

No. 24-1304, No. 24-1318

In The
Supreme Court of the United States

FIRSTENERGY SERVICE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

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

**BRIEF OF RESPONDENT DUKE ENERGY
OHIO, INC. IN SUPPORT OF CERTIORARI**

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July 17, 2025

QUESTIONS PRESENTED

1. The Federal Power Act § 219(c) states that “the Commission shall . . . provide for incentives to each . . . utility that joins a Transmission Organization.” 16 U.S.C. § 824s(c). Does that provision require FERC to provide incentives to utilities that join transmission organizations, even if state law requires them to join?

2. Did FERC act within its discretion by preserving the universal settlements of Duke and FirstEnergy, which included § 219(c) incentives called RTO adders, or was FERC obligated, as the Sixth Circuit held, to *remove* those adders from otherwise unchallenged fair and reasonable settlements because Ohio law requires Duke and FirstEnergy to be members of transmission organizations?

CORPORATE DISCLOSURE STATEMENT

Duke Energy Ohio, Inc. is a direct, wholly-owned subsidiary of Cinergy Corp., which in turn is a direct, wholly-owned subsidiary of Duke Energy Corporation (NYSE: DUK), a publicly traded company. Certain investment management companies such as Vanguard Group, Inc. may from time to time, through subsidiaries and affiliates, own 10 percent or more of Duke Energy Corporation stock. Otherwise, no entity owns 10 percent or more of Duke Energy Corporation stock.

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INTRODUCTION

Duke Energy Ohio, Inc. is a party to this case and is generally aligned with petitioner FirstEnergy. Both Duke and FirstEnergy received RTO adders years ago as part of comprehensive rate settlements that FERC approved. Both will lose their RTO adders under the Sixth Circuit decision below unless this Court accepts review. Two issues warrant certiorari in this Court.¹

First, the correct interpretation of Federal Power Act § 219(c) is that it calls for financial benefits (*i.e.*, adders) for any utility that joins a Regional Transmission Organization (“RTO”), regardless of why. For fifteen years, FERC followed this correct view before changing it over the dissents of two Commissioners. Now the Sixth Circuit has wrongly held that a utility that joins an RTO under a state law mandate does not “join” the RTO within the meaning of the statute and so cannot earn an “incentive” under the statute.

This issue is of national importance. Today, seven states have RTO mandates and two more are considering adding them. That means that under the Sixth Circuit’s view, there are many utilities across the country that are barred from receiving millions of dollars each year that federal law provides for. That outcome runs directly counter to the purpose of § 219(c) and its goal of encouraging and expanding utilities’ investment in the American power grid.

¹ A second petition from the same judgment was filed by American Electric Power (“AEP”). *See American Electric Power Co. v. FERC*, No. 24-1318. The AEP petition raises a subset of

Second, although FERC misinterpreted § 219(c), it correctly refused to re-open Duke's and FirstEnergy's older settlements. FERC concluded that even though it would not award an RTO adder today, its approval of broad settlements years earlier that included RTO adders remained just and reasonable. Comprehensive settlements, FERC correctly reasoned, are entitled to respect.

The Sixth Circuit erred by overruling FERC and ordering that the adders be removed from Duke's and FirstEnergy's settlements. In doing this, the Sixth Circuit brought itself into conflict with the D.C. Circuit and with general legal principles holding that later changes or re-interpretations of law should not upend agreed and finalized voluntary settlements. Settlements exist to resolve uncertainty and move forward. No Court of Appeals should force a federal agency to re-open decade-old accepted settlements just because one of the relevant statutes is understood differently today.

STATEMENT OF THE CASE

The statements reciting the parties in the Court of Appeals, related proceedings, opinions below, and the jurisdiction of this Court are correct in FirstEnergy's petition. *See* FirstEnergy Pet., No. 24-1304, at ii-5.

the same issues presented by FirstEnergy at No. 24-1304. The appendix cites in this brief are to FirstEnergy's petition.

ARGUMENT

I. This Court should grant certiorari and hold that the Federal Power Act § 219(c) applies even when state law mandates that utilities join a transmission organization.

Section 219(c) calls for FERC to provide “incentives” to utilities that “join” transmission organizations. The statute says: “In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.” 16 U.S.C. § 824s(c). All agree that this statute calls for rate adders for utilities that opt to join transmission organizations. The question here is whether the statute also provides for rate adders to utilities that join under state laws mandating membership. The answer is yes.

This is a pure question of law. FERC has vacillated over the years, first providing the adder to utilities that joined under mandates for fifteen years, but refusing to do so since 2021. *See FirstEnergy Pet.* at 18; *AEP Pet.* at 24-25. The issue is also important. At least seven states mandate RTO membership and two more are considering similar legislation. *FirstEnergy Pet.* at 19; *AEP Pet.* at 30.

Although the Sixth Circuit is the first court of appeals to weigh in on this exact issue, its ruling alone creates quite a mess. According to the Sixth Circuit, if a state mandates RTO participation, a utility that joins an RTO cannot receive the adder (and indeed, must lose the adder if it already has one). Ironically, that means state law and federal law—both designed

to *favor* RTO membership—have perverse contrary effects. The federal government offers rewards for joining an RTO, but a state law requiring RTO membership effectively takes away those rewards. Utilities are thus better off in states that do not mandate membership.

This case is a prime example. Utilities in Ohio stand to lose their adder under the Sixth Circuit’s decision, because Ohio requires RTO membership. FirstEnergy App. (“FE App.”) 41a. Meanwhile, utilities across the river in Kentucky, members of the same RTO, will keep their adders. Financial incentives for growth and progress follow the adders, which now follow state borders and leave incoherent outcomes like Duke Energy Kentucky being positioned differently than Duke Energy Ohio.

On the merits, the Sixth Circuit’s read of § 219(c) is wrong. The statute says: “the Commission shall . . . provide for incentives to each . . . utility that joins a Transmission Organization.” 16 U.S.C. § 824s(c). The Sixth Circuit ruled that if a utility joins a transmission organization because a state law mandates it, then the utility is ineligible for any incentive from the Commission. FE App. 30a. The Sixth Circuit relied heavily on its understanding of the words “join” and “incentive” to reach this surprising conclusion. FE App. 23a–30a.

The Sixth Circuit held that “joins” means only an optional choice, not something required by law. FE App. 24a; FE App. 27a. That is not correct. To “join” means “to become a member of an organization.” *Join*, Oxford Learner’s Dictionary (2025). Especially in the context of a phrase like § 219(c)’s “utility that joins a

Transmission Organization,” the word “join” is a factual description that provides no explanation of why the “join[ing]” happened.

For instance, the law requires lawyers to be members of their state bar. So each lawyer “joins.” One might say that the reason for joining is that the law requires it, but in common usage, lawyers still “join” the bar. *Contra* FE App. 28a (suggesting that if a parent requires a child to join Cub Scouts, the child would not say he “joined”).

There are plenty of other examples. In class actions, unnamed class members “join” a lawsuit when the class is certified, even though the process and the joining is not left up to them. *E.g.*, *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020) (“putative class members and their claims are joined to the action only after the class is certified”). Similarly, Federal Rule of Civil Procedure 19 addresses certain necessary parties to litigation and states that they “must be joined as a party.” Fed. R. Civ. P. 19(a)(1). The judge thus “joins” them in an act that is not voluntary by the party. The point is, the word “join” can easily encompass actions required by law.

Duke, for instance, certainly “joined” the regional transmission organization PJM in the ordinary usage of that term. *See, e.g.*, Washington Energy Report, “Duke Energy Ohio and Duke Energy Kentucky Submit Initial Filing to Withdraw from the Midwest ISO and *Join* PJM by January 1, 2012,” Troutman Pepper Locke, <https://tinyurl.com/5n7vd27c> (July 2, 2010) (emphasis added). Although an Ohio statute required Duke to be a member of a regional

transmission organization, obviously Duke took numerous steps to achieve the “joining.” Duke made repeated filings at FERC, proposed and defended rate issues, ultimately settled on an overall return on equity, then sought and obtained FERC approval of the settlement. *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,029 at PP 2–5 (2015) (explaining the history of Duke’s settlement). The theory that Duke did not “join” PJM because of the Ohio statute stretches the word “join” far out of its common usage.

Next, the Sixth Circuit relied on the word “incentives” in the phrase “the Commission shall . . . provide for incentives” to utilities that join RTOs. 16 U.S.C. § 824s(c). The Sixth Circuit opined that “incentives” must refer only to payments that actually encourage optional action. The Sixth Circuit insisted that a payment cannot be an “incentive” if it did not directly cause the action meant to be encouraged. FE App. 24a. That is not true.

Properly viewed, an “incentive” in § 219(c) refers to financial benefit for a utility that joins an RTO. Joining an RTO comes with meaningful risks for any utility, regardless of why they joined. Those risks include the loss of operational control of their transmission facilities, potential new obligations to build facilities the utility may not prefer to undertake, and continued maintenance responsibility combined with diminished decision-making power over transmission assets. *See Comments of the Edison Electric Institute*, FERC Dkt. EL22-34-000 (Mar. 31, 2022). The “incentives” Congress set up in § 219(c) thus offer financial assistance—a form of support and encouragement—to utilities that join RTOs, regardless of why.

In other words, an “incentive” includes support and encouragement for doing an act, even if the act done may have other explanations.

For instance, a cell phone company might offer an “incentive”: sign a contract and get a price cut on the phone itself. Such an offer is obviously designed to encourage and support a certain behavior and is an “incentive.” But the company offers the same “incentive” to everyone who signs a contract, regardless of why. Some people will be directly brought in by the price cut on the phone. Others just prefer that company’s service or are part of a family plan with that company. Everyone who signs the contract, however, gets the “incentive.” Put differently, “incentives” often are set up as “do X, get Y”—meant to encourage and support doing X, but the ultimate reason why X was done is not essential to qualifying for the “incentive” Y.

The same is true under § 219(c). The statute considers RTO adders an “incentive” to encourage RTO membership. But those utilities that join RTOs for other reasons (such as their local state law) are no less “join[ing]” and are equally entitled to the “incentives.”

The Sixth Circuit seemed to believe that granting incentive adders to utilities that join transmission organizations when state law requires it would serve no purpose.

Even if granting an RTO adder to a utility that joins an RTO when state law requires it does not *cause*

the RTO membership, the adder still brings meaningful benefit associated with RTO membership. After all, this country seriously needs substantial new investment in our electric grid. Offering benefits to utilities in RTOs serves the purpose of encouraging that investment.

Further, the Sixth Circuit's decision actually *contradicts* the purpose of § 219(c). By taking away RTO adders from utilities in states that mandate RTO membership, the decision effectively *punishes* RTO membership in those states. Meanwhile, large RTOs like PJM cover many states, some of which require membership and others of which do not. As Commissioner Chatterjee pointed out, "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." FE App. 207a.

The Sixth Circuit's misinterpretation of the statutory terms "join" and "incentives" thus creates an immediate problem warranting this Court's review.

II. This Court should grant certiorari and hold that FERC properly preserved Duke's and FirstEnergy's settlements even after the agency changed its mind about the scope of § 219(c).

Over the years, FERC's position on the meaning of § 219(c) has changed. At first, FERC correctly understood the statute to call for RTO adders if a utility joined a transmission organization regardless of what state law required. *Promoting Transmission Inv. Through Pricing Reform*, Order 679, 116 FERC

¶ 61,057 at P 327 (2006) (“An entity will be presumed to be eligible for the incentive if it can demonstrate that it has joined an RTO . . . and that its membership is on-going”). More recently, FERC changed its mind and now does not award adders when state law requires utilities to join transmission organizations. FE App. 64a. But despite the shift, FERC correctly refused to re-open concluded settlements that included adders. FE App. 99a–101a. The Sixth Circuit, over a dissent by Judge Moore, wrongly reversed FERC on this important point. Certiorari should be granted for several reasons.

First, petitioner FirstEnergy is correct that there is a split of authority. FirstEnergy Pet. at 12–13. The Sixth Circuit’s decision below conflicts with the D.C. Circuit’s ruling in *Brooklyn United Gas Co. v. FERC*, 409 F.3d 404 (D.C. Cir. 2005). The Sixth Circuit’s decision also conflicts with the general legal principle that later changes in the law—and changes in how an agency interprets the law—do not warrant re-opening settlements.

Second, Judge Moore’s dissent below is correct. FE App. 55a–62a. FERC did the right thing by declining to re-open Duke’s and FirstEnergy’s settlements. Settlements are entitled to respect. Thus, it was quite proper for FERC to treat Duke and FirstEnergy differently than Dayton and AEP, which lacked comparable settlements with built-in adders. As the D.C. Circuit has put it, “a rate disparity among customers of the same public utility that was solely the result of a settlement among some of the parties was not unlawfully discriminatory.” *United Mun. Distribs. Grp. v. FERC*, 732 F.2d 202, 212 (D.C. Cir. 1984); see also *City of Bethany v. FERC*, 727 F.2d

1131, 1139 (D.C. Cir. 1984) (noting that “because the preservation of private contracts within the context of a rate-setting statutory scheme promotes economic stability,” a settlement setting a rate “may justify a rate disparity, rendering it lawful”).

In Judge Moore’s words, FERC properly did not want to “signal[] to parties that their settlements could come *unsettled* as a result of later legal developments in which the parties had little say.” FE App. 58a (Moore, J., dissenting). FERC did not want to “rob the settlement process of the certainty and predictability that incentivize settlements and thereby enhance administrative efficiency in support of the public good.” *Id.* The Sixth Circuit panel majority wrongly gave no weight to “FERC’s discretion as policy maker to determine that, in . . . adjudication of rate disputes, it would not be unjust or unreasonable to preserve the integrity of Duke’s and FirstEnergy’s agreements.” FE App. 59a.

Third, the issue of when a federal agency must revisit accepted settlements is very important. In this case, Duke’s ten-year-old settlement set an overall return on equity of 11.38%. That number included 50 basis points for an “RTO adder.” Yet the overall settlement number was extensively negotiated, including by the same parties who now claim a right to revisit it. *See* Intervenor Br., 6th Cir. Dkt. 69, at 8–13 (describing the negotiation preceding Duke’s settlement). The overall return on equity reached was an intricate compromise in which Duke accepted a lower rate than it had initially requested, but higher than an initial counter-proposal. *Id.* at 9. To achieve all stakeholders’ agreement on the 11.38% rate, Duke assumed responsibility for millions of dollars in costs

and for most of the risk that it could later be ordered to pay billions of dollars for large transmission projects approved in its former transmission organization. *Id.* at 10–11. FERC then reviewed the overall settlement and found it fair and reasonable. *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,029 at P 14.

In the decade since, Duke has lived up to its part of the bargain. Intervenor Br., 6th Cir. Dkt. 69, at 12–13 (“The customers then received their benefits under the settlement. Duke paid all of its integration and PJM transition costs. Duke assumed the risk of billions of dollars in Multi-Value Project costs.”). Meanwhile, no party has ever proved—or even argued—that Duke’s overall rate of 11.38% has become unjust or unreasonable as a whole under the Federal Power Act. Complaint Order, FE App. 99a (noting that the “OCC has not adduced in this proceeding” any “evidence that the overall ROE has become unjust and unreasonable”); Complaint Reh’g Order, FE App. 140a (“OCC has failed to provide any evidence to demonstrate that the overall ROEs are unjust and unreasonable”). In short, the consumer group respondents in this case never even argued that Duke’s return on equity number is unfair. Instead, they essentially argued that they regretted agreeing to one specific component of it in 2014, and they succeeded in convincing the Sixth Circuit to order that specific component removed.

Again, the settlement was extensively negotiated, approved as fair and reasonable, never broadly challenged, and ratepayers obtained the benefits of it over the years, which they are obviously keeping. FERC was exactly right when it told the Sixth Circuit

that “comprehensive settlement packages were the result of extended negotiations among multiple parties on a variety of issues stemming from [Duke’s] entry into PJM, ultimately reaching complex agreements that no party contested.” FERC Br., 6th Cir. Dkt. 70, at 57. The Sixth Circuit’s ruling is unfair as well as unsettling to agency-approved settlements in any context.

Fourth, the Sixth Circuit erred on this point for another reason as well. Federal Power Act § 206 requires that an existing overall return on equity be found “unjust and unreasonable” before FERC can alter that rate. Section 206 states that “Whenever the Commission, after a hearing . . . shall find that any rate . . . collected by any public utility . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . and shall fix the same by order.” 16 U.S.C. § 824e(a).

The plain text of the statute requires FERC to find a company’s current return on equity unjust and unreasonable before revising it. *Emera Maine v. FERC*, 854 F.3d 9, 26 (D.C. Cir. 2017) (referring to “section 206’s statutory directive that existing rates be found unlawful before FERC has the authority to change those rates”). In *Emera Maine*, FERC’s § 206 proceeding set aside a total return of 11.14% in favor of a new return of 10.57%. The D.C. Circuit rejected FERC’s action because it had failed to find the overall return unlawful before reducing it. The D.C. Circuit called this rule “a form of ‘statutory protection’ to a utility.” *Id.* at 24.

Emera Maine applies here because the opposing parties asked FERC to revise Duke's overall return of 11.38% down to 10.88% without first finding the overall return unjust and unreasonable. *Id.* at 26 (noting that "the zone of reasonableness creates a broad range of potentially lawful ROEs," which requires specific rejection of the existing return by FERC before it can revise or remove components). FERC properly refused the invitation to repeat the error in *Emera Maine*, but the Sixth Circuit forced it to repeat that error anyway.

The Sixth Circuit seemed to assume that the "rate" under section 206 is the adder itself. FE App. 43a. The only reason the Sixth Circuit offered to support that theory is that if the overall return were the "rate," then a utility could, said the Sixth Circuit, depart a transmission organization yet unfairly keep its adder. FE App. 43a ("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(c) and Order 679)."). But as Duke explained, that hypothetical is impossible. Any utility abandoning its transmission organization must always present and seek approval of an entirely new rate anyway. Intervenor Br., 6th Cir. Dkt. 69, at 20–22; Reh'g Pet., 6th Cir. Dkt. 118, at 7.

Ultimately, no one has challenged Duke's overall return on equity. Even so, the Sixth Circuit ordered FERC to re-open Duke's settlement and subtract one component of its rate. This error of law warrants review in this Court.

CONCLUSION

The petitions for a writ of certiorari in No. 24-1304 and No. 24-1318 should be granted on the two questions presented in this brief.

Respectfully submitted,

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JULY 17, 2025