCC further argues that there is no conflict between the Ohio statute and the FPA, but rather the Ohio statute facilitates the implementation of federal policy by requiring that Ohio transmission providers separate control of transmission and generation, reduce rate pancaking, and ensure that control of transmission facilities cannot be exercised by transmission users.[165]

82. Additionally, AEPSC, ATSI, and EEI claim that application of a voluntariness requirement ignores the substantial benefits generated for customers by RTO participation, and the corresponding risks faced by a utility that participates in an RTO, which do not change whether or not their participation is mandated.[166] PJM and WIRES state that the benefits of RTO membership to public utility customers outweigh the costs of the RTO Adder.[167] Buckeye answers that these arguments do not rebut the Complaint's demonstration that the Ohio TOs' current rates are unjust and unreasonable, but are an attempt to persuade the Commission to change its policy.[168]

---

[164] *Id.* at 21-22.

[165] *Id.* at 22-23.

[166] AEPSC March 31 Answer at 33; ATSI March 31 Answer at 19-20; EEI Comments at 7.

[167] PJM Comments at 3-4; WIRES Comments at 10.

[168] Buckeye April 15 Answer at 4.

a. Determination

83. Section 219(c) states that, "[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."[169] The Commission implemented this directive in Order No. 679, finding that an RTO Adder is appropriate for entities that choose to remain members of a Transmission Organization because, in relevant part, continuing membership is "generally voluntary."[170] Relying on the Commission's description of incentive adders as "an *inducement* for utilities to join, and remain in, Transmission Organizations,"[171] the Ninth Circuit in *CPUC* concluded that, since an incentive cannot induce behavior that is already legally mandated, "the voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder."[172] We decline to address arguments that the Ninth Circuit erred in its interpretation of Order No. 679. The parties are making a collateral attack on Order

---

[169] 16 U.S.C. § 824s(c).

[170] Order No. 679, 116 FERC ¶ 61,057 at P 331.

[171] *CPUC*, 879 F.3d at 974 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86) (emphasis in original).

[172] *Id.* at 975 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86). The term "incentive" as normally defined means something that incites or has a tendency to incite to determination or action." Merriam-Webster On-line Dictionary, https://www.merriam-webster.com/dictionary/incentive#:~:text=Definition%20of%20incentive,incite%20to%20determination%20or%20action.

No. 679 by arguing that Order No. 679 failed to go as far as section 219(c) requires. Such issues should have been raised on rehearing of Order No. 679 and not as collateral attacks on a rulemaking determination.[173]

84. We also decline to address the merits of the preemption arguments raised by the parties in this proceeding. The Complaint turns on whether OCC has demonstrated that the Ohio TOs' rate, inclusive of the RTO Adder, is unjust, unreasonable, unduly discriminatory, or preferential. Our finding that OCC met its burden under section 206 regarding the inclusion of the RTO Adder in Ohio Power's and AEP Ohio Transmission's rates is based on the Ninth Circuit's interpretation of Order No. 679 in *CPUC* and the Commission's decision in the Dayton Orders, as applied to the facts of this Complaint. By contrast, the parties' preemption arguments seek a determination from the Commission regarding the constitutionality of an Ohio law. We find that, as previously found, given the facts and circumstances before us, this Complaint proceeding is not an appropriate procedural vehicle to address the constitutionality of the Ohio statute.[174] We do not have

---

[173] *Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 823 F.3d 641, 651 (D.C. Cir. 2016) ("it is 'hornbook administrative law that an agency need not—indeed should not—entertain a challenge to a regulation' in an individual adjudication"); *ISO New England Inc.*, 138 FERC ¶ 61,238,at P 17 ("a collateral attack is an attack on a judgment in a proceeding other than a direct appeal, and is generally prohibited" (internal citations omitted)).

[174] Dayton Rehearing Order, 178 FERC ¶ 61,102 at PP 31-32 (quoting Dayton Initial Order, 176 FERC ¶ 61,205 at P 71).

a sufficient record on this constitutional issue.[175] Moreover, as we noted in the Dayton Orders, even if we were to consider this issue, only a federal court has the ultimate authority to invalidate the Ohio statute. Given the facts before us, we will exercise our discretion not to further address the preemption issue.

85. Finally, we are not persuaded by arguments from AEPSC, ATSI, EEI, PJM, and WIRES that the benefits of RTO/ISO membership warrant an RTO Adder regardless of whether participation in an RTO/ISO is mandatory. As the Commission found in the Dayton Initial Order, "we do not believe it would be appropriate to award an incentive for an action that the requesting entity is required by law to take, even where that action comes with substantial benefits or risks."[176] Moreover, as the court in *CPUC* observed, the Commission:

> [h]as a longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced. This policy is incorporated in Order 679. The policy prohibits FERC from rewarding utilities for past conduct or for conduct which they are otherwise obligated to undertake.[177]

---

[175] We note that the Ohio Attorney General did not intervene or provide a defense of the Ohio statute.

[176] Dayton Initial Order, 176 FERC ¶ 61,025 at P 30.

[177] *CPUC*, 879 F.3d at 977.

The Commission orders:

(A) The Complaint is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(B) Ohio Power and AEP Ohio Transmission are hereby directed to make a compliance filing, within 30 days of the date of this order, to remove the RTO Adder from their rates effective February 24, 2022, as discussed in the body of this order.

(C) Ohio Power and AEP Ohio Transmission are hereby directed to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2021), within 60 days of the date of this order, for the period from February 24, 2022 through the date that refunds are made.

(D) Ohio Power and AEP Ohio Transmission are hereby directed to file a refund report detailing the principal amounts plus interest paid to each of their customers within 60 days of the date of this order.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached. Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Office of the Ohio Consumers' Counsel Docket No. EL22-34-000

v.

American Electric Power Service Corporation, American Transmission Systems, Inc., and Duke Energy Ohio, LLC

(Issued December 15, 2022)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I dissent from this order eliminating transmission organization membership incentives from the rates of American Electric Power Service Corporation affiliates Ohio Power Company (Ohio Power) and AEP Ohio Transmission Company Inc. (AEP Ohio Transmission).[1] The Federal Power Act does not limit incentives to only those utilities that "voluntarily" join a transmission organization.[2] The Commission improperly added this

[1] *Off. of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 (2022).

[2] *See id.* PP 60-63, 83.

non-statutory requirement in Order No. 679.[3] We had no authority to do so then or now.

2. Section 219(c) of the Federal Power Act provides that "the Commission shall . . . provide for incentives to each transmitting utility or electric utility *that* joins a Transmission Organization."[4] This plain statutory text does not limit the provision of incentives to only those utilities "that 'voluntarily' join[]" a transmission organization. Congress could have established this limitation, but Congress did not.

3. The Commission itself added the "voluntary" limitation in Order No. 679 and subsequent orders implementing the statutory text. I do not see this addition as an example of the Commission filling in unforeseen interstices in a statutory regime or acting in the face of statutory ambiguity. Order No. 679 works an amendment of unambiguous law and only Congress—not FERC—has the authority to pass and amend statutes. Congress said the Commission *shall* provide incentives to a utility "that joins" a transmission organization. Ohio could thus mandate that Ohio Power and AEP Ohio Transmission join a transmission organization and Ohio Power and AEP Ohio Transmission would *still* qualify for the incentive under

---

[3] *See Promoting Transmission Inv. through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, at P 331 (2006), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

[4] 16 U.S.C. § 824s(c) (emphasis added).

the plain terms of the statute for as long as it remains in a transmission organization.

4. The ruling of the 9th Circuit Court of Appeals that under Order No. 679 "the voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder" does not change the meaning of the statute.[5] The Court in *CPUC* did not interpret section 219(c) of the Federal Power Act; it only interpreted and ruled on Order No. 679. *CPUC* does not address whether FERC improperly exceeded the statutory text by limiting the incentive to a utility "that 'voluntarily' joins" a transmission organization.

5. I therefore would uphold the 50-basis point adder for Ohio Power and AEP Ohio Transmission because they have "joined" PJM, which is a transmission organization. I also would reverse our "voluntariness" limitation in Order No. 679 because it runs afoul of the statute.

6. I concur with the majority's determination that the American Transmission Systems, Inc., and Duke Energy Ohio, LLC, should continue to collect the transmission organization incentive in rates because these incentives were included in comprehensive settlements.[6] I would add the further rationale that section 219(c) of the Federal Power Act requires it, and the subsequent addition of the "voluntariness"

---

[5] *Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 975 (9th Cir. 2018) (*CPUC*).

[6] *Off. of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 at PP 60, 64-66.

requirement was a Commission invention not authorized by the statute, as discussed above.[7]

For these reasons, I respectfully concur in part and dissent in part.

_____

James P. Danly
Commissioner

[7] *See supra*, PP 1-5.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Office of the Ohio Consumers' Counsel — Docket No. EL22-34-000

v.

American Electric Power Service Corporation, American Transmission Systems, Inc., and Duke Energy Ohio, LLC

(Issued December 15, 2022)

CHRISTIE, Commissioner, *concurring*:

1. I concur in this order, which makes various findings consistent with Commission precedent. I write to add more general comments on ROE adders, as I have frequently done before.

2. An ROE adder for RTO participation is "by definition, a subsidy, as any ROE adder is — more 'FERC candy' taken directly from consumers and redistributed to transmission owners."[1]

---

[1] *Midcontinent Indep. Sys. Operator, Inc.*, 181 FERC ¶ 61,094 (2022) (Christie, Comm'r, concurring at P 2) (MISO Concurrence) (available at https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-urging-action-re-rto-participation-adder-docket).

3. I will state again here what I did in my MISO Concurrence last month:[2] two of my colleagues, including the Chairman, in April 2021 joined me in voting to limit the RTO participation adder to three years after joining.[3] Over a year and a half later, we have yet to take a final vote to implement that limit. As long as we do not, consumers will continue to pay these adders at a time when consumers are already facing rapidly rising monthly power bills.

For these reasons, I respectfully concur.

_____

Mark C. Christie
Commissioner

---

[2] *Id.* P 3.

[3] *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Supplemental Notice of Proposed Rulemaking, 175 FERC ¶ 61,035 (2021) (Supplemental NOPR). I note that this Supplemental NOPR modified a March 20, 2020 NOPR issued in that docket. *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, Notice of Proposed Rulemaking, 170 FERC ¶ 61,204, *errata notice*, 171 FERC ¶ 61,072 (2020).

Appendix C

183 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman; James P. Danly, Allison Clements, and Mark C. Christie.

Office of the Ohio Consumers' Counsel
v.
American Electric Power Service Corporation, American Transmission Systems, Inc., and Duke Energy Ohio, LLC

Docket No.EL22-34-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued April 20, 2023)

1. On February 24, 2022, pursuant to sections 206 and 306 of the Federal Power Act (FPA)[1] and Rule 206 of the Commission's Rules of Practice and Procedure,[2] the Office of the Ohio Consumers' Counsel (OCC) filed a complaint (Complaint) against American Electric Power

[1] 16 U.S.C. §§ 824e, 825e.

[2] 18 C.F.R. § 385.206 (2022).

Service Corporation (AEPSC),[3] American Transmission Systems, Inc. (ATSI), and Duke Energy Ohio (Duke) (together, Ohio TOs) alleging that they are ineligible for a 50 basis point adder to the authorized return on equity (ROE) for participation in a Transmission Organization (RTO Adder), provided for under Order No. 679,[4] because their participation is not voluntary under Ohio law. On December 15, 2022, the Commission granted the Complaint in part and denied it in part.[5] On January 17, 2022, OCC and AEPSC separately sought rehearing of the RTO Adder Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,[6] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,[7] we are

---

[3] The Complaint was filed against AEPSC's affiliates, Ohio Power Company (Ohio Power) and AEP Ohio Transmission Company Inc. (AEP Ohio Transmission). These companies are all subsidiaries of American Electric Power Company, Inc. (AEP).

[4] *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).

[5] *Office of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 (2022) (RTO Adder Order).

[6] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[7] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

modifying the discussion in the RTO Adder Order and continue to reach the same result in this proceeding, as discussed below.[8]

I. Background

A. The RTO Adder

3. In 2005, Congress amended the FPA to add a new section 219.[9] Section 219(a) directed the Commission to promulgate a rule providing incentive-based rates for electric transmission for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. In relevant part, section 219(c) states that the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.[10] On July 20, 2006, the Commission issued Order No. 679, adding section 35.35 to the Commission's regulations, which includes, in relevant part, an incentive for utilities that "join and/or continue to be a member of an ISO, RTO, or other Commission-approved Transmission Organization."[11] The Commission declined to make a finding on the appropriate size or duration of the

---

[8] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the RTO Adder Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

[9] Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241.

[10] 16 U.S.C. § 824s(c).

[11] Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345, *order on reh'g*, 119 FERC ¶ 61,062.

incentive, but noted that the basis for providing the incentive to existing members "is a recognition of the benefits that flow from membership in such organizations and the fact [that] continuing membership is generally voluntary."[12] The Commission also declined to create a generic ROE incentive for such membership, and instead decided that it would consider the appropriate ROE incentive when public utilities requested it on a case-by-case basis.[13]

4. In 2018, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) addressed Commission orders where, pursuant to section 219 and Order No. 679, the Commission summarily granted Pacific Gas & Electric Company's (PG&E) requests for an RTO Adder for its continuing membership in the California Independent System Operator (CAISO), notwithstanding California Public Utility Commission's argument that PG&E was ineligible for the incentive because California law required PG&E to participate in CAISO.[14] The Ninth Circuit in *CPUC* recognized that under Order No. 679, the presumption that a utility that has joined, and has ongoing membership in, a Transmission Organization is eligible for an RTO Adder may be rebutted by evidence that such membership is not voluntary.[15] Relying on the Commission's description of incentive adders as "an

---

[12] Order No. 679, 116 FERC ¶ 61,057 at PP 327, 331.

[13] *Id.* P 327.

[14] *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966 (9th Cir. 2018) (*CPUC*).

[15] *Id.* at 974-75.

inducement for utilities to join, and remain in, Transmission Organizations,"[16] the Ninth Circuit concluded that, since an incentive cannot induce behavior that is already legally mandated, "the voluntariness of a utility's membership in a transmission organization is logically relevant to whether it is eligible for an adder."[17] The Ninth Circuit remanded the underlying proceedings and instructed the Commission to "inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO]."[18] On remand, the Commission concluded that California law does not mandate PG&E's participation in CAISO and that the RTO Adder induces PG&E to continue its membership, affirming its grant of an incentive *because* it found PG&E membership in CAISO to be voluntary.[19]

5. On August 17, 2020, in addressing Dayton Power and Light Company's (Dayton) request for certain transmission rate incentives pursuant to FPA sections 205 and 219,[20] the Commission accepted Dayton's requested RTO Adder for filing and suspended it for a five month period, subject to refund and the outcome of a paper hearing to explore whether Dayton had shown

---

[16] *Id.* at 974 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86) (emphasis in original).

[17] *Id.* at 975 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86).

[18] *Id.* at 979.

[19] *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038, at P 2 (2019).

[20] 16 U.S.C. §§ 824d, 824s.

that its participation in PJM Interconnection, L.L.C. (PJM) or another Transmission Organization is voluntary, or if such participation is mandated by the Ohio Revised Code.[21]

6. On July 15, 2021, following briefing, the Commission found that Dayton did not qualify for the RTO Adder and therefore denied Dayton's request.[22] The Commission found that, given Ohio law, Dayton did not qualify for the RTO Adder under the Commission's current incentives policy because: (1) Order No. 679 as interpreted in *CPUC* requires a showing of voluntary membership in such a Transmission Organization; and (2) Dayton's membership in a Transmission Organization is not voluntary because Ohio law requires it.[23]

B. Ohio TOs' Affiliates and the RTO Adder

7. A number of PJM utilities provide service in Ohio and the rates for this service are set forth in the following rate zones: (1) the Dayton Zone, which is wholly located within Ohio; (2) the AEP Zone, which spans Ohio, West Virginia, Indiana, Michigan, Kentucky,

---

[21] *The Dayton Power & Light Co.*, 172 FERC ¶ 61,140, at P 22 (2020). Under the Ohio statute, "no entity shall own or control transmission facilities as defined under federal law and located in this state on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities …." Ohio Rev. Code, §§ 4928.12 (A).

[22] *The Dayton Power & Light Co.*, 176 FERC ¶ 61,025 (2021) (Dayton Order), *order on reh'g*, 178 FERC ¶ 61,102 (2022) (Dayton Rehearing Order) (collectively, Dayton Orders).

[23] Dayton Order, 176 FERC ¶ 61,025 at P 14.

Virginia, and Tennessee; (3) the Duke Zone (DEOK), which spans Ohio and Kentucky; and (4) the ATSI Zone, which spans Ohio and Pennsylvania.[24]

8. AEP has six public utility operating companies located in seven different states in the AEP Zone: Appalachian Power Company, Indiana Michigan Power Company, Ohio Power, Kentucky Power Company, Wheeling Power Company, and Kingsport Power Company (collectively, AEP East Companies). AEP also has several transmission-only entities providing transmission service in PJM in the AEP Zone: AEP Appalachian Transmission Company Inc., AEP Indiana Michigan Transmission Company Inc., AEP Ohio Transmission, Kentucky Transmission Company Inc., and AEP West Virginia Transmission Company Inc. (collectively, AEP East Transmission Companies). Ohio Power and AEP Ohio Transmission are the AEP companies owning and operating transmission facilities in Ohio.

9. The AEP East Companies and the AEP East Transmission Companies each separately have a combined transmission rate on file as Attachments H-14 and H-20 of the PJM Open Access Transmission Tariff (PJM Tariff), respectively.[25] Pursuant to section 219 and Order No. 679, the Commission separately granted the RTO Adder to the AEP East Companies and the AEP East Transmission Companies on the condition that the

---

[24] Ohio Commission Comments at 5-6.

[25] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT Attachment H-14, (2.0.0); *see id.* H-20 (0.0.0).

additional 50 basis points did not result in an ROE above the zone of reasonableness.[26]

10. Duke is a wholly-owned operating subsidiary of Duke Energy Corporation that provides transmission service in the DEOK Zone under Attachment H-22 of the PJM Tariff for Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc., who jointly own transmission facilities. In 2015, the Commission approved an uncontested settlement in connection with Duke's move from the Midcontinent Independent System Operator, Inc. (MISO) to PJM, the terms of which included, among other things, Duke's ROE on its revenue requirement for transmission service which is comprised of a 10.88% base cost of common equity and a 50 basis point RTO Adder for a total ROE of 11.38%.[27]

11. ATSI is a wholly-owned, direct operating subsidiary of FirstEnergy Transmission, LLC, which in turn is a wholly-owned subsidiary of FirstEnergy Corporation. ATSI provides transmission service in the ATSI Zone under Attachment H-21 of the PJM Tariff. In 2015, the Commission approved a settlement, which included, among other things, a 10.38% ROE on ATSI's revenue requirement for transmission service, "inclusive of any RTO Adder."[28]

---

[26] *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306, at P 30 (2008); *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075, at P 21 (2010), *order on reh'g*, 135 FERC ¶ 61,066 (2011).

[27] *Duke Energy Ohio, Inc.*, 151 FERC ¶ 61,029, at PP 10, 14 (2015).

[28] *PJM Interconnection, L.L.C.*, 152 FERC ¶ 63,020, at PP 12-13 (2015); *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,106, at P 3

C. Complaint and RTO Adder Order

12. In its Complaint, OCC asserted that the Commission had found that Ohio law mandates transmission owner participation in an RTO to be eligible to provide transmission service in Ohio.[29] Thus, OCC argued that the Ohio TOs' participation in PJM or any other Transmission Organization was not voluntary, similar to how Dayton's participation was not voluntary because the Ohio statute requires it. OCC argued that, for the reasons explained in the Dayton Orders and *CPUC*, it would be unreasonable to incent transmission owner activity that is already required by Ohio law.[30]

13. The RTO Adder Order granted the Complaint in part and denied it in part.[31] The Commission found that OCC had demonstrated that the rates for Ohio Power and AEP Ohio Transmission were unjust and unreasonable because the Commission specifically granted them an RTO Adder under section 219 and their continued participation in a Transmission Organization is not voluntary.[32] By contrast, the Commission found that OCC did not meet its burden of showing the rates for Duke and ATSI were unjust and unreasonable as the Commission had not specifically granted them an RTO

(2015); *PJM Interconnection, L.L.C.*, Docket No. ER15-303-002 (Mar. 11, 2016) (delegated order).

[29] Complaint at 9.

[30] *Id.* at 9-10.

[31] Order No. 679, 116 FERC ¶ 61,057 at P 60.

[32] *Id.*

Adder under section 219 and their rates were instead the products of comprehensive settlements.[33]

II. Requests for Rehearing

14. OCC argues on rehearing that the Commission erred by: (1) failing to remove an RTO Adder from the rates of Ohio consumers served by ATSI and Duke in light of prior precedent; and (2) reaching a decision that is unduly discriminatory.[34]

15. AEPSC argues on rehearing that the Commission erred by: (1) granting the Complaint as to AEPSC subsidiaries Ohio Power and AEP Ohio Transmission when the Commission's rationale for denying the Complaint as to Duke and ATSI applies equally to AEPSC; (2) inappropriately conducting single issue ratemaking by failing to determine the justness and reasonableness of Ohio Power and AEP Ohio Transmission's total ROEs where those rates were agreed to in settlements; (3) rendering a decision contrary to the language in FPA section 219; (4) departing from prior precedent without justification; (5) failing to find that the Ohio statute is preempted by federal law; and (6) granting the Complaint against Ohio Power and AEP Ohio Transmission when those entities were not named as respondents.[35]

16. On February 1, 2023, ATSI filed a motion for leave to answer and answer to OCC's request for rehearing. On

---

[33] *Id.*

[34] OCC Request for Rehearing at 7-17.

[35] AEPSC Request for Rehearing at 6-23.

that same day, OCC filed a motion for leave to answer and answer AEPSC's request for rehearing.

III. Discussion

A. Procedural Matters

1. Answers

17. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.[36] Accordingly, we deny ATSI's motion to answer and reject ATSI's answer to OCC's rehearing request. We also deny OCC's motion to answer and reject OCC's answer to AEPSC's rehearing request.

2. Pleading Requirements

18. On rehearing, AEPSC argues that the Commission violated its own rules and principles of administrative due process in granting the Complaint against Ohio Power and AEP Ohio Transmission, who were not named as respondents.[37] AEPSC argues that the Complaint vaguely referenced AEPSC's "monopoly utilities" which did not clearly identify the relevant affiliates and failed to meet the notice requirements in the Commission's rules and the Administrative Procedure Act.[38] AEPSC argues that OCC should have been required to amend its Complaint to cure this

---

[36] 18 C.F.R. § 385.713(d)(1) (2022).

[37] AEPSC Request for Rehearing at 21-23 (citing to 18 C.F.R. § 385.206(b)(1)).

[38] *Id.* at 23 (citing to 5 U.S.C. § 554(b); 18 C.F.R. § 385.206(b)(1)).

deficiency.[39] AEPSC argues that the Commission erred by curing the deficiency itself without citing any evidence in the record to support its determination.[40] Moreover, AEPSC argues that the Commission's reliance on *Middle South Services, Inc. v. Middle South Utilities, Inc.*[41] is inadequate to excuse these defects because, in that case, the Commission only addressed the possibility of dismissing the complaint entirely, and did not address the requirement in Rule 206 for a complaint to identify the alleged violation and provide adequate notice to interested parties.[42]

19. We are not persuaded that the Commission should have required OCC to amend its Complaint to name Ohio Power and AEP Ohio Transmission as respondents. As explained in the RTO Adder Order, the Complaint made clear that it was directed at Ohio Power and AEP Ohio Transmission in addition to AEPSC.[43] Contrary to AEPSC's argument that the Complaint was too vague to provide notice to these parties, we continue to find that the Complaint clearly identified Ohio Power and AEP Ohio Transmission and sufficiently put those parties on notice of the Complaint filed against them. While the Complaint names AEPSC and its "monopoly affiliates" as respondents, it also specifically names Ohio Power

---

[39] *Id.* at 22.

[40] *Id.* at 22-23.

[41] *Id.* at 23 (discussing *Middle S. Servs., Inc. v. Middle S. Utils., Inc.*, 15 FERC ¶ 61,302 (1981) (*Middle South*)).

[42] *Id.* at 21-22 (citing 18 C.F.R. § 385.206(b)(1)).

[43] RTO Adder Order, 181 FERC ¶ 61,214 at P 29.

and AEP Ohio Transmission, stating that "AEP, ATSI and Duke all directly, or indirectly through their affiliates, provide transmission service in Ohio [via] Ohio Power Company (including Columbus Southern Power Company) and AEP Ohio Transmission Company."[44] Moreover, AEPSC is designated as an entity accepting service "for its operating companies of … Ohio Power Company … and any affiliate of American Electric Power Company, Inc."[45] Under such circumstances, penalizing OCC for failing to more specifically or prominently name those affiliated companies as respondents would "elevate form over substance" given that OCC clearly identified those entities in the language and substance of the complaint.[46] We are also not convinced by AEPSC's attempt to distinguish *Middle South* on the basis that, there, the Commission only addressed the possibility of dismissing the complaint entirely, and did not address the Rule 206

---

[44] Complaint at 1-2, 10.

[45] Federal Energy Regulatory Commission, *Corporate Officials*, https://www.ferc.gov/corporate-officials (under "Electric Matters - A").

[46] *See Middle South*, 15 FERC at 61,661 (declining to dismiss complaint against subsidiary parties when the intent to include them was "clear from the language and substance of the complaint"). Indeed, AEPSC's answer to the Complaint demonstrated that it understood the Complaint was directed to, among others, Ohio Power and AEP Ohio Transmission's rates. AEPSC Answer at 18 ("the OCC does not and cannot meet its burden of showing that the existing rate for the AEP Ohio Companies [defined as Ohio Power and AEP Ohio Transmission] is unjust and unreasonable").

standard.[47] AEPSC's requested relief would prejudice OCC by requiring a later effective date[48] for the same insubstantial reasons that the Commission rejected in *Middle South*. AEPSC provides no explanation as to why the reasoning in *Middle South* does not apply equally to protecting parties threatened with harm short of dismissal. Thus, we continue to find that Ohio Power and AEP Ohio Transmission had adequate notice of the Complaint.

B. Substantive Matters

20. We sustain the result of the RTO Adder Order. We continue to find that OCC demonstrated that the Ohio Power and AEP Ohio Transmission rates were unjust and unreasonable; the Commission specifically granted them an RTO Adder under section 219, and their continued participation in a Transmission Organization is not voluntary.[49] By contrast, OCC did not meet its burden to show the Duke and ATSI rates were unjust and unreasonable; the Commission had not specifically granted them an RTO Adder under section 219 and their rates, inclusive of any RTO Adder, were instead parts of comprehensive settlements.[50] As discussed in more detail below, none of the issues raised in the rehearing

---

[47] AEPSC Request for Rehearing at 21-23.

[48] *See id.* at 23 (arguing that the Commission should "reset the effective date").

[49] Order No. 679, 116 FERC ¶ 61,057 at P 60.

[50] *Id.*

requests persuade us that the Commission's conclusions were in error.

1. OCC

a. Justness and Reasonableness

i. Request for Rehearing

21. OCC argues that the Commission erred in finding that OCC failed to demonstrate that the RTO Adder rendered ATSI's and Duke's Ohio transmission rates unjust and unreasonable.[51] OCC maintains that ATSI's and Duke's rates are no different from those in the Dayton Orders where the Commission found the inclusion of the RTO Adder to be improper because participation in an RTO was mandatory under Ohio law.[52] OCC also argues that allowing ATSI and Duke to retain their RTO Adders represents an unexplained departure from Commission precedent[53] because the Commission in Order No. 679 stated that, "[i]t is true that our reforms adopted in the Final Rule provide 'incentives' to construct new transmission, *but they do not constitute an 'incentive' in the sense of a 'bonus' for*

---

[51] OCC Request for Rehearing at 7-14.

[52] *Id.* at 7-8.

[53] *Id.* at 9 (citing to *Williams Gas Processing – Gulf Coast Co., L.P., v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (citing *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) ("[I]t is 'axiomatic that [agency action] must either be consistent with prior [action] or offer a reasoned basis for its departure from precedent'")).

good behavior."[54] OCC asserts that the Ninth Circuit in *CPUC* essentially agreed with the Commission's ruling in Order No. 679 in finding that "[t]he policy prohibits FERC from rewarding utilities for past conduct or for conduct which they are otherwise obligated to undertake."[55]

22. OCC argues that the fact that the RTO Adder was included in ATSI and Duke's transmission rates via settlement rather than in a FERC order in a single-issue case is irrelevant.[56] It notes that Order No. 679 contemplates the addition of RTO Adders via several mechanisms, including "(1) through a combination of a petition for declaratory order and a subsequent section 205 filing; or (2) by filing only a section 205 filing."[57] Thus, it believes, the adder can be obtained so long as the Commission approves a section 205 filing that contains it.[58] OCC argues that "[a] settlement in a rate proceeding is still a section 205 proceeding" and, therefore, an RTO Adder obtained through that means should be treated no differently from other RTO Adders. OCC believes that the Commission's ruling that settlements reflect a compromise of positions and thus override the fact that the RTO Adders are in the rates being charged to consumers is illogical. OCC alleges

---

[54] *Id.* (citing Order No. 679, 116 FERC ¶ 61,057 at P 26) (emphasis added by OCC).

[55] *Id.* (citing *CPUC*, 879 F.3d at 977).

[56] *Id.* at 10.

[57] *Id.* (quoting Order No. 679, 116 FERC ¶ 61,057 at P 76).

[58] *Id.*

that such a ruling could have dire implications for any final rule adopted in the pending Notice of Proposed Rulemaking proceeding on transmission incentives in Docket No. RM20-10-000.[59]

23. OCC contends that the inclusion of the RTO Adder in settlement rates would not have been part of the various trade-offs made during settlements because, before *CPUC*, the Commission regularly permitted inclusion of the RTO Adder.[60] Additionally, OCC suggests that statements in the settlements indicated that the ROEs settled upon include the RTO Adder.[61] It alleges that this was done to avoid the utilities obtaining the RTO Adder on top of the agreed-to settlement rates in a subsequent single-issue filing.[62]

24. OCC claims that requiring a full-blown investigation of all rate issues to remove the RTO Adder where the ROE results from a settlement places an expensive burden on consumers.[63] OCC also states that this outcome is inconsistent with other situations where the Commission permits complainants to challenge single elements in rates such as ROE or depreciation rates—

---

[59] *Id.* at 11 (citing *Elec. Transmission Incentives Pol'y under Section 219 of the Fed. Power Act*, Notice of Proposed Rulemaking, 170 FERC ¶ 61,204 (2020); *Elec. Transmission Incentives Pol'y under Section 219 of the Fed. Power Act*, Supplemental Notice of Proposed Rulemaking, 175 FERC ¶ 61,035 (2021)).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 11-12.

even where such rates were set by a settlement in a prior proceeding—without challenging all elements of formula rates.[64] OCC further contends that the RTO Adder Order is inconsistent with the Commission's policy of allowing single-issue rate changes for specified cost of service elements, such as depreciation rates and ROE.

25. OCC states that the RTO Adder Order is also inconsistent with the Commission's findings in other ATSI proceedings where the Commission did previously separate the base ROE and RTO Adder when examining the settlement agreement "for purposes of determining a Risk Premium dataset."[65] OCC states that the Commission found that it does not matter whether the base ROE is still appropriate today because the Ohio law mandates participation in an RTO, which makes the utility ineligible for the RTO Adder. OCC argues that it is arbitrary and capricious for the Commission to now ignore that precedent and rely on the comprehensive nature of settlements. Therefore, OCC argues that, because the RTO Adder is unlawful, it should not be included in Duke's and ATSI's rates, and that the change in the law regarding RTO Adders amounts to a change in circumstances that requires reevaluation.[66] OCC argues that a "utility should not be allowed to include

---

[64] *Id.* at 12.

[65] *Id.* at 12 (quoting RTO Adder Order, 181 FERC ¶ 61,214 at P 65 ("We also recognize . . . that ATSI affiliates testified in other proceedings that ATSI's base ROE is 9.88%, rather than the 10.38% ROE contained in the ATSI settlement.")).

[66] *Id.* at 13.

something unlawful in its rates through bargaining."[67] OCC concludes that it should not matter whether the currently authorized base ROE is still just and reasonable for ATSI and Duke, just as it did not matter what the base ROE was for Dayton, Ohio Power, or AEP Ohio Transmission.[68]

ii. Determination

26. We are not persuaded by OCC's argument that ATSI's and Duke's transmission rates are unjust and unreasonable because their settlement rates include the RTO Adder.[69] As explained in the RTO Adder Order, the Commission did not grant the utilities RTO Adders under section 219 and their rates were instead the products of comprehensive settlements.[70]

27. While OCC is correct that an applicant may make a section 205 filing in order to recover an RTO Adder in its rates,[71] it does not follow that the Commission, in approving comprehensive settlement packages, specifically authorized RTO Adders in the section 205 proceedings that resulted in ATSI and Duke's rates. Rather, in ATSI's and Duke's proceedings, even if the statements in the settlements indicated that the parties agreed to include an RTO Adder, as discussed below, the Commission only approved comprehensive settlement

---

[67] *Id.* at 14.

[68] *Id.*

[69] OCC Request for Rehearing at 7-14.

[70] RTO Adder Order, 181 FERC ¶ 61,214 at P 60.

[71] *See* OCC Request for Rehearing at 11.

packages without specifically approving the RTO Adder under section 219.

28. As discussed in the RTO Adder Order, we do not know the precise trade-offs and concessions made by the parties to those proceedings.[72] Even if the settlements included an amount reflecting an RTO Adder, that does not explain how that RTO Adder came to be included in the settlement agreements and what trade-offs led to that outcome. We also do not agree with OCC's argument that the RTO Adder should be removed because it is more likely that consumers, rather than the utility, made concessions as to the inclusion of the RTO Adder during the settlement process.[73] We recognize that, if Duke and ATSI had sought an RTO Adder at that time (i.e., prior to *CPUC*) outside the settlement context, an RTO Adder likely would have been granted. However, OCC's proposal would, in effect, modify the settlement agreement by stripping out a single component of an intricate financial package that the parties to the settlement found balanced and thus agreeable. As the Commission explained in the RTO Adder Order, OCC's preferred approach is inconsistent with the Commission's policy not to revisit individual elements of settlements unless it is shown that they make the overall rate unjust and unreasonable.[74] Here,

---

[72] RTO Adder Order, 181 FERC ¶ 61,214 at P 64.

[73] *Id.*

[74] *See id.* (citing *Sithe/Indep. Power Part., L.P. v. FERC*, 165 F.3d 944, 951 (D.C. Cir. 1999) ("the Commission itself has, in the past, interpreted the § 206 burden scheme to require a customer seeking an investigation into existing rates to 'provide some basis to

OCC has failed to provide any evidence to demonstrate that the overall ROEs are unjust and unreasonable, such as by showing that the overall rate is outside of the "zone of reasonableness."[75] In the absence of such evidence, we continue to find that it would be inappropriate to unilaterally change a single aspect of those comprehensive settlements.[76]

29. While OCC is correct that requiring an investigation of all rate issues to adjust settlement rates places a burden on the parties,[77] we find that countervailing policy considerations caution against adjusting settlement rates on a piecemeal basis. Notably, modifying individual components of settlements would undermine the certainty provided to settling parties and would be inconsistent with the Commission's

---

question the reasonableness of the overall rate level, taking into account changes in all cost components and not just [the challenged component]'"); *see also Cent. Vt. Pub. Serv. Corp.*, 123 FERC ¶ 61,128, at P 38 (2008) (noting that settlement was a product of "intricate financial balance" and trade-offs while declining to modify component of a broader settlement where it would "negate considerable efforts and understandings of settling parties").

[75] *See Emera Me.*, 854 F.3d 9, at 23 (D.C. Cir. 2017) ("The zone of reasonableness informs FERC's selection of a just and reasonable rate.").

[76] *See id.* at 24; 16 U.S.C. § 824e(b) ("[T]he 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.").

[77] OCC Request for Rehearing at 11-12.

longstanding policy of promoting settlements.[78] Further, the burden placed on OCC to demonstrate that the overall ROE is unjust and unreasonable is no greater than the burden placed on any complainant challenging an ROE in other contexts.[79]

30. We disagree with OCC's position that the Commission has permitted an "unlawful" component to remain in Duke and ATSI's respective rates.[80] The Commission approved a comprehensive settlement package, with a single overall figure for Duke's and ATSI's ROEs, without authorizing an RTO Adder in the

---

[78] *See, e.g.*, *Fla. Power & Light Co.*, 175 FERC ¶ 61,024, at P 6 (2021) ("Commission policy favors settlements, as they provide parties with certainty, reduce litigation costs, and permit parties to reach reasonable compromise in resolving difficult issues." (citations omitted)); *San Diego Gas & Elec. Co.*, 122 FERC ¶ 61,009, at P 13 (2008) ("The Commission strongly favors settlements, particularly in cases that are highly contested and complex." (citations omitted)).

[79] *See Sithe/Indep. Power Part.*, 165 F.3d at 951 (noting that a customer must demonstrate an overall rate level is unjust and unreasonable, not just single cost components); *DATC Path 15, LLC*, 177 FERC ¶ 61,115, at PP 24-25 (2021) (FPA section 206 proceeding reducing incentive ROE set by settlement from 13.5% to 10.86% in response to changed circumstances). By contrast, as discussed in the RTO Adder Order, specific incentives that were previously granted on a single-issue basis may be revaluated. RTO Adder Order, 181 FERC ¶ 61,214 at P 62 ("Because the Commission specifically evaluated and granted RTO Adders to Ohio Power and AEP Ohio Transmission on a single-issue basis, separate from all other ROE issues, we may reevaluate and revise those specific incentives on a single-issue basis in response to the changed circumstances raised in the Complaint.").

[80] OCC Request for Rehearing at 13-14.

settling parties' rates at the time of settlement.[81] In the RTO Adder Order, the Commission found only that, on the record in this proceeding, OCC has not proven that the rates established pursuant to that settlement have become unjust and unreasonable.

b. Undue Discrimination

i. Request for Rehearing

31. OCC argues that allowing ATSI and Duke to continue including the RTO Adder in their Ohio transmission rates unduly discriminates against their Ohio customers in violation of FPA section 205.[82] OCC argues that the two critical factors in this proceeding are whether the utilities (1) voluntarily joined an RTO and (2) have rates that include an RTO Adder.[83] Under the first factor, OCC states that ATSI and Duke joined an RTO involuntarily under the rubric set out in the Dayton Orders.[84] Under the second factor, OCC states that the RTO Adder Order already found that the RTO Adder was included in the settlement rates.[85] Moreover, OCC

---

[81] *See Duke Energy Ohio, Inc.*, 151 FERC ¶ 61,029, at P 14 (2015) ("The Commission's approval of the October 30, 2014 Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding."); *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,106, at P 3 (2015) (same).

[82] OCC Request for Rehearing at 14-17; *id.* at 15 (quoting 16 U.S.C. § 824d).

[83] *Id.*

[84] *Id.* at 16.

[85] *Id.* (citing RTO Adder Order, 181 FERC ¶ 61,214 at P 65).

points out that, in the RTO Adder Order, the Commission recognized that record in Duke and ATSI settlement proceedings reflects that the parties agreed upon a 50 basis point ROE adder.[86] Because the Commission relied on these factors to grant the complaint as to Dayton, Ohio Power, and AEP Ohio Transmission, and because the Commission has found that Duke's and ATSI's transmission rates include the RTO Adder, OCC argues that it would be unduly discriminatory to not require removal of the RTO Adder from their rates.[87]

32. OCC states that how the RTO Adder was set should play no role in determining whether the RTO Adder should be taken out because the method of insertion does not bear on whether the rate is unduly discriminatory.[88] OCC asserts that Duke, ATSI, Dayton, Ohio Power, and AEP Ohio Transmission are all similarly situated because they are all subject to the same Ohio law mandating participation in an RTO. Accordingly, OCC argues it would be unduly discriminatory to eliminate the RTO Adder from rates for some but not all customers of these utilities.

ii. Determination

33. We continue to find that ATSI and Duke are not similarly situated to the other Ohio utilities. As discussed above, the rates for Duke and ATSI were

---

[86] *Id.* (citing RTO Adder Order, 181 FERC ¶ 61,214 at P 65).

[87] *Id.*

[88] *Id.* at 17.

established pursuant to a comprehensive settlement package.[89] OCC ignores the fact that piecemeal reconsideration of individual items within a comprehensive settlement would undermine the certainty created by settlements.[90] By contrast, for incentives approved under section 219, such as those for Ohio Power and AEP Ohio Transmission, the Commission specifically evaluated and granted each RTO Adder separate from other ROE issues, which were set for hearing and settlement judge procedures.[91] In such circumstances, removing an RTO Adder that was independently granted does not present the same concerns as modifying the components of a complex, multi-issue settlement package.[92]

34. Thus, we continue to find that ATSI and Duke, which had RTO Adders embedded in the ROE reflected in comprehensive settlement packages, are not similarly

---

[89] RTO Adder Order, 181 FERC ¶ 61,214 at P 66.

[90] *See supra* note 74.

[91] RTO Adder Order, 181 FERC ¶ 61,214 at P 62.

[92] *See* Order No. 679, 116 FERC ¶ 61,057 at PP 191-92 (order implementing FPA section 219 and permitting single-issue ratemaking in the context of transmission incentives); *see, e.g.*, *Consumers Energy Co. v. Int'l Transmission Co.*, 165 FERC ¶ 61,021, at P 73 (2018) (finding that it was "appropriate to revisit the appropriate level of the Transco Adder for the ITC Companies" given their reduced level of independence resulting from a merger), *reh'g denied*, 168 FERC ¶ 61,035 (2019) *aff'd sub nom. Int'l Transmission Co. v. FERC*, 988 F.3d 471, 484-85 (D.C. Cir. 2021) ("FERC reasonably concluded that the existing 50 basis point adder—a level reserved for 'fully independent' Transcos—was no longer appropriate.").

situated to other Ohio utilities such as Ohio Power and AEP Ohio Transmission who were previously granted RTO Adder incentives. To find otherwise would require the Commission to modify settlements that established the parties' ROE, a concern that is not present in Ohio Power and AEP Ohio Transmission's situations.

2. AEPSC

a. Undue Discrimination

i. Request for Rehearing

35. AEPSC argues that the Commission erred in finding that Ohio Power and AEP Ohio Transmission must remove their RTO Adders, because their RTO Adders are embedded in a settlement like ATSI's and Duke's.[93] AEPSC argues that the Commission has violated its obligation to treat all market participants equally and not treat "similar situations differently."[94] AEPSC states that the Commission does not directly address any differences between Ohio Power and AEP Ohio Transmission, Duke, and ATSI, and that they all stem from similarly complex settlement packages where "[w]e do not know the precise trade-offs and concession made by [the] parties to those proceedings during the settlement process . . . ."[95] AEPSC argues that the

---

[93] AEPSC Request for Rehearing at 6-12.

[94] *Id.* at 7 (citing *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 21 (D.C. Cir. 2014)).

[95] *Id.* at 9 (quoting RTO Adder Order, 181 FERC ¶ 61,214 at P 64). AEPSC states that, in 2010, Ohio Power and AEP Ohio Transmission entered into settlements providing those entities with

Commission's reliance on the "pre-settlement determination in 2010 would also be inadequate" as a basis to distinguish Ohio Power and AEP Ohio Transmission's situations from Duke and ATSI's situations "because it would be inapplicable as to AEPSC's 2018 settlement with the municipal power agencies."[96]

36. AEPSC argues that the Commission in the RTO Adder Order recognizes that it is inappropriate to use single-issue ratemaking when a utility's ROE was set through settlement.[97] AEPSC suggests that, despite this, in AEP's case where the rates were set by settlement the Commission still speculated as to what the settling parties would have agreed to if the Commission's RTO Adder policy had been different.[98] As an example, they suggest that, under the Commission's then-applicable interpretation of Order No. 679, in 2010 and 2018 Ohio Power and AEP Ohio Transmission may have agreed to a lower base ROE

---

a base ROE of "10.99%, plus a 50 basis point adder for [each entity's] continuing participation in the PJM RTO, resulting in an 11.49% total ROE." AEPSC Request for Rehearing at 8 (quoting AEP East Companies 2010 Offer of Settlement at 7; AEP PJM Transco's 2010 Offer of Settlement at 7). AEPSC further states that, in 2018, Ohio Power and AEP Ohio Transmission agreed to reduce their base ROE in a settlement resolving a complaint brought by municipal power providers, but the total ROE still "include[d] an additional 50 basis points for PJM RTO membership." *Id.* (quoting AEP 2018 Offer of Settlement, Marked Sheet at Note S).

[96] *Id.* at 10.

[97] *Id.* at 10-12.

[98] *Id.* at 11.

"knowing that its total figure would increase with the RTO Adder."[99] AEPSC asserts that, "[w]hile we cannot know if that were the case, it is clear that the parties made trade-offs in the 2018 settlement," noting that the settlement included items such as an equity cap and provisions for tax reform.[100] AEPSC states that, because Ohio Power's and AEP Ohio Transmission's RTO Adders were not included in rates on a stand-alone basis, it is contrary to section 206 for the Commission to grant a single issue complaint.[101] Instead, AEPSC argues that the Commission must "provide some basis to question the reasonableness of the overall rate level, taking into account changes in all cost components and not just the challenged component."[102] AEPSC disagrees with the Commission's justification for distinguishing between the RTO Adder and the base ROE —namely, AEPSC disagrees with the Commission's reasoning that, because the Commission "granted the adder prior to setting the base ROE for hearing . . . when the parties entered into settlement discussions, they knew they were negotiating only the base ROE."[103] AEPSC states that this reasoning does not support the Commission's finding because "it is

---

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* (quoting *Sithe/Indep. Power Partners, L.P.*, 165 F.3d at 951 (quotation marks and alterations omitted)).

[103] *Id.* (quoting RTO Adder Order, 181 FERC ¶ 61,214 at P 62 n.123).

impossible to compartmentalize negotiations over the base ROE negotiations as if the RTO Adder didn't exist."[104]

ii. Determination

37. We disagree with AEPSC's argument that Ohio Power and AEP Ohio Transmission are arbitrarily being treated differently from ATSI and Duke.[105] Ohio Power and AEP Ohio Transmission are not similarly situated to ATSI and Duke. Unlike ATSI and Duke, Ohio Power's and AEP Ohio Transmission's RTO Adders were authorized by the Commission in separate proceedings under section 219.[106] Further, when the dispute over Ohio Power's and AEP Ohio Transmission's rates was set for settlement judge procedures, the Commission expressly excluded the RTO Adder from those procedures.[107] As a result, as stated in the RTO Adder

---

[104] *Id.* at 12.

[105] *Id.* at 6-12.

[106] *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 30; *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at P 21, *order on reh'g*, 135 FERC ¶ 61,066.

[107] *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 22 ("we are granting the request for the 50 basis point adder for continued participation in an RTO"); *id.* P 30 ("Granting up to 50 basis points of incentive ROE does not remove any other issue pertaining to the ROE from consideration during the hearing and settlement judge procedures, . . ."); *AEP Appalachian Transmission Co., et al.*, 130 FERC ¶ 61,075, at P 21 (2010) ("[w]e find that AEP's proposal to include a 50 basis point adder to each subsidiaries base ROEs for participation in PJM and SPP is just and reasonable and not unduly discriminatory."); *Id.* P 19 ("Except for the issues discussed below, all other issues raised in the proceeding, including but not limited to

Order, at the stage when the parties were making trade-offs in settlements, they knew they were only negotiating the base ROE.[108]

38. Further, we are not persuaded by AEPSC's argument that its later 2018 settlement with the municipal power agencies is analogous to the Duke and ATSI settlements. As explained in the RTO Adder Order and above, in 2008 and 2010, respectively, the Commission evaluated and affirmatively granted RTO Adders to Ohio Power and AEP Ohio Transmission under section 219.[109] Those RTO Adders were in effect at the time the Commission established the hearing and settlement judge procedures that preceded the 2018 settlement, meaning that there was nothing to negotiate regarding those adders, and the Commission at that time only set the base ROE for hearing and settlement.[110] As such, we continue to find that Ohio Power and AEP Ohio Transmission are not similarly situated to ATSI and Duke, which had RTO Adders that were embedded in comprehensive settlement packages of the entire proceedings. Moreover, while AEPSC states that the

---

formula rates, formula rate protocols, ROE, capital structure, plant balances, development and start-up costs, depreciation rates, and costs associated with the new subsidiaries, are set for hearing.").

[108] RTO Adder Order, 181 FERC ¶ 61,214 at P 62 n.123.

[109] The Commission granted the RTO Adders separately from all other ROE issues. *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at PP 19, 21; *Am. Elec. Power Serv. Corp.*, 124 FERC ¶ 61,306 at P 30.

[110] *Am. Mun. Power, Inc. v. Appalachian Power Co.*, 161 FERC ¶ 61,192 (2017).

existence of the already-approved RTO Adder may have impacted the course of its settlement negotiations,[111] we find this concern to be speculative, attenuated, and distinct from the situation of Duke and ATSI, where the parties to those settlement proceedings raised and negotiated the matter in the settlement process leading to comprehensive settlements. In the situation of Ohio Power and AEP Ohio Transmission, the Commission is not modifying the settlements establishing the base ROE but, rather, essentially reversing our prior stand-alone rulings that granted the RTO Adder in the first place. The Commission's authority to eliminate a previously granted incentive is well-established.[112]

b. Remaining Arguments

i. Request for Rehearing

39. AEPSC argues that the Commission's voluntariness requirement is inconsistent with the plain text of section 219.[113] It argues that this statutory argument is separate from the meaning of Order No. 679, and that the Commission was required to provide the incentive to "give effect to the unambiguously expressed intent of

---

[111] AEPSC Request for Rehearing at 11.

[112] *See Int'l Transmission Co. v. FERC*, 988 F.3d 471, 485 (D.C. Cir. 2021) (finding the Commission had satisfied its section 206 burden to show an expressly granted adder independent of the underlying ROE became unjust and reasonable when the Commission found "the merger had reduced [the utility's] independence," which was the basis of granting the adder).

[113] AEPSC Request for Rehearing at 12-16.

Congress."[114] As a result of this lack of ambiguity, it argues, the Commission does not have the authority to interpret Order No. 679 to impose a voluntariness requirement.[115] While the Commission in the RTO Adder Order found that this argument was a collateral attack on Order No. 679, AEPSC argues that it is not collaterally attacking Order No. 679 because, prior to the Ninth Circuit's decision in *CPUC*, AEPSC argues that the Commission itself did not interpret Order No. 679 to require a showing of voluntariness prior to receiving the RTO Adder.[116] Thus, AEPSC states it had no previous opportunity to challenge the voluntariness requirement.[117] Moreover, AEPSC argues that courts have recognized parties' ongoing rights to challenge the validity of administrative rules and regulations.[118]

40. AEPSC argues that the Commission's decision to remove the RTO Adder from Ohio Power's and AEP Ohio Transmission's rates was also arbitrary and capricious because the Ohio statute at issue is preempted by field and conflict preemption principles.[119] AEPSC argues that the Commission erred by finding

---

[114] *Id.* at 13 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[115] *Id.* at 14-15.

[116] *Id.* at 15.

[117] *Id.*

[118] Id. at 16 (citing to *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-47 (D.C. Cir. 1958)).

[119] *Id.* at 17-21.

that this proceeding was an inappropriate procedural vehicle and had an insufficient record to address the alleged constitutional issues.[120]

41. AEPSC also argues that the Commission's finding that Ohio Power's and AEP Ohio Transmission's participation in PJM is "involuntary" was arbitrary and capricious because the Commission failed to acknowledge or distinguish prior findings that membership in PJM was voluntary.[121] AEPSC notes that the Ohio statute at issue here was already in place at the time of those prior PJM cases, but AEPSC argues the Commission in the RTO Adder Order neither acknowledged nor justified its departure from that earlier conclusion.[122]

ii. Determination

42. We are not persuaded by AEPSC's arguments that the Commission erred by declining to address preemption arguments[123] and whether the voluntariness requirement is consistent with the plain text of section 219.[124] The Commission previously addressed those issues in the RTO Adder Order and in the Dayton Orders, and we reaffirm those determinations for the

---

[120] *Id.* at 17.

[121] *Id.* at 16-17 (citing *The New PJM Cos.*, 106 FERC ¶ 63,029, at P 55 *aff'd by*, Opinion No. 472, 107 FERC ¶ 61,271, at P 44 (2004)).

[122] *Id.* at 16.

[123] *Id.* at 17-21.

[124] *Id.* at 12-16.

reasons stated therein.[125] AEPSC provides no new arguments beyond those already considered by the Commission in those proceedings.

43. We also are not convinced by AEPSC's argument that the outcome here improperly departs from precedent in which AEP was found by the Commission to have determined to join PJM voluntarily.[126] AEPSC relies[127] on Opinion No. 472, which found under section 205(a) of the Public Utility Regulatory Policies Act (PURPA)[128] that AEP would be "exempt" from certain state laws.[129] While Opinion No. 472 explains that AEP's determination to join PJM was voluntary under section 205(a) of PURPA, as we explain below, that is not determinative of AEPSC affiliates' qualification for RTO Adders. Not only does Opinion No. 472 fail to discuss the voluntariness standard applied to the RTO Adder context, it also predates Order No. 679 by

---

[125] *Compare id.* at 12-16 (raising section 219 voluntariness arguments) *with* RTO Adder Order, 181 FERC ¶ 61,214 at P 83 (noting and addressing voluntariness arguments); Dayton Rehearing Order, 178 FERC ¶ 61,102 at P 18 (same); *compare* AEPSC Request for Rehearing at 17-21 *with* RTO Adder Order, 181 FERC ¶ 61,214 at P 84 (addressing preemption arguments); Dayton Rehearing Order, 178 FERC ¶ 61,102 at PP 31-32 (same).

[126] AEPSC Request for Rehearing at 16-17.

[127] *Id.* at 16-17 (quoting *The New PJM Cos.*, 106 FERC ¶ 63,029 at P 55 ("AEP saw substantive benefits from membership in a Commission-approved RTO … and signed on voluntarily.")).

[128] 16 U.S.C. § 824a-1(a).

[129] *Id.*.

approximately two years[130] and predates by approximately 14 years the 2018 *CPUC* decision explaining that an incentive cannot induce behavior that is already legally mandated. The interpretation argued for by AEPSC based on Opinion No. 472, again, which predates Order No. 679 and *CPUC*, is incompatible with the Ninth Circuit's interpretation of Order No. 679 in *CPUC* and subsequent Commission orders adopting the Court's interpretation.[131] In particular, as the Commission explained in the Dayton Orders, after *CPUC*, "the Commission was required to determine whether RTO membership was voluntary before granting the incentive."[132]

The Commission orders:

In response to the requests for rehearing, the RTO Adder Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

---

[130] Moreover, as we noted in the RTO Adder Order "[i]n 2008 and 2009, respectively, Ohio Power and AEP Ohio Transmission submitted to the Commission, pursuant to section 205, revised tariff sheets establishing formula rates that included an RTO Adder." RTO Adder Order, 181 FERC ¶ 61,214 at P 62.

[131] *CPUC*, 879 F.3d at 978.

[132] Dayton Rehearing Order, 178 FERC ¶ 61,102 at P 42.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Office of the Ohio Consumers' Counsel Docket No. EL22-34-001

v.

American Electric Power Service Corporation, American Transmission Systems, Inc., and Duke Energy Ohio, LLC

(Issued April 20, 2023)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. For the same reasons that I expressed in my original statement,[1] I further dissent from this order denying rehearing of the Commission's decision to eliminate transmission organization membership incentives from the rates of American Electric Power Service Corporation affiliates Ohio Power Company (Ohio Power) and AEP Ohio Transmission Company Inc. (AEP Ohio Transmission).[2] As I previously explained, the Federal Power Act does not limit incentives to only those utilities that "voluntarily" join a transmission

[1] *Off. of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 (2022) (Danly, Comm'r, concurring in part and dissenting in part).

[2] *Off. of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214.

organization.[3] The Commission improperly added this non-statutory requirement in Order No. 679.[4] We had no authority to do so then or now. Nothing on rehearing changes my opinion.

2. I concur with the majority's determination on rehearing that the American Transmission Systems, Inc., and Duke Energy Ohio, LLC, should continue to collect the transmission organization incentive in rates because these incentives were included in comprehensive settlements.[5] I would add the further rationale that section 219(c) of the Federal Power Act requires it, and the subsequent addition of the "voluntariness" requirement was a Commission invention not authorized by the statute, as discussed in my original statement.[6]

For these reasons, I respectfully concur in part and dissent in part.

James P. Danly
Commissioner

---

[3] *See id.* PP 60-63, 83.

[4] *See Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, at P 331 (2006), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

[5] *Off. of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 at PP 60, 64-66.

[6] *See id.* (Danly, Comm'r, concurring in part and dissenting in part at PP 1-5).

Appendix D

No. 21-4072/22-3351/23-3196/3324/3366/3417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 26, 2025
KELLY L. STEPHENS, Clerk

DAYTON POWER & LIGHT COMPANY, dba AES Ohio, American Electric Power Service, DUKE ENERGY OHIO, INC., and FIRSTENERGY SERVICE COMPANY (21-4072/22-3351); AMERICAN ELECTRIC POWER SERVICE CORPORATION (22-3196/23-3366); OFFICE OF THE OHIO CONSUMERS' COUNSEL (23-3324/3417),

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ORDER

BEFORE: MOORE, NALBANDIAN, and BLOOMEKATZ, Circuit Judges.

The court received three petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

Appendix E

Relevant Statutory Provisions

16 U.S.C. § 824

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not

have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f)1, 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of--

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall--

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms “affiliate”, “associate company”, “electric utility company”,

"holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

16 U.S.C. § 824a

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State

commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

(1) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(2) With respect to an order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation, the Commission shall ensure that such order requires generation, delivery, interchange, or transmission of electric energy only during hours necessary to meet the emergency and serve the public interest, and, to the maximum extent practicable, is consistent with any applicable Federal, State, or local environmental law

or regulation and minimizes any adverse environmental impacts.

(3) To the extent any omission or action taken by a party, that is necessary to comply with an order issued under this subsection, including any omission or action taken to voluntarily comply with such order, results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation.

(4)(A) An order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation shall expire not later than 90 days after it is issued. The Commission may renew or reissue such order pursuant to paragraphs (1) and (2) for subsequent periods, not to exceed 90 days for each period, as the Commission determines necessary to meet the emergency and serve the public interest.

(B) In renewing or reissuing an order under subparagraph (A), the Commission shall consult with the primary Federal agency with expertise in the environmental interest protected by such law or regulation, and shall include in any such renewed or reissued order such conditions as such Federal agency determines necessary to minimize any adverse environmental impacts to the extent practicable. The conditions, if any,

submitted by such Federal agency shall be made available to the public. The Commission may exclude such a condition from the renewed or reissued order if it determines that such condition would prevent the order from adequately addressing the emergency necessitating such order and provides in the order, or otherwise makes publicly available, an explanation of such determination.

(5) If an order issued under this subsection is subsequently stayed, modified, or set aside by a court pursuant to section 825l of this title or any other provision of law, any omission or action previously taken by a party that was necessary to comply with the order while the order was in effect, including any omission or action taken to voluntarily comply with the order, shall remain subject to paragraph (3).

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person or municipality engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: Provided, That such temporary connection shall be

discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an

international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e).

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to--

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting--

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall--

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.