

**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 Petitions for Writs of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

**BRIEF IN OPPOSITION FOR THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL AND BUCKEYE
POWER, INC.**

Maureen Willis
Ohio Consumers'
Counsel
Angela O'Brien
Deputy Consumers'
Counsel
OFFICE OF THE OHIO
CONSUMERS' COUNSEL
65 East State Street,
Suite 700
Columbus, Ohio 43215
(614) 466-1312

Denise C. Goulet
Counsel of Record
McCARTER & ENGLISH, LLP
1301 K Street, N.W., Suite
1000 West
Washington, D.C. 20005
(202) 753-3400
dgoulet@mccarter.com
*Special Counsel for the
Office of Attorney General
of Ohio on Behalf of the
Office of the Ohio
Consumers' Counsel*

Cynthia S. Bogorad
Jeffrey M. Bayne
Spiegel & McDiarmid LLP
1818 N Street, NW
8th Floor
Washington, DC 20036
(202) 879-4000
cynthia.bogorad@spiegelmc.com
Counsel for Buckeye Power, Inc.

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QUESTIONS PRESENTED

1. If the Federal Energy Regulatory Commission (FERC) finds that, because a public utility is statutorily ineligible for an incentive rate adder, the inclusion of the adder in the utility's transmission rate is unjust, unreasonable, unduly discriminatory or preferential under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e, is FERC nevertheless precluded from modifying the rate if it was established by settlement of a prior rate proceeding?

2. Did the Sixth Circuit, like the Ninth Circuit, correctly hold that section 219 of the FPA, 16 U.S.C. § 824s, does not entitle every public utility that joins a regional transmission organization to an incentive adder on its allowed return on equity, regardless whether the utility is required by state law to join and participate in such an organization?

3. Did the Sixth Circuit, like the Ninth Circuit, correctly hold that the FPA does not preempt a state law requiring entities owning or controlling transmission facilities in the state to be a member of, and transfer control of those facilities to, one or more independent transmission entities approved by FERC?

CORPORATE DISCLOSURE STATEMENT

Buckeye Power, Inc. states that it is a non-profit generation and transmission cooperative, owned and governed by its member distribution cooperatives, which are in turn each Ohio non-profit cooperatives owned by their retail member-consumers. Buckeye Power, Inc. has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in Buckeye Power, Inc.

The Office of the Ohio Consumers' Counsel is a governmental agency.

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BRIEF IN OPPOSITION

The decision by the U.S. Court of Appeals for the Sixth Circuit reviewed orders of the Federal Energy Regulatory Commission (FERC) in two related rate proceedings. In one proceeding, FERC appropriately denied a request by Dayton Power & Light Company (DP&L) under sections 205 and 219 of the Federal Power Act (FPA or “the Act”), 16 U.S.C. §§ 824d & 824s, for a 50-basis-point incentive “add” on its rate of return on equity attributed to its membership in a “Regional Transmission Organization” or “RTO.”¹ FERC denied the request for this incentive “RTO Add” because an Ohio statute already mandated that Ohio utilities be members of an RTO, and thus the add would not serve as an incentive. In the other proceeding, respondent the Office of the Ohio Consumers’ Counsel (OCC), the statutory representative of Ohio’s residential electricity consumer interests, filed a complaint under section 206 of the FPA, 16 U.S.C. § 824e, which was supported by respondent Buckeye Power, Inc. The complaint argued that, in light of FERC’s order in the DP&L case, the transmission rates of other Ohio utilities that also contained RTO Adds were unjust, unreasonable, unduly discriminatory or preferential. FERC granted OCC’s complaint as to the Ohio utility affiliates of petitioner American Electric Power Service Corporation (AEP), but denied it as to the utility

¹ The FPA defines a “Regional Transmission Organization” or “RTO” as “an entity of sufficient regional scope approved by the Commission— (A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and (B) to ensure nondiscriminatory access to the facilities.” 16 U.S.C. § 796(27).

affiliate of petitioner FirstEnergy Service Company (FirstEnergy) and respondent Duke Energy Ohio, Inc.

The Sixth Circuit considered petitions for review of FERC's orders in both proceedings. FirstEnergy and AEP seek this Court's review of the Sixth Circuit's judgment in the OCC complaint case.² OCC and Buckeye urge the Court to deny certiorari.

The Sixth Circuit correctly held that section 219(c) of the FPA, 16 U.S.C. § 824s(c), requires voluntary membership in an RTO to qualify a public utility for an incentive-based rate treatment based on such membership. Thus, public utilities are not entitled to an incentive rate if state law mandates they join such an organization. The court properly upheld FERC's decision requiring AEP to eliminate the RTO Adder from the transmission rates of its Ohio utilities, as those utilities' participation is involuntary because of the Ohio statute. The Sixth Circuit also correctly reversed FERC's decision to allow FirstEnergy and Duke Energy Ohio to retain RTO Adders that were in rates established through settlements approved by FERC. Finally, the Sixth Circuit correctly held that the Ohio statute is not preempted by the FPA.

Contrary to the petitioners' contentions, the Sixth Circuit's decision does not conflict with any decisions of this Court or any other court of appeals. Additionally, the court's decision does not involve matters addressed in a 2025 executive order declaring a national energy emergency. The Court should deny review.

² DP&L did not seek this Court's review of the Sixth Circuit's judgment with respect to its case, and Duke Energy Ohio did not seek this Court's review of the Sixth Circuit's judgment with respect to the OCC complaint case.

STATUTES AND REGULATIONS

Sections 201, 202, and 219 of the FPA, 16 U.S.C. §§ 824, 824a & 824s, and Ohio Rev. Code Ann. § 4928.12 are in Appendices I and J to the Petition in No. 24-1304. Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d & 824e, FERC's incentive-based rate regulations, 18 C.F.R. § 35.35, and Ohio Rev. Code Ann. § 4928.02 are in the Appendix to this brief.

STATEMENT OF THE CASE

1. *Statutory and Regulatory Background.* In 1935, Congress enacted Part II of the FPA, 16 U.S.C. § 824 *et seq.*, “to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.” *New York v. FERC*, 535 U.S. 1, 6 (2002) (cleaned up). Section 201 establishes federal jurisdiction over rates for the transmission of electric energy in interstate commerce and public utilities owning or operating facilities used for such transmission. 16 U.S.C. § 824. Section 205(a) requires that all rates for such transmission be “just and reasonable” and provides that any such rate “that is not just and reasonable is hereby declared to be unlawful.” 16 U.S.C. § 824d(a). Section 205(c) requires public utilities to file schedules showing all such rates and charges with the Commission, and section 205(d) requires public utilities to file any changes to these rate schedules before they may take effect. 16 U.S.C. § 824d(c) & (d). Congress also enacted section 206(a), which authorizes FERC, after a hearing held either on its own initiative or on complaint, to modify any rate or practice upon a finding that it is “unjust, unreasonable, unduly discriminatory or preferential.” FERC then “shall determine the just and reasonable rate ... to be thereafter observed and in force, and shall fix the same by order.” 16 U.S.C. § 824e(a).

In 2005, Congress added section 219 to the Act, requiring FERC to adopt a rule establishing “incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.” 16 U.S.C. § 824s(a). Section 219(b) required this rule to promote and encourage investment in transmission facilities and related technologies. 16 U.S.C. § 824s(b). Separately, section 219(c) required that in this rule FERC “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).³ Section 219(d) provides that “[a]ll rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title [FPA sections 205 and 206] that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.” 16 U.S.C. § 824s(d).

FERC promulgated the required rule in Order No. 679. *See Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43294 (July 31, 2006), *reh’g granted in part & denied in part*, Order No. 679-A, 72 Fed. Reg. 1152 (Jan. 10, 2007). FERC required public utilities to file incentive-rate proposals under section 205 and demonstrate that

³ The FPA defines a “Transmission Organization” as 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).

their proposals comply with section 219 and that the resulting rates are just and reasonable. *See id.* at 43304–05 (PP 76–80) (describing procedures). *See also id.* at 43300 (P 43) (“The Commission will, on a case-by-case basis, require each applicant to justify the incentives it requests.”). FERC expressly rejected arguments for establishing a general adder for RTO membership, instead stating it would evaluate requests for the appropriate return on equity incentive from public utilities on a case-by-case basis. *See id.* at 43330 (P 326). FERC determined that its “decision in this rule to consider specific incentives on a case-by-case basis fulfills the Congressional mandate to the Commission.” *Id.* FERC also declined to “make a generic finding on the duration of incentives that will be permitted for public utilities that join Transmission Organizations.” *Id.* (P 327) FERC clarified that these incentives were not confined to entities newly joining a Transmission Organization after the effective date of the rule; instead, “entities that have already joined, and that remain members of, an RTO, ... are eligible to receive this incentive” in “recognition of the benefits that flow from membership in such organizations and the fact continuing membership is *generally voluntary*.” *Id.* (P 331) (emphasis added). The codified regulation implementing section 219(c) provides:

(e) The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with

the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization.

18 C.F.R. § 35.35(e) (2025).

2. *The Proceedings Below.* In July 2021, FERC denied DP&L's request for a 50-basis-point incentive adder to its allowed return on equity. FERC found that the Order No. 679 incentive requires voluntary membership in an RTO, whereas Ohio law mandates DP&L's membership in an RTO. FE App. 157a, *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 (2021), *reh'g denied*, 178 FERC ¶ 61,102 (2022).

In February 2022, OCC filed a complaint under FPA section 206 against AEP, FirstEnergy, and Duke Energy Ohio. OCC's complaint alleged that these three utilities were similarly ineligible for the 50-basis-point incentive adders in the transmission rates they were charging Ohio consumers at that time. In December 2022, FERC granted the complaint in part, finding that the 50-basis-point incentive adder in AEP's rates was unjust and unreasonable because Ohio law required AEP's Ohio utilities to be members of an RTO, making AEP ineligible to charge that incentive adder. Consequently, FERC ordered the AEP incentive adder to be removed from consumers' rates. FE App. 64a, 95a–96a, 105a–109a, *Office of the Ohio Consumers' Counsel v. AEP*, 181 FERC ¶ 61,214 at PP 60–63, 76–79 (2022), *reh'g denied*, 183 FERC ¶ 61,034 (2023).

FERC denied OCC's complaint, however, with respect to FirstEnergy and Duke Energy Ohio. FERC's ruling was based on their rates having been established by settlement agreements that specified their allowed returns on equity. FE App. 99a–101a, 181 FERC ¶ 61,214 at PP 64–66. FERC noted that the Duke Energy Ohio settlement identified an overall return on equity with a 50-basis point RTO Adder, and that the FirstEnergy settlement included “any incentive adder for RTO participation.” FE App. 100a, 181 FERC ¶ 61,214 at P 65.

The Sixth Circuit's decision addressed petitions for review of FERC's orders in both proceedings. It held that all four Ohio transmission utilities, DP&L, FirstEnergy, Duke Energy Ohio and AEP, are ineligible for the RTO Adder. FE App. 48a, 126 F.4th at 1135. Interpreting the text of FPA section 219(c) and the context provided by the rest of the statute, the court held that FPA section 219(c) “requires voluntary membership” in an RTO before a public utility may receive an “incentive” rate adder. To find otherwise would “give the utility an unearned windfall.” FE App. 27a, 126 F.4th at 1124. With respect to the OCC complaint proceeding, the court held that FERC's decision that AEP's incentive adder was unjust and unreasonable was not arbitrary and capricious. FE App. 45a–46a, 126 F.4th at 1133–34.

The court further held that FERC's decision not to remove the incentive adders from the rates of FirstEnergy and Duke Energy Ohio was arbitrary and capricious. The court found that FERC had not provided a reasonable explanation for treating those utilities differently from AEP, in light of all three being ineligible for the incentive adder. FE App. 46a, 126 F.4th at 1134. The court also rejected arguments

that the FPA preempted the Ohio statute. FE App.33a–40a, 126 F.4th at 1127–31. On March 26, 2025, the Sixth Circuit denied requests for rehearing and rehearing en banc filed by FirstEnergy, AEP and Duke Energy Ohio.

SUMMARY OF ARGUMENT

Petitioners provide no reason for this Court to review the Sixth Circuit’s decision. The decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision does not involve issues of such national importance as to warrant this Court’s review. The Court should decline to review this matter on each of the questions presented.

1. FirstEnergy argues that the Sixth Circuit should have allowed it to continue collecting an RTO Adder for which it is ineligible because the rate proceeding that established its current rates was resolved by a settlement. Contrary to FirstEnergy’s claims, the Sixth Circuit’s decision does not conflict with the 2005 D.C. Circuit’s decision upholding FERC’s enforcement of a natural-gas pipeline rate settlement. No party in that case had filed a complaint alleging, and FERC did not find, that aspects of the prior rate settlement were unjust and unreasonable or otherwise contrary to the FPA. Accordingly, that case is readily distinguishable and does not present a conflict.

FirstEnergy fares no better in trying to find a conflict with decisions in two other circuits involving the settlement of ordinary civil litigation. These cases have nothing to do with the settlement of rate proceedings under the FPA. Nor do they address FERC’s undoubted obligation under FPA section 206

to modify an existing rate (including one established by a settlement) it finds to be unjust and unreasonable. Similarly, FirstEnergy’s argument that the Sixth Circuit’s decision warrants review because of the impact on settlement processes more generally is meritless.

2. Both FirstEnergy and AEP argue that the Sixth Circuit erred in its interpretation of section 219(c) of the FPA. But neither claims that the Sixth Circuit’s interpretation of section 219(c) of the FPA to require voluntary RTO membership conflicts with any decision by any court. Indeed, the Ninth Circuit, in an unpublished opinion, subsequently reached the precise same conclusion as the Sixth Circuit, interpreting section 219(c) to include a voluntariness requirement. *Pac. Gas & Elec. Co. v. FERC*, No. 24-2527, slip op. at 9–11 (9th Cir. July 11, 2025) (unpublished). Moreover, the Sixth Circuit’s decision is consistent with the D.C. Circuit’s interpretation that incentive-based rate treatments must incentivize some voluntary action by the recipient public utility, as well as precedent on the just and reasonable requirements of sections 205 and 206 (to which section 219(d) expressly subjects all rates established under section 219).

In any event, the Sixth Circuit’s interpretation of section 219(c) is the correct, best reading of the statute. The court examined the statutory text and the context for the Transmission Organization incentive within the statute. It correctly concluded that this incentive, like other “incentive-based” rate treatments in the statute, requires a voluntary action by the recipient utility in order to be just and reasonable. The Sixth Circuit correctly rejected the petitioners’ counterarguments, which read the word “incentives”

out of the statute. The court correctly refused to convert an incentive into an entitlement that would automatically increase rates to consumers and create a windfall for utilities. The Sixth Circuit properly affirmed FERC's finding that it is not just and reasonable to require Ohio consumers to pay higher transmission rates for an "incentive" when Ohio law already requires the utility to join an RTO.

3. Finally, FirstEnergy and AEP claim that the Sixth Circuit erred in finding that the FPA does not preempt the Ohio law mandating RTO participation (although none of their supporting respondents or *amicus* supports the Court's review of this issue). FirstEnergy and AEP incorrectly argue that there is a conflict between the circuits and this Court with respect to the Sixth Circuit's finding with respect to preemption, but neither this Court nor any court of appeals has found the FPA preempts such a state law. Instead, the opposite is true: the Ninth Circuit found a similar California law not preempted because of the absence of any conflict between the state and federal law, and federal law leaves room for state regulation on this particular matter.

Moreover, this Court and other courts of appeals have explicitly acknowledged the dual nature of federal and state regulation of interstate transmission facilities. Congress did not regulate the entire field of interstate transmission, but left the states with distinct authority to regulate local matters. Ohio mandated RTO participation by utilities providing electricity in its state as part of the legislative bargain that allowed the restructuring of the industry through the "unbundling" of transmission, distribution and generation functions in the state. The RTO participation mandate sought to ensure that Ohio

consumers benefit from greater access to the competitive markets for electricity.

Finally, contrary to the arguments by the petitioners and their supporting respondents and amici, the Sixth Circuit's decision does not warrant review on the grounds that it exacerbates the national energy emergency declared in a recent presidential executive order. The executive order broadly addresses energy supply and energy infrastructure, including electric generation, to meet increasing energy demand, but it does not address a need for greater utility RTO membership or increased profits in electric transmission rates. Thus, the emergency declared in the executive order has no nexus to the incentive at issue here. Thus, FERC properly continued to deny the RTO Adder to a utility required to participate in an RTO by state law. *San Diego Gas & Elec. Co.*, 192 FERC ¶ 61,015 (2025). As FERC has stated, and as the Sixth Circuit and Ninth Circuit correctly held, Congress did not intend for RTO Adders to incentivize investment in transmission, because that is the purpose of the incentives separately provided in section 219(b) of the statute. Indeed, the recipient of an RTO Adder need only maintain RTO membership and can use the increased returns for any purpose; it is under no obligation to invest in transmission facilities.

ARGUMENT

I. NO COURT HAS FOUND THAT FERC SETTLEMENT POLICY EXTINGUISHES FERC AUTHORITY OR CONSUMER RIGHTS UNDER FEDERAL POWER ACT SECTION 206.

FirstEnergy and its supporters fundamentally misrepresent the nature of settlements in the FERC ratemaking process by treating them as inviolate and outside the statute's normal ratemaking structure. The Sixth Circuit's opinion properly recognizes that FERC should treat rates set by settlement the same as other rates subject to challenge under FPA section 206. FE App. 44a–46a, 126 F.4th at 1133–34. Settlements resolve disputes in specific rate proceedings. They do not fix rates indefinitely. Absent specific language in a settlement binding a party to never seek a change in the rate (which is *not* alleged here), existing rates set by settlement are no different than rates set through litigation or other procedures for purposes of FPA section 206. That is consistent with Congressional intent that FPA section 206 allows rates to change over time to ensure they remain just and reasonable for consumers as costs and circumstances change.

The Sixth Circuit explicitly relies on FPA section 206 in finding that FERC must fix any rate or practice found to be unjust and unreasonable and properly did so here by “removing the RTO Adder” from rates. FE App. 42a–43a, 126 F.4th at 1132. The statute states that whenever FERC, “after a hearing held upon its own motion or upon complaint, shall find that any rate ... by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract

affecting such rate ... is unjust and unreasonable,” it “shall determine the just and reasonable rate ... to be thereafter observed and in force, and shall fix the same by order.” 16 U.S.C. § 824e(a). OCC filed its complaint before FERC under FPA section 206. FERC has authority under that statute to find existing rates, however set, unjust, unreasonable and unduly discriminatory.

Here, FERC found it was unjust and unreasonable to include the RTO Adder incentive in the FERC-jurisdictional transmission rates of Ohio utilities when Ohio law already mandated their RTO participation, and the Sixth Circuit correctly upheld that finding. FE App. 46a, 126 F.4th at 1134. Given this finding of unjust and unreasonable rates, FERC is obligated under FPA section 206 to modify the rates so they are just and reasonable. The Sixth Circuit correctly found FERC’s ruling exempting FirstEnergy and Duke Energy Ohio from this finding to be unduly discriminatory. *Id.*

FirstEnergy incorrectly argues that the Sixth Circuit’s decision conflicts with the D.C. Circuit’s opinion in *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407–08 (D.C. Cir. 2005), which accords deference to utility rates set by settlement. In that case (which did not involve the RTO Adder or any incentive-based rate treatment), the D.C. Circuit upheld FERC’s decision to reject an effort by some, but not all, parties to a settlement from a prior case to change the rate produced by that settlement by agreeing to a new rate approach in a later merger proceeding. No party in the merger case had challenged the existing settlement rate as unjust and unreasonable under FPA section 206. As a result, FERC did not find the existing settlement rate in *Brooklyn Union* to be unjust,

unreasonable, unduly discriminatory or preferential under FPA section 206. Because section 206 allows FERC to modify an existing rate only after first finding the existing rate is unjust, unreasonable or unduly discriminatory or preferential, FERC had no basis to approve a modification to the existing settlement rate. *Brooklyn Union* at 405, 407-408.

The only other case arising out of an appeal of a FERC order cited by FirstEnergy, *Transcontinental Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172, 1173 and 1181 (D.C. Cir. 2007), is inapposite for the same reason. That case involved a suit by Sunoco against the pipeline for breach of a settlement regarding the pipeline's on-going obligation to provide gathering services to Sunoco after the pipeline sold its gathering facilities to an unregulated affiliate. Like *Brooklyn Union*, that case did not involve a situation in which the settlement sought to be breached had been challenged as unjust and unreasonable under FPA section 206.

There also is no conflict between the cases FirstEnergy cites which give deference to settlements that had not been challenged under FPA section 206, and the Sixth Circuit's ruling. The Sixth Circuit's ruling involves settlement rates that had been first challenged, and then found, unjust, unreasonable, and unduly discriminatory or preferential under FPA section 206.

FirstEnergy's reliance on non-FERC settlement cases is even less relevant. Those cases do not invoke FPA sections 205 and 206, which provide unique rights to utilities and their consumers to change existing rates, however set.

FirstEnergy's effort to extend *Brooklyn Union's* holding to challenges under FPA section 206 would lead to the unreasonable outcome in which settlement rates could never be challenged and would live in perpetuity, even absent any allegation that the settlement specifies such a severe restriction. Unless a settlement specifically forbids it, utilities can file to change *their* existing settlement rates under FPA section 205 at any time. FPA section 206 provides corollary protection for consumers. *New York v. FERC*, 535 U.S. at 6 ("§ 205 of the FPA prohibited, among other things, unreasonable rates and undue discrimination 'with respect to any transmission or sale subject to the jurisdiction of the Commission,'" and "§ 206 gave [FERC] the power to correct such unlawful practices.") (citations omitted). Neither statute provides an exemption for rates set by settlement.

There is no merit to FirstEnergy's argument (Pet. at 14) that disruption of settlement rates under FPA section 206 will discourage parties from engaging in settlements. Indeed, the opposite is true. Holding that settlement rates cannot be changed through the normal FPA sections 205 and 206 rate processes would discourage parties from settling because costs can and do change over time. Similarly, First Energy's argument (Pet. at 14) that rates set by settlement should be insulated from "post-settlement developments," including intervening federal court decisions, would undermine FERC's section 206 authority and obligation to ensure just and reasonable rates.

FirstEnergy also incorrectly argues (Pet. at 2) that the Sixth Circuit improperly "pull[ed] out a single component [of rates] based on a post-settlement

change in law.” That is not what the Sixth Circuit did. It found that AEP’s, FirstEnergy’s and Duke Energy Ohio’s settlement rates each contain identifiable RTO Adders, thus making it possible to remove the unjust and unreasonable incentive from their rates. FE App. 46a, 126 F.4th at 1134.⁴

II. THE SIXTH CIRCUIT’S DECISION THAT FEDERAL POWER ACT SECTION 219(C) INCENTIVES REQUIRE VOLUNTARY MEMBERSHIP IN A TRANSMISSION ORGANIZATION IS CORRECT AND CREATES NO CONFLICT.

FirstEnergy and AEP do not assert that the Sixth Circuit’s interpretation of section 219(c), which requires voluntary membership in an RTO, is inconsistent with any decision from this Court or other courts of appeals. *See* FE Pet. at 16; AEP Pet. at 24-25. Indeed, the Ninth Circuit, the only other court of appeals to have interpreted section 219(c), reached the same conclusion as the Sixth Circuit in a recent unpublished decision. *See Pac. Gas & Elec. Co. v. FERC*, slip op. at 9–11.

The only “conflict” the petitioners assert are the dissenting views of two former members of the Commission. *See* FE Pet. at 17–18; AEP Pet. at 24–25. But that past intra-agency dispute does not warrant this Court’s review, particularly when there is no

⁴ Respondent Duke Energy Ohio claims that the Sixth Circuit also erred by holding that FERC cannot revoke the RTO Adder without first finding the entire rate unjust and unreasonable. Brief in Support of Certiorari at 12–13. Neither petitioner has asked the Court to review this issue, and the Sixth Circuit correctly found no support for that argument. FE App. 43a, 126 F.4th at 1132.

present intra-agency dispute. In July 2025, FERC unanimously held, consistent with the Sixth and Ninth Circuits, that “section 219(c) is best interpreted as limiting the RTO Adder’s availability to utilities that voluntarily participate in RTOs.” *San Diego Gas & Elec. Co.*, 192 FERC ¶ 61,015 at P 46 (2025) (“*San Diego*”).

Moreover, the availability of RTO Adders is pending in an agency rulemaking proceeding, which further weighs against this Court’s review. In 2020, FERC proposed to provide a generic 100-basis-point RTO Adder that would be available to utilities that join or remain in an RTO “regardless of the voluntariness of their participation.” *See Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, 85 Fed. Reg. 18784, 18798 (Apr. 20, 2020) (notice of proposed rulemaking).⁵ After receiving comments, FERC issued a supplemental notice in 2021 that proposed to provide a 50-basis-point generic adder for the first three years after a utility first joins a Transmission Organization and to terminate the incentive after three years. *See Electric Transmission Incentives Policy Under Section 219 of*

⁵ As this proposal confirms, AEP is incorrect in asserting in the Statement in its Petition that in Order No. 679 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.” AEP Pet. at 9 (modification original) (quoting Order No. 679, P 326). As explained above in the *Statutory and Regulatory Background* portion of the Statement of the Case, Order No. 679 expressly adopted a case-by-case approach. AEP is also incorrect in asserting that FERC “rejected a proposal to make the utilities categorically ineligible if state law required membership.” AEP Pet. at 10 (citing Order No. 679, PP 316 & 331). Order No. 679 contains no such statement and instead adopted a case-by-case approach. *See* Order No. 679, 71 Fed. Reg. at 43330 (P 326).

the Federal Power Act, 86 Fed. Reg. 21972, 21974 (Apr. 26, 2021) (supplemental notice of proposed rulemaking). The supplemental notice also solicited further comments on whether to include a “voluntariness” requirement in its regulations providing for this incentive. *See id.* at 21975–76. FERC has not taken final action on these proposals. Parties, including petitioners, may present their legal and policy arguments to FERC and during judicial review of any final agency action.

In any event, the Sixth Circuit’s decision is the best reading of section 219(c). The court of appeals correctly determined, consistent with *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024), that the “single, best” reading of section 219(c) of the Act is that it “requires voluntary membership” in a Transmission Organization and therefore does not entitle public utilities to an incentive rate if they join such an organization under a state-law mandate. *See* FE App. 23a, 126 F.4th at 1123. That the Ninth Circuit reached the same conclusion underscores that this reading is the single, best one.

The Sixth Circuit first examined the statutory text: Section 219 (c) required that FERC’s rule “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). The court concluded that the terms “incentives” and “joins” imply voluntary and not mandatory action. FE App. 24a, 126 F.4th at 1123. As the court concluded, this interpretation was consistent with an earlier Ninth Circuit decision concerning the RTO Adder provided for in Order No. 679: “An incentive cannot induce behavior that is already legally mandated.” *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 974 (9th Cir.

2018) (cleaned up). *See* FE App. 24a–25a, 126 F.4th at 1123.

The court concluded that the statutory context reinforced this interpretation. Section 219(c)’s Transmission Organization incentives were part of the broader rule Congress required in section 219(a): “incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.” 16 U.S.C. § 824s(a). Thus, the section 219(c) incentives were to be “in the form of ‘incentive-based’ rate treatment, as dictated by section 219(a).” FE App. 25a, 126 F.4th at 1124. The court correctly concluded that “incentive-based” rate treatment is a term of art that “refers specifically to regulations offering a reward to a utility that *voluntarily* takes some future action.” FE App. 25, 126 F.4th at 1124 (emphasis original). Consistent with that understanding, the D.C. Circuit held that incentive-based rates cannot motivate conduct that has already occurred. FE App. 25a-26a, 126 F.4th at 1124 (citing *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 138 (D.C. Cir. 2019)).

Section 219(b) further reinforced the court’s reading that an incentive-based rate treatment connotes voluntary action by the regulated utility. That section required that FERC’s rule also provide separate incentive-based rate treatments to “promote” capital investment and “encourage deployment of transmission technologies.” 16 U.S.C. § 824s(b). The court concluded that “FERC can ‘promote’ and ‘encourage’ only voluntary choices to invest, not mandatory ones.” FE App. 26a, 126 F.4th at 1124.

Finally, the court noted that section 219(d), 16 U.S.C. § 824s(d), subjects all incentive-based rate treatments to the just-and-reasonable requirements of sections 205 and 206 of the FPA. The court concluded that it would be unjust and unreasonable to grant an incentive rate to a utility mandated by law to join an RTO, because the incentive “would not (and could not) incentivize anything.” FE App. 26a, 126 F.4th at 1124.

The petitioners’ counter reading of the statute does not withstand scrutiny. They confine their arguments to five words in section 219(c), specifically that FERC’s rule “shall” provide incentives “to each” utility “that joins” a transmission organization. *See* FE Pet. at 16; AEP Pet. at 26. Finding that language dispositive, the petitioners read the word “incentives” out of section 219(c) and, indeed, out of the entire statute. *See* FE Pet. 16–17 (“‘incentives’ is simply a term of art that describes what is given to a utility ‘that joins’—not a limitation on the reasons for joining.”); AEP Pet. at 26–27 (arguing that FERC’s rule still incentivizes RTO membership even if some states mandate RTO membership).⁶

Contrary to both petitioners’ claims (FE Pet. at 16–17; AEP Pet. at 26–27), the Sixth Circuit did not

⁶ AEP asserts in its Statement that it “voluntarily committed to join an RTO as part of a merger.” AEP Pet. at 10. FERC did not accept that characterization, and explained that its orders in the earlier merger-related proceeding did not address the voluntariness requirement for RTO incentive adders (and, in fact, pre-dated Order No. 679). FE App. 152a–153a, *Ohio Consumers’ Counsel v. AEP*, 183 FERC ¶ 61,034 at P 43 (2023). The Sixth Circuit affirmed this finding. FE App. 47a, 126 F.4th at 1134–35. Regardless, AEP has not sought this Court’s review on whether its participation is voluntary.

rely exclusively on dictionary definitions of “incentive,” but found confirmation in the fact that in requiring “incentive-based” rate treatments “[i]n the context of utilities,” Congress was using a regulatory term of art. FE App. 25a, 126 F.4th at 1124. Courts “generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.” *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988). The petitioners have no answer to the Sixth Circuit’s correct application of that established principle of statutory interpretation.

Neither do the petitioners have an answer for the court’s conclusion that transforming section 219(c) into a utility entitlement would be inconsistent with section 219(d)’s requirement that all incentive-based rate treatments be just and reasonable, as required by sections 205 and 206. By using the phrase “incentive-based ... rate treatments” in section 219(a), and by requiring in section 219(d) that all such incentive-based rate treatments be just and reasonable, Congress tethered section 219(c) RTO incentives to existing ratemaking law.

It is well-established that to comport with the just-and-reasonable requirement, incentive-based rates must be no higher than necessary to induce the desired conduct by the regulated utility:

If the Commission contemplates increasing rates for the purpose of encouraging exploration and development ... it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose. Further than this we think the Commission cannot go without additional authority from Congress.

City of Detroit v. FPC, 230 F.2d 810, 817 (D.C. Cir. 1955), *quoted in Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1503 (D.C. Cir. 1984). This conclusion is consistent with longstanding precedent that for rate incentives to be just and reasonable under sections 205 and 206, they must be prospective and tied to the conduct intended to be induced. *Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 977 (9th Cir. 2018) (“FERC has 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.”). In enacting section 219(d), Congress specified that it was not authorizing FERC to go further than this. Thus, the court correctly concluded that it would not be just and reasonable to provide a higher rate to utilities to take an action they are already legally obligated to do without the higher rate; instead, that would “give the utility an unearned windfall.” FE App. 27a, 126 F.4th at 1124. The Sixth Circuit also correctly concluded that reading section 219(c) as an entitlement statute would be inconsistent with Congress’ “purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion,” 16 U.S.C. § 824s(a). *See* FE App. 27a, 126 4th at 1124.

Accordingly, the petitioners’ arguments for a statutory entitlement to receive an incentive rate of return for maintaining their state-mandated RTO membership have no basis in the statute or case law.

III. THE SIXTH CIRCUIT'S DECISION THAT THE OHIO STATUTE MANDATING RTO PARTICIPATION IS NOT PREEMPTED BY FEDERAL LAW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

Ohio's law requiring transmission utilities providing electricity in Ohio to participate in an RTO was enacted in 1999, well before FPA section 219, when Ohio enacted comprehensive legislation deregulating the electric utility industry. *See* Ohio Rev. Code Ann. §§ 4928.02 & 4928.12. Ohio statutes allowed electric utilities serving the state to "unbundle" the transmission, distribution and generation services they provided Ohio consumers. Electric generation services in Ohio are no longer state-regulated, a permissible state action under FPA section 201, 16 U.S.C. § 824. Ohio's unbundling efforts coincided with Congressional and FERC policies seeking to open the industry to greater competition in electric services. *See, e.g., New York v. FERC*, 535 U.S. at 10 (upholding FERC regulations unbundling wholesale electric energy sales from interstate transmission services to promote competition in wholesale markets).

FirstEnergy and AEP now challenge the constitutionality of the 1999 Ohio law, arguing the Ohio law conflicts with federal law objectives, and/or the entire field of interstate transmission regulation is preempted by the FPA. Neither argument is correct. Compliance with both Ohio law and the FPA is not only possible, but the Ohio law furthers the federal law's goal. And while FPA section 201, 16 U.S.C. § 824, establishes federal jurisdiction over the rates for transmission of electric energy in interstate commerce,

this Court has recognized that Congress did not exhaustively preempt every aspect of transmission services.

A. There is no conflict preemption.

The Sixth Circuit got it right: there is no conflict between the state law mandating RTO participation and federal laws directing FERC to encourage RTO participation.

The Sixth Circuit explained that “[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.’” FE App. 33a-34a, 126 F.4th at 1127-28 (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000)); see also *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 522 (1989) (explaining that conflict preemption can occur only when there would be “clear damage” to federal goals). As the Sixth Circuit correctly found, the Ohio law does not stand as an obstacle to compliance with the federal law objectives. Instead, FPA section 219(c) explicitly encourages participation in RTOs, and “[t]he Ohio law does precisely that.” FE App. 34a, 126 F.4th at 1128. Petitioners are complying with both state and federal law by being members of an RTO. FE App. 34a–35a, 126 F.4th at 1127.

The Ninth Circuit recently reached the same conclusion in an unpublished opinion. *Pac. Gas & Elec. Co. v. FERC*, slip op. at 7–8. The Ninth Circuit found a similar law in California requiring participation by its state utilities in an RTO not conflict preempted by federal law. The Ninth Circuit’s reasoning tracked that of the Sixth Circuit, finding “[t]hat Congress

chose to incentivize rather than mandate, RTO membership does not necessarily imply an intent to prevent states from mandating it.” *Id.* at 8. *See also San Diego*, 192 FERC ¶ 61,015 at PP 38–39 (relying on the Sixth Circuit’s opinion in *Dayton Power & Light* to find the California law is not conflict preempted).

The Third Circuit’s recent decision in *Transource Pennsylvania, LLC v. DeFrank*, No. 24-1045 (3rd Cir. Sept. 5, 2025), finding a Pennsylvania Public Utility Commission decision preempted by the FPA does not create a conflict with the Sixth Circuit’s decision. The Third Circuit’s decision did not involve a state law mandating RTO participation by its state’s utilities. Instead, in that case a district court order found that a state commission order denying a transmission siting certificate to the utility was conflict preempted because “it posed an obstacle to federal objectives ‘by undercut[ting] the foundational goal of congestion-alleviating projects.’” *Transource*, slip op. at 39, 52. The Third Circuit upheld that conflict preemption finding, stating that FERC’s ability to fulfill its mandates [to reduce congestion through regional transmission planning] would be “fatally undermined if state agencies could veto congestion-reducing projects” based on a disagreement with FERC’s approach, because it would “pose an obstacle to the full achievement of federal purposes.” *Id.*, slip op. at 48–49.

Here, the Ohio law neither second-guesses Congressional effort to encourage RTO participation, nor makes that participation impossible. To the contrary, the Sixth Circuit explained that the Ohio law “further[s] Congress’s overall goal of increasing RTO participation.” FE App. 34a, 126 F.4th at 1128; *see also Pac. Gas & Elec. Co. v. FERC*, slip op. at 7-8

(explaining that the similar California law “does not frustrate the purpose of Section 219(c) of the FPA, which is to increase participation in RTOs using incentives”). The Sixth Circuit’s decision is also consistent with the Third Circuit’s finding in *Transource* that “even though FERC has come to exercise increasingly broad authority over interstate aspects of electricity transmission, especially regional transmission planning and expansion, state regulators retain spheres of authority over intrastate aspects of the industry,” including siting, permitting, and construction of transmission lines. *Transource*, slip op. at 19.

The Sixth Circuit correctly rejected claims by FirstEnergy (Pet. at 23-24) and AEP (Pet. at 22-23) that the Ohio law directly conflicts with FPA section 202(a), 16 U.S.C. § 824a(a), which allows, but does not direct, FERC to require coordination of interstate facilities. The Sixth Circuit explained that “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.” FE App. 35a, 126 F.4th at 1128. “Congress may have wanted to prevent FERC from mandating membership via rule, not prevent Ohio from doing so.” *Id.* See also *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015) (quoting *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013) (“The fact that a state has more stringent regulations than a federal law does not constitute conflict preemption.”)).

B. Congress did not field preempt all state regulation of interstate transmission services.

In *New York v. FERC*, this Court stated that “the Court ‘starts with the assumption that the historic police powers of the States were not to be superseded ... unless that was the clear and manifest purpose of Congress.’” 535 U.S. at 18 (citations omitted). The intent to displace state law altogether can be inferred from a framework of regulation “so pervasive ... that Congress left no room for the States to supplement it” or where there is a “federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In the FPA, however, Congress did not establish a clear and manifest purpose to broadly preempt all state law regulating the conditions on which a utility operating within a state may provide such service. Section 201(b)(1) establishes federal jurisdiction over the rates for transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce and facilities used for such transmission and sales. 16 U.S.C. § 824(b)(1). But Congress declared in Section 201(a) that “such Federal regulation, however, [was] to extend only to those matters which are not subject to regulation by the States.” 16 U.S.C. § 824(a). Thus, section 201(b)(1) preserves state jurisdiction over retail electric rates and service and explicitly excludes from federal jurisdiction facilities used for electric generation, local distribution, intrastate transmission, and transmission by the end-use consumer. 16 U.S.C.

§ 824(b)(1). Accordingly, the Sixth Circuit was correct in concluding that the Ohio law mandating participation in a FERC-approved transmission organization is not field preempted. FE App. 35a–40a, 126 F.4th at 1127–31. The Ninth Circuit reached the same conclusion. *See Pac. Gas & Elec. Co. v. FERC*, slip op. at 8 (“California is regulating within the domain Congress assigned to the states, *see* 16 U.S.C. § 824(b)(1), but in a manner that indirectly affects interstate wholesale rates. Such indirect effects do not trigger field preemption.”).

As this Court has found, FERC’s scope of authority under the FPA does not “assum[e] near-infinite breadth,” as Congress granted FERC certain authority while also “limiti[ing] FERC’s regulatory reach” *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 266–67 (2016). Here, using the long-held police powers of the state, the Ohio Legislature allowed monopoly providers of electric utility services to unbundle their monopoly services so long as they participated in an RTO.

In *New York v. FERC*, the Court recognized the dual state/federal jurisdiction over interstate transmission services and facilities. *See* 535 U.S. at 27. The Court upheld FERC’s recognition “that the States retain significant control over local matters even when retail transmissions are unbundled.” *Id.* at 24. This Court has recognized the dual nature of federal and state jurisdiction under the FPA and the corollary Natural Gas Act (NGA), 15 U.S.C. § 717 *et seq.* *See Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 164 (2016) (finding that states “may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC’s domain.”); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373,

385 (2015) (finding that preemption depends on “the target at which the state law aims” and that the NGA “was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.”); *New York v. FERC*, 535 U.S. at 24 (upholding FERC’s finding that requiring unbundled, open-access transmission service “will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, ... and authority to impose non-bypassable distribution or retail stranded cost charges.”); *Ark. Elec. Co-op. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983) (the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.”).

The courts of appeals have followed this tradition. The D.C. Circuit, for example, acknowledged the dual federal/state jurisdiction over interstate transmission facilities in recognizing state authority to regulate transmission siting, *see S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 62 (D.C. Cir. 2014), as well as the dual federal/state authority over electric storage resources, *see Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1188 (D.C. Cir. 2020) (upholding FERC’s authority to regulate the participation of energy storage resources in interstate markets notwithstanding state regulation of the participation in retail markets, finding that states can prevent these resources from participating in both markets simultaneously).

The Second and Seventh Circuits also recognized the dual nature of federal/state jurisdiction by

upholding state laws providing for zero emission environmental credit programs, even though the credits might indirectly affect wholesale prices for electricity in interstate commerce. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 50 (2d Cir. 2018) (citing *N.Y. State Dept. of Soc. Sers. v. Dublino*, 413 U.S. 405, 421 (1973) (“Where coordinate state and federal efforts exist within a complimentary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.”); *see also Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (finding the indirect effects of state emissions credit law on interstate rates is not preempted, but rather is “an inevitable consequence of a system in which power is shared between state and national governments.”).

FERC has taken the same position. In *San Diego*, FERC correctly relied upon the Sixth Circuit’s decision in *Dayton Power & Light* to uphold California’s law mandating participation in an RTO, finding that FPA section 201(a) does not provide FERC with exclusive jurisdiction over transmission. *San Diego*, 192 FERC ¶ 61,015 at P 35. FERC reasoned that the California law fits within the realm of matters left to the states “because it primarily regulates intrastate transmission – an area explicitly reserved to the states by the FPA.” *Id.* at P 36 (referring to such local matters as “state efforts to improve transmission reliability and efficiency.”)

There is no “wall of precedent” supporting AEP’s argument that the Ohio law is field preempted. AEP Pet. at 17. Many of the cases cited by AEP do not even address field preemption. *Green Dev., LLC v. FERC*, 77 F.4th 997, 1002 (D.C. Cir. 2023) (addressing challenges to FERC’s authority to directly assign costs

to a generator); *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 915, 919 (8th Cir. 2009) (finding that the appellant had not raised a federal question); *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 459 (1972) (determining whether certain transmission facilities were interstate or intrastate facilities); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 344 (1982) (concluding that a state action violated the Interstate Commerce Clause). None address state laws mandating RTO participation or the RTO Adder.

As AEP concedes, “no one doubts that States play some role, including over the building of in-state transmission infrastructure via siting, permitting, and construction authorities.” AEP Pet. at 21. While AEP refers to this authority as affecting “in-state” transmission infrastructure, it acknowledges that such facilities are still part of the interstate grid. *See* AEP Pet. at 18 (“nearly all electricity transmission in the continental United States occurs in interstate commerce”). AEP does not explain how the Ohio RTO participation mandate, which aims to protect Ohio consumers in competitive retail markets, FE App. 38a, 126 F.4th at 1130, intrudes on FERC’s authority. The Sixth Circuit correctly found that the Ohio law “highlights improving options and reliability for consumers and expresses concern for open competition ‘in the provision of retail electric service,’ [Ohio Rev. Code Ann.] § 4928.12(B)(5), which states (rather than FERC) regulate.” FE App. 38a, 126 F.4th at 1130.

For similar reasons, there is no merit in FirstEnergy’s argument (Pet. at 9) that the Sixth Circuit’s reasoning is in error because it said that the Ohio statute “primarily regulated intrastate

transmission.” While the Sixth Circuit opinion mentions intrastate versus interstate transmission, the Sixth Circuit’s discussion of intrastate activities refers to local matters subject to state regulatory authority. It correctly explained that section 205(a) of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-1(a), demonstrates that “Congress did not preempt all state laws intersecting with interstate transmission,” finding that “PURPA allows—but does not require—FERC to exempt utilities from state laws hindering voluntary utility coordination.” FE App. 39a, 126 F.4th at 1130. The Sixth Circuit properly reasoned that “[l]eaving FERC the discretion to exempt utilities from these state laws [prohibiting coordination] shows that Congress knew about state laws affecting the coordination of electric utilities and chose not to preempt them.” *Id.* Indeed, the discretion Congress granted FERC to exempt utilities from state laws that “prohibit[] or prevent[] the voluntary coordination of electric utilities,” 16 U.S.C. § 824a-1(a), confirms Congress’s intent *not* to preempt state laws that *mandate* coordination or Transmission Organization participation.

IV. THE SIXTH CIRCUIT’S DECISION DOES NOT IMPEDE NEEDED TRANSMISSION INVESTMENT.

In a final argument for this Court’s review, the petitioners argue that the Sixth Circuit’s decision exacerbates a national energy emergency and will impede needed capital investment in transmission facilities. *See* FE Pet. 19; AEP Pet. 30. These arguments are flawed in multiple respects.

First, the claim that the Sixth Circuit’s decision exacerbates the “national energy emergency” declared in Executive Order No. 14156, 90 Fed. Reg. 8433 (Jan.

20, 2025), misses the mark. The executive order broadly addresses energy supply and energy infrastructure, including electric generation, but it does not address a need for maintaining or increasing membership in RTOs, a need for FERC to increase utility profits for transmission investments, or a need for “incentive-based” rate treatments for membership in RTOs or for any other reason.

Second, FERC has made clear that “[s]ection 219(c), applicable to the Transmission Organization incentive, is separate from the construction incentives in subsection (b), and therefore was not intended to directly encourage construction.” *Promoting Transmission Investment Through Pricing Reform*, Order No. 679-A, 72 Fed. Reg. 1152, 1166 (Jan. 10, 2007) (P 87).⁷ Moreover, the Sixth Circuit recognized the “myriad problems with calling the RTO adder a construction ‘incentive’ and not a membership inducement,” the most concerning of which is that “[n]othing would stop [utilities] from using the revenue from the adder for other purposes, such as increasing shareholder dividends” rather than construction. FE App. 29a, 126 F.4th at 1125.

Third, nothing in the Sixth Circuit’s opinion impedes the ability of the petitioners or any other public utility to request incentive-based rate treatment for transmission-infrastructure investment under section 219(b) and FERC’s regulations. If

⁷ In the Statement in its Petition, AEP asserts that “a higher ROE will, all else equal, incentivize investment in transmission over other uses.” AEP Pet. at 9. This conclusory statement erroneously implies that Congress intended section 219(c)’s transmission-organization incentives to incentivize transmission investment. The Sixth Circuit, like FERC, rejected that interpretation of the statute. FE App. 29a–30a, 126 F.4th at 1126.

anything, the court of appeals' decision steers consumer dollars toward more efficient investment in needed transmission infrastructure, consistent with the Executive Order.

Finally, if the petitioners believe their allowed rates of return on equity are insufficient to attract capital, they have the right to file for an increased return under section 205 of the FPA and make their case to FERC. As decades of precedent confirms, the *base* return on equity (i.e., the return on equity without any adders) is the mechanism to ensure a sufficient return to raise capital. *See FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (discussing just and reasonable rates under analogous NGA provisions).

The nation faces significant energy policy challenges. But granting utilities an automatic entitlement to higher profits in transmission rates for RTO membership mandated by state law will not incentivize transmission investment. Nor does it provide any basis for this Court to review the decision below.

CONCLUSION

The petitions should be denied. Ohio consumers should not be funding windfall profits to incentivize Ohio utilities and their affiliates to join a regional transmission organization when Ohio law mandates such conduct.

Respectfully submitted,

Denise C. Goulet

Counsel of Record

Randolph L. Elliott

MCCARTER & ENGLISH, LLP

1301 K Street, N.W.,

Suite 1000 West

Washington, D.C. 20005

(202) 753-3400

dgoulet@mccarter.com

*Special Counsel for the Office of
Attorney General of Ohio on
Behalf of the Office of the Ohio
Consumers' Counsel*

Maureen Willis

Ohio Consumers' Counsel

Angela O'Brien

Deputy Consumers' Counsel

OFFICE OF THE OHIO CONSUMERS'
COUNSEL

65 East State Street, Suite 700

Columbus, Ohio 43215

(614) 466-1312

Cynthia S. Bogorad

Jeffrey M. Bayne

Spiegel & McDiarmid LLP

1818 N Street, NW, 8th Floor

Washington, DC 20036

(202) 879-4000

cynthia.bogorad@spiegelmc.com

Counsel for Buckeye Power, Inc.

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APPENDIX

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Federal Power Act:

Section 205, 16 U.S.C. § 824d1a

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Ohio Rev. Code Ann. § 4928.0218a

Federal Power Act, Section 205
16 U.S.C. § 824d

§824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together

with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge,

classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; “automatic adjustment clause” defined

- (1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter,

the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term “automatic adjustment clause” means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(g) Inaction of Commissioners

(1) In general. With respect to a change described in subsection (d), if the Commission permits the 60-day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825l(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

6a

If, pursuant to this subsection, a person seeks a rehearing under section 8251(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 8251(b) of this title.

Federal Power Act, Section 206
16 U.S.C. § 824e

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the 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. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded

within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the

Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by

contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)

(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

**Federal Energy Regulatory Commission
Regulations Under the Federal Power Act
18 C.F.R. § 35.35 (2025)**

**Subpart G—Transmission Infrastructure
Investment Provisions**

§ 35.35 Transmission infrastructure investment.

(a) Purpose. This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Definitions.

(1) **Transco** means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

(2) **Transmission Organization** means 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.

(c) General rule. All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and

conditions be just and reasonable and not unduly discriminatory or preferential.

(d) Incentive-based rate treatments for transmission infrastructure investment. The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219, that the total package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(1) For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(i) A rate of return on equity sufficient to attract new investment in transmission facilities;

- (ii) 100 percent of prudently incurred Construction Work in Progress (CWIP) in rate base;
 - (iii) Recovery of prudently incurred pre-commercial operations costs;
 - (iv) Hypothetical capital structure;
 - (v) Accelerated depreciation used for rate recovery;
 - (vi) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility;
 - (vii) Deferred cost recovery; and
 - (viii) Any other incentives approved by the Commission, pursuant to the requirements of this paragraph, that are determined to be just and reasonable and not unduly discriminatory or preferential.
- (2) In addition to the incentives in § 35.35(d)(1), the Commission will authorize the following incentive-based rate treatments for Transcos, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential:
- (i) A return on equity that both encourages Transco formation and is sufficient to attract investment; and
 - (ii) An adjustment to the book value of transmission assets being sold to a Transco to remove the disincentive associated with the

impact of accelerated depreciation on federal capital gains tax liabilities.

(e) Incentives for joining a Transmission Organization. The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. The Commission will also permit transmitting utilities or electric utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by transmitting utilities or electric utilities or through transmission rates charged by the Transmission Organization that provides services to such utilities.

(f) Approval of prudently-incurred costs. The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(g) Approval of prudently incurred costs related to transmission infrastructure development.

The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(h) FERC-730, Report of transmission investment activity. Public utilities that have been granted incentive rate treatment for specific transmission projects must file FERC-730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

- (1) In dollar terms, actual transmission investment for the most recent calendar year, and projected, incremental investments for the next five calendar years;
- (2) For all current and projected investments over the next five calendar years, a project by project listing that specifies for each project the most up-to-date, expected completion date, percentage completion as of the date of filing, and reasons for delays. Exclude from this listing projects with projected costs less than \$20 million; and
- (3) For good cause shown, the Commission may extend the time within which any FERC-730 filing is to be filed or waive the requirements applicable to any such filing.

(i) Rebuttable presumption.

- (1) The Commission will apply a rebuttable presumption that an applicant has demonstrated that its project is needed to ensure reliability or

reduces the cost of delivered power by reducing congestion for:

(i) A transmission project that results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A project that has received construction approval from an appropriate state commission or state siting authority.

(2) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(j) Commission authorization to site electric transmission facilities in interstate commerce.

If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

Ohio Revised Code Ann. § 4928.02

It is the policy of this state to do the following throughout this state:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that

the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the

use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

(O) Encourage cost-effective, timely, and efficient access to and sharing of customer usage data with customers and competitive suppliers to promote customer choice and grid modernization.

(P) Ensure that a customer's data is provided in a standard format and provided to third parties in as close to real time as is economically justifiable in order to spur economic investment and improve the energy options of individual customers.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.