

(“BPS”) protected against emerging threats not yet reflected in standards or regulations. As the Commission and Congress have each highlighted in proceedings discussed below related to the development of the instant NOPR,⁴ the BPS is a vast interconnected system which is facing increasingly complex and quickly evolving security threats. Particularly pernicious are ever-changing cybersecurity threats which by their nature can target one resource and create systemwide ripple effects with just one hit. While certain protections are required under existing NERC CIP reliability standards, the NERC reliability standards process is a long, detailed process that takes time to implement and may not be able to keep up with evolving technology. Hence, it is prudent to examine how to incent and pay for protections that address rapidly evolving technology in order to keep our electric grid reliable, resilient, and operational. The legislative language in the Infrastructure and Jobs Act directs FERC to create incentives for “above and beyond” cybersecurity protections, demonstrating the importance of incentivizing these investments at all points across the grid.

The NOPR, however, misses the mark in responding to Congress’ directive by limiting the proposed incentive approaches to transmission facilities and certain rate-based generation facilities, thus excluding competitive power generators that recover their costs through competitive markets. Not only is this approach inconsistent with Congress’ intent, but it also misses an opportunity to fortify the Bulk-Power System in its

⁴ See generally, Public Law 117–58, “The Infrastructure Investment and Jobs Act”, (November 15, 2021);

Cybersecurity Incentives Policy White Paper, by FERC Staff, Docket No. AD20-19-000, (June 2020) (“Cybersecurity White Paper”), <https://www.ferc.gov/sites/default/files/2020-06/notice-cybersecurity.pdf>;

Cybersecurity Incentives, Notice of Proposed Rulemaking, 173 FERC ¶ 61,240, Docket No. RM21-3-000, (December 17, 2020), p. 1. (“December 2020 NOPR”)

entirety.⁵ Congress clearly demonstrated that it seeks to enhance *system-wide* cybersecurity and not just the cybersecurity of individual Transmission Providers or facilities.⁶

Given the interconnected nature of the interstate electric system, it is only reasonable that all segments of the BPS should be incented to fortify their cybersecurity defenses in the same manner as the Commission proposes for Transmission Providers and cost-of-service generation in the NOPR in order to further strengthen the entirety of the system.

I. BACKGROUND

In November 2021, Congress passed the Infrastructure and Jobs Act. Among myriad other provisions, this legislation directed the Commission to revise its regulations to establish incentive-based rate treatments for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce by public utilities who advance cybersecurity technology and participate in cybersecurity threat information sharing programs.

In response to this directive, after submitting a report on cybersecurity issues to the U.S. Senate Energy & Natural Resources Committee and the U.S. House of Representatives Energy & Commerce Committee in May 2022, the Commission issued the instant NOPR to propose a regulatory framework to allow certain utilities to qualify for incentives for eligible cybersecurity expenditures. Per this framework, a utility would need to show that its investments (1) materially improve cybersecurity through either an investment in advanced cybersecurity technology or participation in a cybersecurity

⁵ See generally, The Infrastructure Investment and Jobs Act.

⁶ *Id.*

threat information sharing program; and (2) are not already be mandated by Critical Infrastructure Protection (CIP) Reliability Standards, or local, state, or Federal law.⁷

The instant NOPR is not the Commission's first foray into this issue. Previously, in June 2020, Commission staff issued a Cybersecurity White Paper to explore potential frameworks for providing transmission incentives to utilities for cybersecurity investments that produce significant cybersecurity benefits for actions taken that exceed the requirements of the mandatory and enforceable CIP Reliability Standards.⁸ Following the issuance of the Cybersecurity White Paper, the Commission issued the Cybersecurity Incentives NOPR on December 17, 2020,⁹ which proposed to allow utilities to request incentives for certain cybersecurity investments that go above and beyond the requirements of the CIP Reliability Standards. The December 2020 NOPR has been superseded by the instant NOPR, and has thus been terminated in the instant proceeding.

II. COMMENTS

A. Any Incentives Must be Extended to All Public Utilities Under FERC Authority

EPSA members take very seriously the cyber and physical security of their operations as well as those of the grid. Ensuring that all cyber and physical security considerations are fully addressed is central to the reliable operations of all participants in the delivery of electricity to consumers, including independent power producers (IPPs) and competitive power suppliers who rely on capacity, energy, and ancillary market revenues for service supplied to continue to operate. Any day with a service

⁷ NOPR, p. 3.

⁸ *Cybersecurity Incentives Policy White Paper*.

⁹ December 2020 NOPR.

disruption is a day that a competitive power supplier is not able to conduct its business or sell its product. Further, any day with a service disruption is a day that customers will not be able to conduct their business or make or sell their products. Neither is acceptable and that is why competitive suppliers invest in extensive security systems for their own protection and that of the BPS.

The instant NOPR proposes two options to offer or allow incentives as outlined by Congress. First, the NOPR proposed development of a list of pre-qualified investments (“the PQ List”) to identify the types of cybersecurity expenditures that the Commission will find eligible for an incentive. Under this approach, a utility seeking an incentive would be required to demonstrate that its cybersecurity expenditure qualifies as one or more of the PQ List items and, although the PQ List items would be entitled to a presumption of eligibility, the utility would still need to demonstrate that the proposed rate, inclusive of the incentive, is just and reasonable.¹⁰ The Commission also asks whether a case-by-case approach should be used to evaluate whether certain cybersecurity expenditures are eligible for incentives. It may be that a combination of these two approaches is most appropriate, by establishing a pre-qualified list, but allowing utilities to seek incentives for “unlisted” investments on a fact-specific basis. As new technologies are identified in this case-specific process, the Commission should update the PQ list to reflect the evolving types of investments that have been and should be accepted under this rule.

Under either of these approaches, the Commission proposes rate recovery mechanisms that would be limited to utilities that operate under cost-of-service

¹⁰ NOPR, p. 15.

ratemaking.¹¹ While these types of incentives are on their face more straightforward for the Commission to extend under cost-of-service ratemaking, given their direct involvement in approving rates for entities under this paradigm, this approach overlooks a large swath of BPS resources and facilities. Further, it is at odds with the plain language of the Infrastructure and Jobs Act. The Act reads that:

[T]he Commission shall establish, by rule, incentive-based, including performance-based, rate treatments for the transmission of electric energy in interstate commerce *and the sale of electric energy at wholesale in interstate commerce by public utilities* for the purpose of benefitting consumers by encouraging--(1) investments by public utilities in advanced cybersecurity technology; and (2) participation by public utilities in cybersecurity threat information sharing programs.¹²

It is clear from this language that Congress did not intend to limit recovery of these incentives to entities under cost-of-service regulation but rather intended to provide incentives to the entire bulk power system, including generators that sell electric energy at wholesale in interstate commerce – much of which occurs pursuant to market-based rates in centrally organized competitive markets – the Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs). Further, Congress specifically cites small or medium-sized public utilities with limited cybersecurity resources as being potentially eligible for *additional* incentives beyond those identified in the legislation, demonstrating the Congressional intent to fortify the entirety of the BPS to the greatest extent that is reasonably possible.¹³ As such, the Commission *is*

¹¹ NOPR, p. 19, “We propose the following rate incentives for utilities that make eligible cybersecurity investments: (1) an ROE adder of 200 basis points that would be applied to the incentive-eligible investments; and (2) deferral of certain eligible expenses for rate recovery, enabling them to be part of rate base such that a return can be earned on the unamortized portion.”

¹² Infrastructure Investment and Jobs Act, Section 40123 (c), (Emphasis added).

¹³ *Id.*, Section 40123 (d)(2).

required to extend these incentives to all entities whose rates it regulates under its authority to ensure just and reasonable wholesale rates and protect against undue discrimination. Moreover, it stands to reason that offering the same incentives to entities that recover their costs through competitive markets is necessary to improve the cybersecurity readiness of the BPS, as directed by Congress.

Transmission Providers and generation resources all face complex cybersecurity risks, and both represent essential parts of the BPS. Given the interconnected nature of the interstate electric system, the system is better protected from cybersecurity threats if all similarly situated facilities on that system are incented to fortify their cybersecurity defenses as Transmission Providers would be under the NOPR. As cyber threats can often ripple throughout interconnected systems, it holds that the BPS would be well-served to be as fortified as is reasonably possible. Incenting one type of facility based solely on its regulated rate construct, while leaving out others who rely on competitive markets, does not achieve that goal.

B. The Commission has Options to Allow for Single Issue Rate Recovery

EPSA recognizes that incenting voluntary behavior may be more complicated for those entities that recover their costs through competitive markets rather than a guaranteed rate of return. While the Commission can offer an ROE adder to cost-of-service entities, it has no such clear vehicle for IPPs and competitive suppliers that operate in competitive markets. With that said, single issue ratemaking may offer a pathway for the Commission to pursue. In fact, the Infrastructure and Jobs Act contemplates this option. The law provides that:

The Commission shall permit public utilities to apply for incentive-based rate treatment under a rule issued under this section on a

single-issue basis by submitting to the Commission a tariff schedule under section 205 that permits recovery of costs and incentives over the depreciable life of the applicable assets, without regard to changes in receipts or other costs of the public utility.¹⁴

This passage clearly shows that Congress is concerned with system-wide cybersecurity as it has contemplated avenues for recovery of incentive expenditures that could apply to *all* BPS entities. The most straightforward way for the Commission to provide single issue rate recovery would be to establish a formula rate for costs associated with identified incented cybersecurity investments. Competitive entities could make investments on the PQ list and apply to the Commission for formula rate recovery having established that its investment is eligible for the incentive. Once the competitive entity has established the formula rate template for eligible costs, it would update the formula rate by submitting cost information as part of an informational filing to the Commission. This method would limit the administrative burden associated with formal single issue rate proceedings while still providing a transparent process that would allow for Commission and interested stakeholder review of each investment.

Should the Commission not decide to implement a formula rate to reasonably mirror the incentive dynamic that the NOPR outlines for Transmission Providers, the Commission could publish the PQ List and allow for competitive market participants to file a FPA Section 205 Filing with the Commission for authorization to make an upgrade with the required showing of benefits. If the Commission approves the 205 Filing, that entity would then be able to make the cybersecurity update and file for cost recovery of the costs incurred to make the upgrade. The Commission operates under a similar paradigm for assessing costs associated with providing reactive power service

¹⁴ Infrastructure Investment and Jobs Act Section, 40123 (f).

Either of these pathways would ultimately help achieve the stated cybersecurity goal and lead to similar outcomes as the incentives proposed for cost-of-service entities, all while preserving Commission oversight and discretion over the associated costs.

C. The Commission Should Ensure that Cross-Subsidization Does Not Occur in Vertically Integrated Entities

The Commission must ensure that cross-subsidization does not occur among vertically integrated entities based on the proposed cost-of-service methodology outlined in the NOPR. While these companies may have separate legal entities for their transmission and generation operations, cybersecurity programs are often administered as a shared service. Accordingly, the Commission must ensure that any entities to which it extends incentives on the transmission side are not cross-subsidizing cybersecurity operations for their generation arms. This is critical in order to ensure just and reasonable rates that are not unduly discriminatory for generation resources competing against each other. This poses concerns in some RTOs – including MISO and SPP – in which IPPs and competitive suppliers compete against vertically integrated utilities to supply power to the system operator. As the NOPR is currently structured, those “vertically integrated” utilities can apply their cost-of-service incentives to their affiliated unregulated generation facilities and recover those costs from ratepayers. This creates a clear disadvantage to competitive power suppliers who, under the current proposal, cannot recover the costs to better fortify their facilities in the same or a similar manner, as Congress intended. Allowing these entities to use transmission incentive monies to subsidize their generation operations would put IPPs

and competitive suppliers at an even greater competitive disadvantage than they already face in these regions.

I. Conclusion

The language of the Infrastructure and Jobs Act clearly requires the Commission to offer cybersecurity incentives to all BPS participants whose cybersecurity readiness can impact the security of the system. The Commission should revise the NOPR to ensure it complies with Congress' directive. Additionally, the Commission should take measures to ensure that vertically integrated utilities do not cross-subsidize their generation operations with incentives received for voluntary transmission cybersecurity measures.

Respectfully submitted,

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