UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	)	Docket No. EL24-119-000
PJM Interconnection, L.L.C.	)	Docket No. ER24-2338-000
Duquesne Light Company, et al.	)	Docket No. ER24-2336-000
		(Not Consolidated)

LIMITED PROTEST AND MOTION TO LODGE OF THE ORGANIZATION OF PJM STATES, INC.

Pursuant to Rules 211 and 212 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.211 and 212, the Organization of PJM States, Inc. ("OPSI"),[1] respectfully submits this Limited Protest in response to PJM's Complaint[2] and the Transmission Owners' ("TOs") filing to amend the Consolidated Transmission Owners Agreement ("CTOA") filed pursuant to § 205 of the Federal Power Act.[3]

PJM argues in its complaint that the location of its regional transmission planning rules ("the RTEP Protocol") is not just and reasonable because it limits PJM's independence and discriminates against PJM compared to other Regional Transmission Organizations ("RTOs"). However, PJM has not submitted a just and reasonable set of replacement rules that is limited to solving the problem it has identified. Therefore, if the Commission agrees the location of the RTEP Protocol is unjust and unreasonable, it should establish paper hearing procedures to further develop

[1] OPSI's following members support this Limited Protest and Motion to Lodge: the Delaware Public Service Commission, Public Service Commission of the District of Columbia, Illinois Commerce Commission, Kentucky Public Service Commission, Maryland Public Service Commission, Michigan Public Service Commission, New Jersey Board of Public Utilities, Pennsylvania Public Utility Commission, Tennessee Public Utility Commission, Virginia State Corporation Commission, and Public Service Commission of West Virginia. The Indiana Utility Regulatory Commission, North Carolina Utilities Commission, and Public Utilities Commission of Ohio abstained in the vote on this filing.

[2] PJM Interconnection, L.L.C, *Facilitating PJM Independent 205 Filing Rights Over Transmission Planning*, Docket No. ER24-119-000 (June 21, 2024) ("PJM Complaint").

[3] Duquesne Light Company, et al., *Amendments to the Consolidated Transmission Owners Agreement*, Docket No. ER24-2336-000 (June 21, 2004) ("CTOA Filing").

the record to determine the just and reasonable and not unduly discriminatory or preferential set of replacement rules.

If the Commission rejects PJM's FPA § 206 complaint, the Commission must also reject the TOs' FPA § 205 filing to amend the CTOA and PJM's FPA § 205 filing to amend its Open Access Transmission Tariff[4] ("OATT"), because both refer to the location of the RTEP Protocol in the Tariff. The RTEP Protocol is not currently located in the Tariff. Because the RTEP Protocol is currently located in the Operating Agreement ("OA"), PJM must receive a 2/3 sector weighted vote in support from the Members Committee to file amendments to the RTEP Protocol with the Commission under FPA § 205.

FERC can only change existing rules in accordance with the FPA. There is no FPA § 205 filing before the Commission to remove the RTEP Protocol from the OA. Therefore, it must act pursuant to FPA § 206. If FERC rejects PJM's complaint, the location of the RTEP Protocol in the OA will continue to be just and reasonable. Accordingly, PJM will continue to need the support of the PJM Members to file changes to the RTEP Protocol under FPA § 205. A FERC decision approving other rules that contradict this would constitute a violation of the filed rate doctrine.

If the Commission agrees the location of PJM's regional transmission planning rules is unjust and unreasonable, it should, nevertheless, reject the CTOA filing because some of the amendments are unjust and unreasonable, unduly discriminatory, or preferential. The CTOA Amendments will weaken PJM's independence, weaken the perception of its independence and the PJM Board of Managers' independence among states and stakeholders, and reduce PJM's ability to conduct efficient and cost-effective regional transmission planning.

[4] PJM Interconnection, L.L.C., *Facilitating PJM Independent 205 Filing Rights Over Transmission Planning*, Docket No. ER24-2338 (June 21, 2024) ("OATT Filing").

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I. Executive Summary

OPSI agrees with PJM and the TOs that PJM should have unilateral authority to amend its regional transmission planning rules commensurate with its responsibility to ensure the reliability of the grid, and OPSI stated this publicly in a letter to the PJM Board of Managers in early April 2024.[5] However, OPSI provided an important caveat: "But, how the PJM Board comes about that authority is an important detail."[6] PJM has proposed to obtain this independent authority to amend its regional planning rules by transferring them from the Operating Agreement ("OA") to the Tariff. The OA requires PJM to obtain the consent of the Members Committee before submitting an FPA § 205 filing to amend it,[7] and the Tariff does not.

PJM has chosen to tie its FPA § 206 Complaint to an unjust and unreasonable FPA § 205 filing from the TOs to amend the CTOA.[8] Several proposed amendments to the CTOA are unjust and unreasonable and require the Commission to reject that filing outright. Others are superfluous to PJM's goal of having the unilateral ability to file amendments to the RTEP Protocol under FPA § 205. They should not be included as components of a just and reasonable set of replacement rules and should be rejected.

In its April letter to the PJM Board, OPSI wrote "Inclusion of superfluous and harmful modifications or new provisions in an amended CTOA filed at FERC will likely result in OPSI

[5] OPSI, *Letter to PJM Board of Managers* at p. 1 (April 3, 2024) available at: https://opsi.us/wp-content/uploads/2024/04/2024.04.03-OPSI-CTOA-Letter-to-PJM.pdf ("April OPSI Letter").
[6] *Id.*
[7] PJM, Operating Agreement at §§ 8.4 and 18.6.
[8] PJM Complaint at p. 5 ("Absent such alignment among the CTOA, the Operating Agreement, and the Tariff, and harmonization of the two agreements, the ultimate effectuation of the transfer is not possible, legally or practicably. This filing is being submitted with the mutual understanding that it reflects PJM and the PJM Transmission Owners' agreement to the CTOA amendments as a whole, and without acceptance of those amendments that include the PJM Transmission Owners' agreement to grant PJM with Tariff filing rights, PJM does not have the legal authority to effectuate the changes proposed in this filing. PJM and the PJM Transmission Owners have fully complied with the process for amending the CTOA, and accordingly PJM respectfully requests that the Commission also accept the proposed amendments to the CTOA in Docket No. ER24-2336-000, as well as the proposed amendments to the Operating Agreement submitted in this filing.").

protesting the proposal, even though we agree with the primary purpose of the PJM Board having the relevant 205 rights."[9] PJM and the TOs have not addressed OPSI's concerns in the instant filings, therefore, OPSI is filing this Protest.

This limited protest argues the Commission must make relevant decisions in a specific order:

> The Commission must begin its decision making with PJM's Complaint.
> First, the Commission must determine whether the current location of the RTEP Protocol in the OA is unjust and unreasonable.[10] If it remains just and reasonable, the Commission must reject, not just PJM's complaint, but its FPA § 205 filing and the TOs' FPA § 205 filing, because they would require a change to the OA in violation of the filed rate doctrine. While OPSI wants PJM to have the authority to unilaterally propose changes to the RTEP Protocol under FPA § 205, this preference does not render the status quo unjust and unreasonable. Indeed, there is historical evidence to suggest the "checks and balances" in PJM's governance process, i.e. locating the RTEP Protocol in the OA, were made to precisely guard against this type of situation.
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> Alternatively, if the Commission agrees the location of the RTEP Protocol is unjust and unreasonable, the Commission should establish paper hearing procedures to further develop the record to determine the just and reasonable and not unduly discriminatory or preferential set of replacement rules. This is necessary because by linking its replacement to the TOs' CTOA filing it has proposed an unjust and unreasonable replacement rate, and some of the amendments to the CTOA are unnecessary to give PJM the filing rights it needs.
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> The Commission cannot grant the FPA § 205 filings without first finding the OA unjust and unreasonable pursuant to FPA § 206.
> If the Commission grants PJM's Complaint, it should nonetheless reject the TOs' FPA § 205 filing to amend the CTOA, because several of the amendments are not just and reasonable. In this case, the Commission would have to find the CTOA is unjust and unreasonable and direct amendments that align it with the revised Tariff and OA while excluding the superfluous or unjust or unreasonable provisions OPSI has identified.[11]
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> Similarly, the Commission could accept PJM's FPA § 205 filing to place the RTEP Protocol in the Tariff as part of a replacement rate that does not accept the unjust and unreasonable CTOA amendments. However, approving this filing without finding the OA to be unjust and unreasonable would constitute the same filed rate doctrine violation identified above.

[9] April OPSI Letter at 2.
[10] *See infra* at § III.B.1.
[11] *See infra* at § IV.C.

The set of actions described above presents a path that would allow PJM to obtain FPA § 205 filing rights over the RTEP Protocol that does not rely on the Commission accepting the unjust and unreasonable amendments to the CTOA. The TOs acknowledge that their filing goes further than necessary to simply grant PJM authority over regional transmission planning. Exhibit D to the TO's CTOA Amendment filing identifies which provisions are needed to transfer to PJM independent authority to modify the RTEP Protocol and which are not.

II. Background

On February 6, 2024, the PJM TOs posted draft amendments to the CTOA "in recognition that PJM needs the independence and the tools to reliably and affordably meet new challenges in the future."[12] The accompanying letter stated that the TOs intended to meet at the Transmission Owners Agreement Administrative Committee ("TOA-AC") on February 20, 2024, to discuss the amendments, to "provide an update" to the Members Committee on February 22, 2024, and to hold a vote on the amendments at the TOA-AC on March 15, 2024.[13] On March 12, 2024, the PJM Board of Managers stated it needed more time to evaluate the proposed CTOA amendments and indicated it would not have a response to them until at least March 31, 2024, pursuant to an OPSI request.[14]

On April 3, 2024, OPSI wrote a letter to the PJM Board of Managers agreeing that PJM should have independent FPA § 205 filing rights over the RTEP Protocol but emphasizing that

[12] American Electric Power, et. al., *Request to convene a meeting of the TOA-AC to consider amendments to the Consolidated Transmission Owners Agreement* (Feb. 6, 2024) available at: https://www.pjm.com/-/media/committees-groups/committees/toa-ac/2024/20240220/20240220-proposed-amendments-to-the-ctoa.ashx.

[13] *Id.*

[14] PJM Board of Managers, PJM Board Response to Several Transmission Owners Letter Regarding CTOA Amendments Proposed by AEP, AES Ohio, Exelon, and PPL, March 12, 2024 available at: https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240312-board-response-to-several-transmission-owners-letter-re-ctoa-amendments-proposed-by-aep--aes-oh-exelon-ppl.ashx. OPSI, Unanimous OPSI Comments on Proposed CTOA Revisions Informational Report (Feb. 22, 2024) available at: https://www.pjm.com/-/media/committees-groups/committees/mc/2024/20240222/20240222-item-01---3-opsi-comments-to-proposed-ctoa-revisions-informational-report.ashx.

simply agreeing to amendments to the CTOA was not the appropriate path to effectuate the transfer of the RTEP Protocol from the OA to the OATT.[15] OPSI wrote, "[T]he PJM Board should instead look for another way to obtain those 205 rights, either by amendment of the OA by Members, a Section 206 filing, or a cleaner amendment to the CTOA that makes only the minimum number of changes necessary to transfer 205 rights."[16]

OPSI also stated it is "very concerned that some of the proposed amendments to the CTOA exceed what is necessary to give the PJM Board these filing rights, to the ultimate detriment of retail consumers."[17] To that end, OPSI shared its concerns with seven specific proposed amendments and two amended definitions. OPSI stated, "**Inclusion of superfluous and harmful modifications or new provisions in an amended CTOA filed at FERC will likely result in OPSI protesting the proposal, even though we agree with the primary purpose of the PJM Board having the relevant 205 rights.**"[18]

OPSI wrote that "Even after much engagement and independent research, it is still not clear to OPSI that parties to the CTOA have the authority to transfer the relevant 205 rights by simply amending the CTOA."[19] In response, the PJM Board of Managers directed PJM to provide revisions to the OA to the PJM Members Committee for a vote and wrote "The PJM Board shares OPSI's concerns about following a defined process to amend the OA. While the CTOA is a foundational governing document, the OA is also a foundational governing document. As such, an attempt should be made to amend the OA by a vote of the Members Committee."[20] PJM Members

[15] April OPSI Letter.
[16] *Id.* p. 3.
[17] *Id.* at p. 1-2. (While PJM is submitting an FPA § 206 filing to obtain these rights, it is not accompanied by a set of relevant and just and reasonable set of CTOA Amendments.)
[18] *Id*. at p. 3 (emphasis in original).
[19] *Id.* at p. 1.
[20] PJM Board of Managers, *PJM Board Response to OPSI Letter Regarding Proposed CTOA Revisions*, (April 17, 2024) available at: https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240417-pjm-board-response-to-opsi-letter-re-proposed-ctoa-revisions.ashx.

Committee approval would have allowed PJM to bring those OA revisions before the Commission under FPA § 205.

The TOs also responded to OPSI's letter, making several small changes to their proposal that did not address OPSI's primary concerns.[21]

On May 3, 2024, the Members Committee opposed PJM's proposal with a sector-weighted vote of 1.227 out of 5.[22] Despite this vote, the PJM Board of Managers directed PJM to make the instant filings to amend the OA and Tariff.[23]

Therefore, PJM brings the amendments to the OA to the Commission without the support of PJM Members in an FPA § 206 Complaint. The culmination of these events led to the three filings before the Commission now. This Protest builds on the arguments OPSI made in its April Letter, which is included with this protest as Attachment A.

III. If the Commission Grants PJM's Complaint, it Should Set the Question of the Just and Reasonable Replacement Rate for a Paper Hearing

A. PJM's Complaint

In its Complaint, PJM argues that "the historic regulatory paradigm for transmission planning in the PJM Region is no longer just and reasonable going forward" and makes three

[21] PJM Transmission Owners, *TO Response re Claim of Ancillary Provisions and OPSI 4-3-24 Letter* at p. 4 (April 12, 2024) available at: https://www.pjm.com/-/media/committees-groups/committees/toa-ac/2024/20240514/20240514-to-response-re-claim-of-ancillary-provisions-and-opsi-4-3-24-letter.ashx ("OPSI raises concerns that Section 6.3.11 may limit PJM's Section 205 filing rights. While this was not the intent of the parties, the parties nonetheless have determined that they can eliminate this proposed revision as other provisions, including newly proposed Section 7.9, discussed below, protect PJM's independence and the TOs' rights.") *See also* p. 1 ("OPSI raises a concern that the parties are proposing changes to the definition of Regional Transmission Expansion Plan. Specifically, OPSI raises concern that the change in definition could make it more difficult for non-incumbent transmission developers to participate in the planning process. The TOs do not seek to change the meaning of the term but simply to clarify it. Nonetheless, the TOs have revised the relevant language to remove the reference to the "Parties" Transmission Facilities that appears to be the cause of OPSI's concern.").

[22] PJM, Supplemental Voting Results, PJM Members Committee, (May 6, 2024) available at: https://www.pjm.com/-/media/committees-groups/committees/mc/2024/20240506-annual/mc-voting-results---item-08---proposed-oa-and-tariff-revisions-effectuating-the-transfer-of-the-regional-transmission-expansion-planning-protocol.ashx.

[23] PJM Board of Managers, *Board Communication on Moving Planning Protocol from OA to Tariff and CTOA Revisions*, (May 31, 2024) available at: https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240531-board-comm-moving-planning-protocol-from-oa-to-tariff-and-ctoa-revisions.ashx.

arguments to support its assertion.[24] First, it argues that the status quo "inhibits" PJM from independently proposing amendments to the RTEP Protocol pursuant to FPA § 205, which hampers its ability to provide efficient and reliable transmission service "as required by the Commission's regulations, orders and the RTEP protocol."[25] PJM argues that the OA limits PJM's independence and that this requirement "simply creates an elongated period of regulatory uncertainty."[26] Second, PJM argues that this paradigm unduly discriminates against PJM when compared to other RTOs subject to the same Commission regulations.[27] And third, PJM argues that the location of the RTEP Protocol in the OA limits the Commission's ability to "have a rational and consistent regulatory review of similar proposals across the nation."[28]

PJM's proposed replacement rules include not just striking the RTEP Protocol from the OA and relocating it to the Tariff but adopting all of the CTOA amendments the TOs proposed.[29] "By relocating the RTEP Protocol to the PJM Tariff, PJM will gain the ability to submit independent FPA section 205 filings to the Commission regarding its regional planning rules, by virtue of Tariff, Section 9.2(a), thereby remedying the unjust and unreasonable historic paradigm…."[30] PJM describes in its transmittal letter that it is filing its Complaint "in connection with" the Transmission Owners' FPA § 205 filing to amend the CTOA and that the replacement rules PJM proposes in its Complaint are ultimately necessary to ensure "regulatory alignment among the CTOA, the Operating Agreement, and the Tariff."[31] PJM argues that absent the harmonization of the OA, Tariff, and CTOA, the "ultimate effectuation of the transfer is not possible legally or

[24] PJM Complaint at p. 3.
[25] *Id*.
[26] *Id.* at p. 21.
[27] *Id.* at § II.B.
[28] *Id.* at p.3.
[29] *Id*. at pp. 3-6.
[30] *Id*. at p. 29.
[31] *Id.* at p. 5.

practicably"[32] and that "without acceptance of [the CTOA] amendments that include the PJM Transmission Owners' agreement to grant PJM with Tariff filing rights, PJM does not have the legal authority to effectuate the changes proposed in this filing."[33]

B. The Commission Must First Decide if the Location of the RTEP Protocol in the OA Remains Just and Reasonable

1. If the Location of the RTEP Protocol Continues to be Just and Reasonable, the Commission Must reject the FPA § 205 Filings in ER24-2336 and ER24-2338, in accordance with the Filed Rate Doctrine

The filed rate doctrine stands for the proposition that the only legal rate is the filed rate, as stated publicly, and that unless and until the Commission orders otherwise, the filed rate remains in effect.[34] The U.S. Supreme Court has long recognized that "the rate of the carrier duly filed is the only lawful charge…. [Buyers and sellers] must abide by it, unless it is found by the Commission to be unreasonable."[35] Stated differently, unless and until the Commission receives a FPA § 205 filing from a utility to amend its rate or finds a rate to be unjust and unreasonable pursuant to FPA § 206, the filed rate is the only legal rate. The DC Circuit has recently written "If the Federal Energy Regulatory Commission approves the rates proposed, those rates will apply until altered."[36]

In the context of the three filings made by PJM and the TOs, there is no FPA § 205 filing asking to amend the OA. That option has been specifically foreclosed, because the PJM Members

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[32] *Id*.
[33] *Id*.
[34] *Borough of Ellwood City v. FERC*, 583 F.2d 642 at 648 (3rd Cir. 1978) citing 16 U.S.C. 824 (c) and (d) ("The basic principle is simple: Since all rates subject to the Commission's jurisdiction must be filed and filed rates cannot be changed except as provided.").
[35] *Louisville & Nashville R.R. Co. v. Mottley*, 237 U.S. 94 (1915). *See also*, *Keogh v. Chicago & Northwestern Ry. Co*., 260 U.S. 156 (1922) ("The legal rights of a shipper as against a carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.").
[36] *See N.Y. State Pub. Serv. Comm'n v. FERC*, 23-1192, 23-1259, 23-1286 (D.C. Cir. Jun 14, 2024) citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127–29 (1990); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962–63 (1986).

Committee did not endorse the changes to the OA PJM proposes in its Complaint.[37] Therefore, the only way for the Commission to remove the RTEP Protocol from the OA is by finding its current location is unjust and unreasonable, either by complaint or on the Commission's own initiative.[38]

2. PJM's Existing Ability to Comply With FERC Rules and Orders

PJM states that the current paradigm inhibits it from independently proposing rule changes to the RTEP Protocol and that inhibits PJM's ability to fulfill its legal responsibilities to plan the system.[39] However, PJM has a FERC Compliance Protocol that allows it to comply with FERC compliance directives irrespective of a Members Committee vote.[40] And other than Order No. 1920 which is the Commission's most recent major transmission planning Order, FERC has found PJM to be in compliance with other major planning orders like Order Nos. 888, 2000, 890, and 1000.

In its April Letter, OPSI pointed out that the location of the RTEP Protocol has been in the OA for over 25 years.[41] Specifically, PJM proposed to place the RTEP Protocol in the OA in its proposal to become an Independent System Operator ("ISO") because FERC had previously found that the TOs' original proposal to place it in the Tariff, which was a part of the Transmission Owners Agreement at the time, would prevent PJM from being truly independent.[42] The Commission called this lack of independence a "fundamental flaw" in the initial PJM ISO

[37] *See supra* at n. 22.
[38] 16 U.S.C. § 824(e).
[39] PJM Complaint at p. 3.
[40] PJM, Manual 34, Appendix I (Manual 34) ("In the event that PJM receives an Order from FERC including compliance directives, PJM is responsible for filing a response to such directives within the designated timeframe as specified in the Order. The response development shall be in accordance with the Compliance Filing Protocol documented within this Appendix…. Where a stakeholder process is used that does not result in the requisite 2/3 or greater sector weighted outcome, and if the Membership agree by general acclamation, PJM's filing transmittal shall include any and all Member-prepared position statements.").
[41] April OPSI Letter at p. 1.
[42] *Atlantic City* et. al.,77 FERC ¶ 61,148 at p. 47 (1996) ("Guidance Order").

proposal, because only the TOs could amend that document.[43] Therefore, PJM and its member companies proposed, and FERC accepted, the paradigm that exists today in which the RTEP Protocol is subject to the OA's amendment rules.[44] The PJM member companies asserted that these provisions would "provide a system of checks and balances that will assure non-discriminatory, open access transmission service throughout the PJM control area."[45] FERC wrote the proposal complied with the Commission's ISO Independence Principle.[46]

In an Order No. 2000 compliance filing, PJM wrote

> While the PJM members (i.e., the market participants) have certain powers, those powers have been carefully limited and balanced. The PJM Members Committee may elect the PJM Board from a slate of candidates selected by an independent consultant; it may form additional advisory committees; **it may amend** and terminate **the PJM Operating Agreement** (subject to Commission approval); and it may advise the PJM Board.[47]

Since then, the PJM Board has approved $48.3 billion in transmission development, including $6.6 billion in 2023 alone.[48] In its complaint, PJM now argues that its ability to plan the

[43] *Id.* at 38 ("Because the existing PJM members would have a super-majority representation on each administrative committee, voting on the administrative committees would be heavily weighted in favor of the existing PJM members. Therefore, the existing PJM members would also be able to exercise ultimate control over actions of the ISO. For example, the PJM members, through the administrative committees, would have the ability to determine the need for transmission expansion…. [T]he Supporting Companies' proposal would not result in an ISO that, in the long run, would be independent of any individual market participant, and would not prevent control of decisionmaking by any one class of participants (here, the PJM members). Nor would the proposed ISO be perceived to be independent. This lack of independence is a fundamental flaw in the Supporting Companies' proposal."). PJM's membership at this time consisted of Atlantic City Electric Company, Baltimore Gas and Electric Company, Delmarva Power & Light Company, Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power & Light Company (PP&L), Potomac Electric Power Company, Public Service Electric and Gas Company and PECO Energy Company.

[44] *Atlantic City* et. al., 81 FERC 61,257 at pp. 59-63 (1997).

[45] *Id.* at 3.

[46] *Id.* at 63 ("The Commission approves the ISO governance structure filed by Supporting Companies. The PJM Board has the broad technical skills that are necessary to manage the ISO and it possesses the requisite independence from the transmission owners that the Commission previously found to be lacking in Supporting Companies' prior restructuring application. ISO Principle No. 1 provides that a governance structure should fairly represent all users of the transmission system. We believe that the Members Committee established by the PJM Operating Agreement fairly represents the broadest possible users of the ISO… Therefore, no modification is required to satisfy ISO Principle No. 1.").

[47] PJM Interconnection L.L.C., *Order No. 2000 Compliance Filing* at p. 15 (Oct. 11, 2000) (emphasis added).

[48] PJM, RTEP 2023 at. pp. 1 and 4 available at: https://www.pjm.com/-/media/library/reports-notices/2023-rtep/2023-rtep-report.ashx ("RTEP 2023").

system efficiently and reliably is being challenged by resource mix changes and load growth.[49] PJM states that coordinating expected retirements and needed replacements, which are overwhelmingly intermittent resources, will result in "an ever greater need for transmission planning and expansion."[50]

Additionally, PJM argues that the current paradigm discriminates against PJM compared to other RTOs.[51] The problem with PJM's claims of discrimination is that PJM is not similarly situated to other RTOs and ISOs. OPSI notes that the governance structures of other RTOs that do have independent FPA § 205 filing rights over their planning rules also have rules that grant the states in their regions greater authority to influence how the costs associated with transmission development are allocated. The Organization of MISO States has the authority to request MISO to file cost allocation proposals on its behalf in some circumstances,[52] and the SPP Bylaws provide the SPP Regional State Committee with primary responsibility for determining regional proposals in certain areas including cost allocation and resource adequacy decisions.[53] OPSI has no formal FPA § 205 authority over any issue related to regional transmission planning or cost allocation.

C. PJM Has Not Proposed a Just and Reasonable Replacement Rate, Therefore, The Commission Must Determine the Just and Reasonable Replacement

Section 206 of the FPA enables the Commission to change rates that are found to be unjust and unreasonable "after a hearing held upon its own motion or upon complaint" by a third party

[49] PJM Complaint at p. 14.
[50] *Id*. at p. 15-17.
[51] *Id.* at 3.
[52] MISO, Transmission Owners Agreement, Appendix K, Section E.3(e) ("At any point during the stakeholder process developing a proposal seeking to amend an existing regional cost allocation methodology or develop a new cost allocation methodology as per Article II, Section II.E.3.b of this Appendix K, the OMS Committee may undertake to develop and request MISO file an OMS Committee alternative cost-allocation methodology, so long as 66% of all of the OMS Committee voting members agree to this undertaking and pursuant to Section II.E.3.a of this Appendix K. At the end of the stakeholder process MISO will either file with FERC a new transmission cost allocation methodology, a change to an existing transmission cost allocation methodology or will provide the OMS Committee with a written explanation of its decision not to file changes to the Tariff. If MISO does not file changes to the Tariff, no OMS alternative cost-allocation methodology will be filed with FERC by MISO.").
[53] SPP, Bylaws at § 7.2.

and states "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."[54]

PJM does not argue that the CTOA is unjust and unreasonable and does not provide a replacement rate associated with that document. PJM simply states that it is submitting its Complaint "in connection with" the CTOA Amendments filing.[55] The TOs acknowledge in the CTOA filing that PJM can file an FPA § 206 complaint on the CTOA if it believes that document is unjust and unreasonable.[56]

However, in the Complaint proceeding, it is PJM's burden to show that its proposed replacement rate is just and reasonable, and by deferring to the TOs, it has not offered any independent justification for why the CTOA Amendments are a just and reasonable replacement rate. Therefore, PJM has not met its burden under FPA § 206. OPSI requests the Commission initiate paper hearing procedures and determine the just and reasonable replacement rules.

D. PJM Has Linked its Replacement Rate to CTOA Amendments that are Unjust and Unreasonable and Unnecessary to Solve the Problem it has Identified

As discussed further below in Section **Error! Reference source not found.**, the Amendments to the CTOA are not just and reasonable. In short, the TOs have proposed amendments to the CTOA that limit PJM's independence, limit the perception of independence of both PJM and the PJM Board of Managers, limit the transparency into PJM's processes, demonstrate the PJM Board of Managers' lack of responsiveness to stakeholders, and make it more difficult to develop cost-effective and efficient regional transmission.

[54] 16 U.S.C. §824(e).
[55] PJM Complaint at p. 4.
[56] CTOA Filing at p. 41.

For example, Article 2.3 creates a new closed meeting between the TOA-AC and some or all of the PJM Board of Managers to discuss the CTOA. Sections 4.1.4(b)(ii) and 6.3.4(b)(ii) would codify in the CTOA TOs' ability to proceed with a local project when PJM has identified a regional project that solves its local need. And Article 5.2 would allow Transmission Owners to proceed with replacement projects that could expand or enhance the transmission system in a way that encroaches upon the planning responsibility they have transferred to PJM. None of these amendments are needed to transfer to PJM independent authority to propose changes to the RTEP Protocol pursuant to FPA § 205. To the contrary, some are harmful to PJM's real and perceived independence, the transparency of its processes, its relationship with stakeholders, and its goal to plan cost-effective and efficient regional transmission.

PJM states that it submitted its complaint "with the mutual understanding that it reflects PJM and the PJM Transmission Owners' agreement to the CTOA amendments as a whole, and without acceptance of those amendments that include the PJM Transmission Owners' agreement to grant PJM with Tariff filing rights, PJM does not have the legal authority to effectuate the changes proposed in this filing."[57] To the contrary, the TOs acknowledge PJM can file an FPA § 206 complaint on the CTOA.[58]

If the Commission allows PJM to rely on the CTOA filing to justify its replacement rate, the Commission should initiate paper hearing procedures because its replacement rate contains amendments to the CTOA that are unnecessary to correct the unjust and unreasonable rules PJM has identified and would be harmful to retail consumers.

Further, if the Commission agrees that the amendments to the CTOA are unjust and unreasonable and rejects the CTOA Filing, there would not be a filing before the Commission

[57] PJM Complaint at p. 5.
[58] CTOA Filing at p. 41.

asking to change the CTOA to reflect the relocation of the RTEP Protocol from the OA to the Tariff. In this situation, the Commission would have to determine the CTOA is unjust and unreasonable *sua sponte* in order to grant PJM's complaint. If the Commission does not, the CTOA would incorrectly identify the location of the RTEP Protocol in the OA which would indicate that PJM can file an FPA § 205 filing to amend the RTEP Protocol without the support of the Members, which is prohibited by the OA.

If the Commission does order a paper hearing to determine the just and reasonable replacement rules, it should start with the goal of identifying the fewest changes to the CTOA necessary to facilitate the relocation of the RTEP Protocol from the OA to the Tariff. Revisions unrelated to this move would be unneeded to correct the unjust and unreasonable location of the RTEP Protocol and would therefore be unjust and unreasonable.

IV. The Commission Should Reject the TOs FPA § 205 Filing to Amend the CTOA

Turning to the TOs' filing in Docket ER24-2336, the TO's have asked to amend the CTOA pursuant to FPA § 205. When considering an FPA § 205 filing, the Commission is in a "passive and reactive" role pursuant to FPA § 205.[59] Therefore, if the Commission finds one or more of the CTOA Amendments to be unjust or unreasonable, it must reject the entire filing.[60]

A. The TOs' Filing

The TOs state the CTOA Amendments are "primarily directed at transferring to PJM the responsibility to prepare the [RTEP]."[61] However, they do acknowledge that the filing contains other CTOA Amendments to "facilitate the PJM planning process by supporting communications

[59] *See NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114-15 (D.C. Cir. 2017) ("Section 205 puts FERC in a 'passive and reactive role'. Under Section 205, FERC reviews the proposed rate scheme filed by a utility or Regional Transmission Organization and determines whether the proposal is just and reasonable. FERC may accept or reject the proposal." (citations removed).
[60] *Id.*
[61] CTOA filing at p. 2.

and coordination."[62] The TOs also request the Commission to apply a Public Interest standard of review to several of the CTOA Articles.[63]

B. The TOs Cannot Amend the CTOA Pursuant to FPA § 205 in a Way That Requires Changes to the OA

The TOs state in the CTOA Filing that PJM has filed its Complaint "seeking conforming amendments to the [OA] to remove provisions rendered duplicative or unnecessary by the PJM Tariff amendments."[64] This is different than the PJM's stated purpose for its Complaint. As described above, PJM argues that the location of the RTEP Protocol is "is no longer just and reasonable for three specific reasons."[65] As set out above, if the Commission approves the changes to the OA pursuant to an FPA § 205 filing asking to amend the CTOA without finding the location of the RTEP Protocol in the OA is unjust and unreasonable, that would be a violation of the filed rate doctrine. Rules approved by the Commission remain in effect until altered as allowed by the FPA.[66]

The CTOA does not give TOs the unilateral authority to amend the OA. When the TOs transferred the authority to conduct regional planning they specifically wrote, "The Transmission Owners Agreement creates an Administrative Committee of transmission owners, which may make recommendations to the ISO, but the Administrative Committee **is expressly denied the right to exercise any control over functions and responsibilities transferred to the ISO**…."[67] The Transmission Owners Agreement also stated the rights the TOs retained related to this transfer,

[62] *Id.* at p. 22.
[63] *Id.* at §IV.F.
[64] *Id.* at p. 2.
[65] *See supra* at n. 24.
[66] *See supra* at III.B.1.
[67] Atlantic City Electric Company et. al., *Filing of the PJM Supporting Companies*, Docket No. EC97-38-000 and ER97-3189-000 p. 10 (June 2, 1997) (emphasis added).

none of which allowed them to further direct how PJM could encumber its planning rights in the OA or otherwise.[68]1

PJM states that its complaint "is being submitted with the mutual understanding that it reflects PJM and the PJM Transmission Owners' agreement to the CTOA amendments as a whole, and without acceptance of those amendments that include the PJM Transmission Owners' agreement to grant PJM with Tariff filing rights, PJM does not have the legal authority to effectuate the changes proposed in this filing."[69] PJM does not have the authority to file amendments to the CTOA pursuant to FPA § 205, but it can, like others, file an FPA § 206 on any rate schedule. e.g. the CTOA, it believes is unjust and unreasonable. It has not done that here. The TOs have not retained an ability to further direct how PJM can or cannot make FPA § 206 filings to amend the RETP Protocol as they both indicate.

Therefore, arguments that the TOs can somehow alter the CTOA in a way that drives changes to the OA are incorrect. To the contrary, attempts to modify the OA pursuant to an FPA § 205 filing asking to amend the CTOA are prohibited by the OA, the FPA, and the filed rate doctrine.

C. Specific Amendments to the CTOA Are Unjust and Unreasonable

1. Amendments to Articles 2.3 and 6.3.5 are Contrary to the Commission's Policies Promoting Independence, Transparency, and Stakeholder Responsiveness and are therefore Unjust and Unreasonable

The Commission wrote in its Order providing additional guidance following the initial PJM Restructuring filing that "The principle of independence is the bedrock upon which the ISO must

[68] *Id.* at p. 10 ("The transmission owners have reserved the same limited rights they reserved in the December 31, 1996 filing to: (I) assure the recovery of their revenue requirement by permitting Section 205 filings to change rate levels; (2) adopt and implement procedures to protect an owner's electrical facilities from physical damage or to prevent injury or damages to persons or property; (3) build, acquire, sell, dispose, retire, merge or otherwise transfer or convey all or any part of an owner's assets; and (4) take such actions as the owner deems necessary to fulfill its obligations under state or federal law to provide safe and reliable service.").

[69] PJM Complaint at p. 5.

be built if stakeholders are to have confidence that [PJM] will function in a manner consistent with this Commission's pro-competitive goals."[70] As noted above, PJM and its Member Companies designed the current paradigm in response to the Commission's guidance and concern that PJM's lack of independence was a fundamental flaw with the initial PJM ISO proposal.[71]

PJM recognizes this in its Complaint when it states "'[A]n RTO needs to be independent in both reality and perception, and granting [its Complaint] will solidify this 'bedrock' principle of independence, as PJM looks to meet major challenges of regional planning in the coming years."[72] This important directive led to PJM's characterization of the Members' rights in its initial Order No. 2000 compliance filing which PJM described as "carefully limited and balanced."[73] In approving the settlement that led to the balance of filing rights in PJM, the Commission wrote

> [I]f TOs use their filing rights in a way that compromises RTO independence or functions or causes undue discrimination between or among RTO members or customers, the Commission will consider whether the Settlement Agreement is contrary to the public interest. We also intend to exercise careful oversight in connection with these matters and, if appropriate, institute a Section 206 proceeding to do so.[74]

Now, TOs are attempting to disrupt that balance and the real and perceived perception of PJM's independence. In its filing, the TOs are attempting to bypass the appropriate procedure by using their filing rights over the CTOA to claim that somehow their decision to amend the CTOA can force changes to other rate schedules that it has no authority over. Further implicating PJM's

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[70] Guidance Order at p. 36.
[71] *See supra* at § III.B.2.
[72] PJM Complaint at p. 21 citing *Regional Transmission Organizations*, 89 FERC ¶ 61,285 at pp. 193, 205 (1999).
[73] *See supra* at n. 47. ("There are five sectors in PJM: (I) generation owners; (2) other suppliers; (3) transmission owners; (4) electric distributors; and (5) end-use customers. Each sector must have at least five members. Each sector has one vote that is divided into a positive and negative component in direct proportion to the votes of the sector 15 members for a particular motion. To pass a pending motion, the sum of the affirmative votes must be greater than the product of .667 multiplied by the number of sectors that have at least five members and participated in the vote. Thus, the P JM Members Committee cannot act, even in its advisory role, without approval of a two-thirds majority of the sectors.") (citations omitted).
[74] 105 FERC ¶ 61,294 at P 33 (2003).

independence, the CTOA filing would reduce the transparency into the PJM Board's decision-making process.

FERC issued FERC Order No. 719 in part to improve "the responsiveness of [RTOs] and [ISOs] to their customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services."[75] FERC defined responsiveness as a "board's willingness, as evidenced in its practices and procedures, to directly receive concerns and recommendations from customers and other stakeholders, and to fully consider and take actions in response to the issues that are raised."[76] The Commission stated it would assess each RTO's or ISO's filing using four criteria: (1) inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness."[77] FERC found that this requirement and principle would ensure that "no single stakeholder group can dominate."[78]

But in this instance, the TOs have proposed amendments to the CTOA that were negotiated with PJM outside of the view of members, and PJM has filed its Complaint in response to a failed vote of the members. PJM received feedback from OPSI and other stakeholders opposing certain CTOA amendments. However, instead of requesting changes to the TOs' proposal, PJM agreed to the CTOA amendments without any modifications, even though PJM members overwhelmingly opposed the proposal now before the Commission.[79] The circumstances leading to this proposal and the proposal itself indicate PJM may be moving away from the independence principles and responsiveness principles in Orders No. 888, 2000, and 719.

[75] *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 at p. 1 (2008).
[76] *Id.* at P 477.
[77] *Id.* at P 7.
[78] *Id.* at P 507.
[79] *See supra* at n. 22.

a) Article 2.3

The CTOA Amendments propose a new article creating an "Annual Meeting to Discuss the State of the Agreement."[80] This article would require the TOA-AC to meet with the Reliability and Security Committee of the PJM Board "or other relevant committee or members of the PJM Board as the PJM Board designates."[81] There is no requirement to meet with other PJM stakeholders. This exclusive group would discuss the purposes and objectives of the CTOA which include facilitating the coordination of planning in the PJM Region and the establishment of rights and obligations of PJM and the TOs.[82] These are certainly matters of great interest to the states and other stakeholders, parties that would not be allowed to attend these meetings. This significantly reduces the transparency into the PJM Board's decision making and could meaningfully weaken the perception of the PJM Board's independence.

OPSI recognizes there may be instances in which the PJM Board needs to discuss confidential information with the PJM Transmission Owners. However, these amendments make no attempt to distinguish which conversations should remain confidential and which must be closed. Categorically excluding the states and other stakeholders from simply listening to the portions of these conversations that do not involve confidential information, seriously harms the perception of the PJM Board's independence.

The states have procedures and agreements in place to protect confidential planning information.[83] The TOs have made no attempt to allow states to use these agreements or modify

[80] CTOA Filing, Exhibit A at Article 2.3.
[81] *Id.*
[82] *Id*. at 2.1 and 2.3.
[83] PJM, State Commissions, Authorized Persons Schedule available at: https://www.pjm.com/committees-and-groups/state-commissions.

these procedures or agreements in a way that would allow them to listen to these conversations while also protecting confidential information.

The TOs state that they "are answerable to their states and their customers, whom they are obligated to serve."[84] But it is unclear how this meeting will serve customers or benefit states specifically because neither would be allowed to listen to the conversation. To the contrary, states and customers would not know the extent to which these conversations inform and drive proposals that appear in the stakeholder process and eventually come before the Commission.

Proposed Article 2.3 is unjust and unreasonable, because it would weaken the perception of PJM's and the PJM Board's independence and their responsiveness to customers, states, and other stakeholders without engaging with fairly simple methods to protect confidential information the TOs identify as necessitating this closed meeting.

b) Article 6.3.5

Article 6.3.5 would obligate PJM to "[M]aintain its RTO status, consistent with its obligations under this agreement."[85] The TOs argue that this article "Ensures no break in service or reliability while PJM and/or the Transmission Owners address any changes to PJM's governing documents if the Commission changes its RTO regulations in a way that affects PJM's status as an RTO."[86] The TOs claim that if the Commission changes its RTO regulations, and PJM cannot comply with them, it would still be able to continue carrying out its functions described in the CTOA.[87] However, this proposed article would limit the ability of the Commission to require reforms of PJM.

[84] CTOA Filing at p. 40.
[85] *Id.* at Attachment A, 6.3.5.
[86] *Id.* at Attachment D.
[87] *Id.* at p. 40-41.

OPSI is concerned that if the Commission does decide to continue its critical work of improving the transparency and independence of RTOs, including bolstering their ability to conduct cost-effective and efficient transmission planning, that this article, not the Commission's rules, could prevent PJM from maintaining its RTO status, because it requires PJM to follow the CTOA over Commission directives. As such, the Commission should reject the proposed requirement that PJM maintain its RTO status "consistent with its obligations under this agreement,"[88] because it is not just and reasonable that this agreement should be able to dictate whether and how PJM maintains its RTO status, over the Orders and Rules of the Commission.

Like the articles in the section above, tying PJM's RTO status to this agreement rather than Commission rules and orders could reduce PJM's independent ability to comply with the Commission's directives. Further, this article reduces the perception of PJM's independence as it appears to elevate PJM's obligations to this agreement above its obligations as directed by the Commission. Simply put, that is not just and reasonable.

2. Amendments to Articles 4 and 5 Contradict the Commission's Policy of Promoting More Efficient and Cost-Effective Regional Transmission Development

The Commission has taken significant steps on transmission planning beginning with Order No. 888, which established minimum transmission planning requirements, Order No. 890, which established planning principles including coordination, openness, and transparency, and Order No. 1000, which addressed concerns about the identification and evaluation of whether regional facilities may be more efficient or cost effective than projects identified in the local planning process.[89]

[88] *Id*. at Attachment A, 6.3.5.
[89] *Building for the Future Through Regional Transmission Planning and Cost Allocation*, 187 FERC ¶ 61,068 at PP. 15-16 (2024) ("Order No. 1920").

Importantly, in Order No. 1000, the Commission emphasized that the benefit of having a project selected in a regional transmission plan for the purposes of cost allocation means the RTO has determined that project to be a more efficient or cost-effective transmission facility to meet regional transmission needs.[90] The Commission also described how local projects are "included" in the regional plan without further analysis of whether they are cost-effective or efficient.[91]

In Order No. 1920 the Commission stated "there is mounting evidence" that existing processes may be inadequate to ensure Commission-jurisdictional rates remain just and reasonable and not unduly discriminatory or preferential.[92] OPSI has made similar points recently. In response to the Commission's Technical Conference on Transmission Planning and Cost Management, OPSI expressed concerns about whether transmission planning in the PJM region is cost effective.[93] OPSI stated, "Although PJM is obligated under Manual 14B and its governing documents to analyze local projects to determine whether regional projects offer more cost-effective solutions to the problems identified in the local planning process, it is not clearly communicating that it is doing so. Because of this, states fear that PJM may not be conducting the required analysis at all."[94]

Two amendments in the CTOA Amendments exacerbate these concerns by allowing local projects to proceed despite a regional project being identified as the more efficient or cost-effective solution.

[90] Order No. 1920 at P 18.
[91] *Id* at P 19.
[92] *Id.* at P. 47.
[93] *Id.*
[94] OPSI, *Comments of the Organization of PJM States, Inc.*, Docket No. AD22-8 at p. 2 (Mar. 23, 2023).

a) Articles 4.1.4 (b)(ii) and 6.3.4(b)(ii)

Articles 4.1.4 (b)(ii) and 6.3.4(b)(ii) are identical. Article 4 describes the TOs' commitments, and Article 6 describes PJM's Rights and Commitments. The TOs state that these articles "[r]equire[] coordination between PJM and a PJM TO proposing a local project where PJM determines that a RTEP Project may also address the local need and require[] the Transmission Owner to document a decision to proceed with its local project."[95] Articles 4.1.4(b)(ii) and 6.3.4(b)(ii) are not just and reasonable, because they would allow local projects to proceed when PJM has identified a regional project that would more efficiently or cost-effectively address a regional need and the local need.

Although styled as a requirement for a PJM TO to document its rationale as to why it is proceeding with the local project, to OPSI's knowledge, Articles 4.1.4(b)(ii) and 6.3.4(b)(ii) would be the first time CTOA provisions have ever stated that a PJM TO may build a local project to meet a need that PJM has determined will be met by a regional project. Thus, these provisions do not merely establish a documentation and consultation process. Rather, they create a new contractual right for TOs to construct local projects even when PJM has determined that a more efficient regional project obviates the need for the local project. Such a contractual right would be particularly unjust and unreasonable if the Commission were to still presume the local project is prudent and needed notwithstanding PJM's contrary conclusion.[96]

Furthermore, Articles 4.1.4 (b)(ii) and 6.3.4(b)(ii) could *de facto* enable TOs to displace more efficiently planned regional projects with their own local projects. Though the TOs claim

[95] CTOA Filing at Exhibit D.

[96] 18 C.F.R. 35.35(i)(1)(i-ii) (The Commission's regulations require it to rebuttably presume that a transmission project is needed if it is the result of "a fair and open regional transmission planning process" or if it "has received construction approval from an appropriate state commission or siting authority."). OPSI would contend that a local project should not be deemed to be the result of "a fair and open regional transmission planning process" if the regional planner determines the project is not needed, and thus should not benefit from this presumption absent an appropriate state approval.

that "[n]othing in these provisions affects PJM's ability to proceed with the RTEP project,"[97] Section 1.4 of the RTEP protocol requires that the RTEP "avoid unnecessary duplication of facilities."[98] The RTEP must likewise "avoid the imposition of unreasonable costs on any Transmission Owner or any user of Transmission Facilities."[99] Consequently, if the TO's exercise of their rights under Articles 4.1.4(b)(ii) and 6.3.4(b)(ii) render the regionally planned project duplicative in whole or part, then PJM would either have to remove the regional project from the RTEP or downsize it.

Either way, customers would lose the RTO's assurance that the resulting project or combination of projects is the most efficient or cost-effective solution. Indeed, it could well be the case that the combination of a local project and a downsized regional project would cost consumers more than a single regionally planned project with a larger scope. The risk of such a result is further heightened by the fact that local projects are not included in the regional plan for the purposes of cost allocation and do not require the approval of the PJM Board.

Of course, the result would be even worse for ratepayers if the local project does not obviate the need for the regional project. That could lead to a situation in which ratepayers would be forced to pay for two projects to solve a need that could have been met solely with a regional project. Such an outcome would be patently unjust and unreasonable.

The fact that this process could allow these unjust and unreasonable outcomes is enough for the Commission to find these articles unjust and unreasonable and reject the TO's CTOA Amendment Filing. To be clear, OPSI encourages coordination between PJM and TOs. But just

[97] CTOA Filing at p. 36.
[98] PJM OA, Schedule 6 at § 1.4 (d).
[99] *Id*.

and reasonable coordination should not allow less efficient transmission to be built when PJM has identified more efficient regional transmission that also solves the local need.

Moreover, giving TOs an effective right to displace regionally planned projects would materially undermine long-term transmission planning. If PJM begins identifying potential long-term projects that a TO believes it will not be able to build, it will be financially motivated to find ways to build local projects that meet those same needs while adding to its rate base, regardless of whether those projects are the most cost-effective solution. Proposed Articles 4.1.4(b)(ii)'s and 6.3.4(b)(ii)'s interaction with Section 1.4 of the RTEP Protocol would give the TOs the means to do just that, simply by unilaterally claiming the existence of some need that only a local project can meet. The end result could be a paradigm in which local projects either routinely displace long-term regional transmission projects or diminish the latter's benefits by needlessly duplicating part of their function. That would unjustly and unreasonably deprive consumers of the main potential cost-saving benefit of long-term planning.

This process is also unjust and unreasonable, because it does not make any attempt to describe a process that requires PJM and the TOs to accurately and collaboratively determine if the regional project *does in fact* solve the local need. While this is not precluded, all this process requires is that the TO document its rationale and intent to proceed with a potentially duplicative project in order to develop a potentially duplicative project.[100] The TOs could have revised the CTOA in such a way that allowed for more efficient projects to proceed when the regional project also solves the local need and provide a process that would assure that outcome, but they have not.

[100] CTOA Filing at Attachment A.

Indeed, PJM conducted a series of workshops in 2019 on precisely the issue of what should happen when Supplemental Projects overlap with PJM projects.[101] These workshops culminated with the language in Manual 14B, 1.4.2.2. Because this process was only memorialized in a PJM manual, the Commission has not had the opportunity to review it to determine whether it is just and reasonable. The TOs have not moved to lodge or otherwise incorporate the manual rules in this proceeding, therefore, the Commission must limit its analysis to the revisions provided in CTOA Filing.

There are provisions in Manual 14B that protect consumers and provide transparency by requiring PJM to notify regulators when these overlaps of local and regional projects occur. These safeguards are not included in the CTOA Amendments. For example, this manual requires PJM to determine whether a baseline project meets a supplemental need.[102] If PJM continues to believe the PJM project meets the local need after conversations with the TO and with other stakeholders, it "shall submit" the project to the PJM Board for inclusion in the RTEP.[103] Further, the manual states that if the TO determines the baseline upgrade meets its need, the TO "will withdraw the project."[104] The CTOA Amendments do not impose these important obligations on PJM or the TOs.

[101] *See* PJM, PC Special Session – RTEP Process Enhancements. These meetings concluded in August 2019. Available at: https://pjm.com/forms/registration/Meeting%20Registration.aspx?ID=%7b1C5FAB0A-E958-4D74-8C25-9E3ABE6C29F9%7d.

[102] PJM, Manual 14B, ("In the development of the RTEP, PJM shall examine whether a possible baseline upgrade would more efficiently and cost-effectively address the identified regional need, as well as a supplemental need addressed by a proposed Supplemental Project.").

[103] *Id.* ("If PJM identifies that a possible baseline upgrade would more efficiently and cost-effectively address the identified regional need, as well as a supplemental need, PJM will discuss with the relevant Transmission Owner and other stakeholders at the next appropriate Subregional RTEP or TEAC meeting. PJM shall submit the proposed baseline upgrade to the PJM Board for inclusion in the RTEP.").

[104] *Id.*

Additionally, Manual 14B requires PJM to notify the relevant siting authority when a PJM project could impact the need for a Supplemental Project.[105] The CTOA Amendments do not.

Although these safeguards currently exist in Manual 14B, the fact that they are merely in manuals means that PJM can change these provisions unilaterally and without Commission review. The fact that the TOs did not bring the transparency and regulatory notification provisions of Manual 14B forward into the CTOA means there is not an adequate assurance that the rates produced by this process will remain just and reasonable. Therefore, the Commission should reject this filing because these provisions that allow TOs to unilaterally build local projects regardless of whether more efficient regional projects would satisfy the same need are unjust and unreasonable.

The lack of such safeguards is particularly concerning given that local projects already account for the overwhelming majority of the transmission cost for PJM ratepayers, yet, are also the projects subject to the least regulatory oversight. Specifically, over the 2013-2023 period transmission owners spent approximately spent $46.6 billion on Supplemental Projects while only about $26.6 billion was spent on RTEP projects.[106] In other words, over the past eleven years spending on local projects has become the outright majority of transmission spending and exceeds the spending on regionally planned infrastructure by 75%. Moreover, as multiple state commissions and consumer advocates have informed the Commission, a significant number of local projects are not subject to any state regulatory review in multiple PJM states, including at

[105] *Id*. ("Accordingly, PJM will include the proposed Supplemental Project in the next RTEP base case. After discussion with the relevant Transmission Owner, PJM will notify the relevant regulatory siting authority, if applicable, when a Supplemental Project is being reviewed that PJM has identified a baseline violation for which the baseline solution may impact the supplemental need for the Supplemental Project.").

[106] OPSI calculated these numbers by summing together the annual transmission expenditures on baseline and supplemental projects listed in PJM's 2023 RTEP Report for every year from 2013 to 2023. *See* RTEP 2023 at p. 290, fig. 5.2.

least Ohio,[107] Pennsylvania,[108] New Jersey,[109] and Indiana.[110] The Commission should not be making it any easier for TOs to divert more investment out of the RTEP and into their own local plans, when regional projects can solve local needs in addition to regional needs.

Separately, if these articles apply to Asset Management projects in addition to Supplemental projects, the CTOA amendments have not made that clear. The Commission has written that projects driven by end-of-life ("EOL") needs and PJM projects do not overlap.[111] If this process does apply to projects that address EOL needs, it could interact with Order No. 1920's right sizing requirements as discussed below.

b) Article 5

The CTOA Amendments propose to add the word "replace" to Article 5.2 which discusses the Parties' Retained Rights. The addition of this word reflects the culmination of a contentious stakeholder process related to EOL planning that produced a members proposal and a TO proposal that interpreted PJM's responsibilities and the retained rights of the parties differently, culminating in a decision from the D.C. Circuit.[112] In short, PJM Stakeholders proposed to revise the OA to allow the PJM RTEP process to review projects addressing an assets' EOL condition.[113] Their

[107] *See* Complaint of the Office of the Ohio Consumers' Counsel to Protect Ohio Consumers Under the PJM Tariff from the Failures of Multiple Agencies to Regulate Hundreds of Millions of Dollars in Monopoly Electric Transmission Charges for "Supplemental Projects" Planned by AEP, AES, Duke, and FirstEnergy and Request for Fast-Track Processing, Docket No. EL23-105 at pp. 22-24 (Sept. 28, 2023); Comments of the Public Utilities Commission of Ohio's Office of the Federal Energy Advocate, Docket No. EL23-105 at 3, 6 (Nov. 17, 2023).
[108] *See* Comments of the Pennsylvania Office of Consumer Advocate, Docket No. EL23-105 at 3-6 (Nov. 17, 2023).
[109] *See* Answer of the New Jersey Board of Public Utilities in Support of the Complaint of the Office of the Ohio Consumers' Counsel, Docket No. EL23-105 at 3-7 (Nov. 17, 2023).
[110] *See* Indiana Office of Utility Consumer Counselor's Motion to Intervene and Comments in Support of the Complaint Filed by the Ohio Office of Consumer's Counsel, Docket No. EL23-105 at 2-3 (Nov. 17, 2023).
[111] *Am. Mun. Power, Inc. v. FERC*, 86 F.4th 922 (D.C. Cir. 2023) ("As the Commission interpreted the Owners Agreement and Operating Agreement, the categories of asset management projects and enhancements did not overlap. The Commission said the 'current division of responsibilities,' that is, the dividing line between these two categories, was 'consistent with the California Orders,' and the Commission found this interpretation to be reasonable.") ("*AMP v. FERC*").
[112] CTOA Filing at Attachment A, 5.2.
[113] 173 FERC P 61,242 at P 7 (2020).

proposal would have moved the planning for EOL needs from Attachment M-3 of the Tariff to Schedule 6 of the OA.[114] This would have allowed planning for EOL needs to come within the purview of PJM's regional planning process and for projects to meet EOL needs to come before the PJM Board for its determination that the project is cost-effective and efficient.[115] The TOs argued that they retained the right to replace their assets pursuant to the CTOA.[116]

The Commission found that the CTOA was ambiguous "regarding whether consideration of EOL Projects was a matter delegated to PJM"[117] and determined that "Viewed through the lens of the general reservation providing that the PJM Transmission Owners gave up only those rights 'specifically transferred' to PJM, we are not able to conclude that the CTOA provides for the transfer of responsibility for the consideration of EOL Projects."[118] The D.C. Circuit, upon appeal stated, "Whether an 'enhancement' includes a replacement that adds no more than an incidental increase is ambiguous. The Commission's interpretation that it does not was reasonable."[119]

In their transmittal letter, the TOs state, "The proposed addition of the word, 'replace' to CTOA, section 5.2 does not expand the Transmission Owners' ability to replace their aging Transmission Facilities. This language reflects the decision of the D.C. Circuit in the recent litigation over the Attachment M-3 and the competing stakeholder proposal."[120]

Under the Commission's interpretation of the division of responsibilities between the PJM TOs and PJM, it has written that when "a project that significantly increases the capacity of a

[114] *Id.*
[115] *Id.*
[116] *Id.* at P 3.
[117] 176 FERC ¶ 61,053 P 16 ("EOL Rejection Order").
[118] *Id.*
[119] *AMP v. FERC* at p. 18.
[120] CTOA filing at p. 49.

transmission facility, rather than replaces an existing transmission facility, would not be considered an EOL project, and would be planned by PJM."[121]

The addition of the single word "replace" to the CTOA is unjust and unreasonable because it is broader than the Commission's Orders and the D.C. Circuit's opinion and contrary to PJM's existing asset management rules.[122] This language could allow TOs to replace their assets in a way the expands or enhances the transmission system. It is unjust and unreasonable and contrary to the Commission's previous Orders and PJM's current rules because TOs have not retained the right to replace their assets in a way that expands the transmission system.

c) Interaction of Article 5.2 and Order No. 1920

Further, in Order No. 1920, the Commission creates a new type of replacement facility, a "right-sized replacement transmission facility"[123] This project type is a new facility that satisfies a TO replacement need while also addressing a long-term need and results in more than an incidental increase in transmission capacity needed to simply replace the asset.[124] The Commission clarified that this reform addresses "replacement" facilities and not entirely new transmission facilities.[125]

The TOs contend this article does not interact with Order No. 1920.[126] However, allowing the TOs to add the word "replace" without additional context could lead to uncertainty around whether they delegated to PJM the responsibility to plan replacements that expand or enhance the

[121] EOL Rejection Order at P 20.
[122] PJM, Open Access Transmission Tariff at Attachment M-3 ("'Asset Management Project' shall mean any modification or replacement of a Transmission Owner's Transmission Facilities that results in no more than an Incidental Increase in transmission capacity undertaken to perform maintenance, repair, and replacement work, to address an EOL Need, or to effect infrastructure security, system reliability, and automation projects the Transmission Owner undertakes to maintain its existing electric transmission system and meet regulatory compliance requirements.").
[123] Order No. 1920 at P 1679.
[124] *Id.*
[125] *Id.*
[126] CTOA Filing at p. 50.

transmission system and also interact with long-term needs. Therefore, the Commission should reject this amendment, in addition to the reasons above, because it could limit PJM's ability to comply with Order No. 1920.

D. The Commission Should Not Apply a Public Interest Standard of Review to Specific CTOA Amendments

1. Articles 2.3, 4.1.4(b)(ii), 5.2, 6.3.4(b)(ii) and 6.3.5 do not have the characteristics necessary for the Commission to Justify a Mobile-Sierra Presumption

The Commission has written that the *Mobile-Sierra* presumption only applies if a particular instrument contains "individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length."[127] The *Mobile-Sierra* presumption exists to promote stability that benefits customers.[128] This presumption has its roots in the FPA, and the FPA is a consumer protection statute.[129]

The amendments cited above do not have the characteristics necessary to apply a *Mobile-Sierra* presumption because they are not individualized rates that indicate they were negotiated. Some purport to be restatements of the status quo, while others create new processes. They are

[127] 142 FERC ¶ 61,214 at P. 182-183 (2013) ("PJM Order No. 1000 Compliance Order") ("The Mobile-Sierra presumption applies to a contract only if the contract has certain characteristics that justify the presumption… In ruling on whether the characteristics necessary to justify a Mobile-Sierra presumption are present, the Commission must determine whether the instrument at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. The former constitute contract rates, terms, or conditions that necessarily qualify for a Mobile-Sierra presumption; the latter constitute tariff rates, terms, or conditions to which the Mobile-Sierra presumption does not apply, although the Commission may exercise its discretion to apply the heightened Mobile-Sierra standard.").

[128] *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.,* 554 U.S. 527, 22 (2008) ("The FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff.") *See also United Gas Pipe Line Co. v. Mobile Gas Serv., Corp.*, 350 U.S. 332 (1956). *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[129] See, e.g., *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *New England Power Generators Ass'n v. ISO New England Inc*., 146 FERC ¶ 61,038 at P 26 & n.33 (2014); *See Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388-389 (1959); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Mun. Light Boards of Reading & Wakefield, Mass. v. Fed. Power Comm'n*, 450 F.2d 1341, 1348 (D.C. Cir. 1971) ("Its primary aim is the protection of consumers from excessive rates and charges.").

generally applicable because new parties to the CTOA must take them as-is upon entering into the CTOA.

a) <u>These Articles are not Individualized Terms</u>

In the CTOA Filing, proposed Article 9.16.3 states that Articles 2,4,5,6, and 7 are "individualized terms" that were negotiated independently and arms-length between PJM and the Parties, do not constitute terms that are generally applicable, "constitute a contract" between PJM and the TOs, and shall not be changed upon a unilateral filing from PJM or the TOs without a determination by the Commission that the provision "seriously harms the public interest."[130]

The Commission has previously written "[T]he PJM CTOA cannot be classified in its entirety as containing contract rates or tariff rates." – contract rates being individualized and tariff rates being generally applicable. The Commission has also stated that "determining the standard of review that should apply to specific provisions of the CTOA is an appropriate way to recognize the distinctions among its provisions."[131]

The Commission has noted that terms of general applicability are evident when any new PJM TO must accept these provisions as-is, with limited room for negotiation.[132] It is not expected that new TOs, would have much if any ability to negotiate the CTOA upon becoming a party to it. Indeed, the CTOA requires a majority of CTOA parties to agree to amendments before submitting them to FERC.[133] There are situations where some entities that own transmission facilities would

[130] CTOA Filing at Attachment A, 9.16.3.
[131] PJM Order No. 1000 Compliance Order P 185.
[132] *Id.* at P 187 ("This conclusion is bolstered by the fact that any new PJM Transmission Owner would have to accept these provisions as-is, with limited room for negotiation. Amending the CTOA requires action by a two-thirds majority of current PJM Transmission Owners (i.e., parties to the CTOA), substantially inhibiting the ability of a new PJM Transmission Owner to negotiate a change to these provisions. As a result, new PJM Transmission Owners are placed in a position that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a Mobile-Sierra presumption.") (citation omitted).
[133] Consolidated Transmission Owners Agreement at § 8.5.1.

automatically become a party to the CTOA by virtue of owning transmission in the PJM region.[134] Because new parties to the CTOA would have little to no ability to modify the referenced articles upon becoming a party to the CTOA, the Commission should find that these terms are of general applicability.

b) <u>These Articles Do Not Indicate They Were Negotiated</u>

Even if the Commission disagrees and finds these rates to be individualized terms and conditions, they lack an indication that they were negotiated. None of the CTOA articles listed above demonstrate an adversarial negotiation. Article 2.3 simply creates a new meeting to discuss the agreement. The creation of this meeting does not indicate it was created to balance the needs of adversarial parties but instead to allow a "frank exchange of views regarding how the implementation of their agreement affects the planning and operation of the country's largest transmission system."[135]

Nor do Articles 4.1.4(b)(ii) and 6.3.4(b)(ii) indicate they were negotiated by adversarial parties. The stated purpose of these articles is to *foster coordination* between the TOs and PJM. The TOs claim that Article 5.2 "Adds the word 'replace' to codify the Commission's decision, as affirmed by the D.C. Circuit, that the Transmission Owners retain the right to replace their facilities." This does not indicate a negotiation but instead is an attempt to reflect PJM's and the TOs' perception of the status quo in the CTOA. Lastly, the TOs state that 6.3.5 simply recognizes that if PJM loses its RTO status that it is required to continue carrying out its responsibilities

[134] CTOA Filing at p. 22 ("The CTOA Amendments also update the CTOA to incorporate Order No. 1000 principles. First, the CTOA Amendments add a new type of CTOA Party, a "CTOA Designated Party," which is an entity that is not an existing Transmission Owner but has been designated by PJM to construct an RTEP Project. During the time that this non-incumbent holds CTOA Designated Party status, it will be subject to the rights, commitments, and undertakings of a Transmission Owner to the extent that those provisions are applicable, putting it on equal footing with incumbent Transmission Owners. Once the assigned RTEP Project is in service, the CTOA Designated Party automatically becomes a Transmission Owner and a full Party to the CTOA.).

[135] *Id.* at p. 40.

pursuant to the CTOA. The TOs do not state specifically how this provision or the others are a product of negotiation between PJM and the TOs.

As such, the Commission should not afford these articles a *Mobile-Sierra* presumption because they do not have the characteristics necessary for the Commission to apply the presumption. The presence of negotiation between adversarial parties is what allows the Commission to presume a negotiated rate is just and reasonable. Because an adversarial negotiation is not present, the Commission is unable to apply the *Mobile-Sierra* presumption to these articles.

2. The Commission Should Not Use its Discretion to Apply a Public Interest Standard of Review to these Articles

If the Commission determines that the *Mobile-Sierra* presumption does not apply to the articles, the TOs argue the Commission should nonetheless exercise its discretion and apply this heightened protection anyway.[136] As has been described above, the revisions to the CTOA conflict with the Commission's long-standing policies supporting RTO transparency, independence, and cost-effective and efficient transmission development and do not warrant the Commission using its discretion to apply a public interest standard of review to these articles.

But most importantly, the TOs highlight how this arrangement benefits the TOs and not primarily how it benefits customers. "Given the huge investment by Transmission Owners in PJM and the critically important responsibility they have ceded to PJM, the stability of their relationship as embodied in the CTOA must continue to be protected."[137] They do note that advancing RTO membership "and with it, consumer and reliability benefits" is an important Commission policy,[138]

[136] *Id.* at § IV.F.5.
[137] *Id.* at p. 11.
[138] *Id.* at p. 48.

but understanding how an agreement benefits customers should be the Commission's primary objective. The FPA is a consumer protection statute first and foremost.[139]

As discussed above, these amendments would reduce the benefits PJM, as an RTO, provides to consumers. They would make it harder for PJM to direct cost-effective and efficient transmission development, and they would weaken the transparency and perceived independence of PJM and the PJM Board of Managers. For those reasons and the others identified above, should the Commission find these articles to be just and reasonable, which they are not, the Commission should not apply a public interest standard of review to these articles.

V. Motion to Lodge

OPSI moves to lodge[140] a letter it wrote to the PJM Board of Managers dated April 3, 2024.[141] Generally, the Commission finds good cause to grant a motion to lodge where the information will supplement the record in the proceeding and may assist the Commission in the decision-making process.[142]

OPSI has described extensively the series of events that led to the three filings discussed above. OPSI's April Letter influenced that process and formed the basis for the instant Limited Protest. This letter provides the Commission with additional context and would inform the Commission's decision making. Therefore, the Commission should grant this motion to lodge OPSI's April Letter in all three dockets captioned above.

[139] *See supra* at n. 129.
[140] This motion is submitted pursuant to Rule 212 of FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.212.
[141] OPSI April Letter.
[142] *See Consumers Energy Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 167 FERC ¶ 61,212, at P 11 (2019) ("Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record."); *see, e.g.*, *Indep. Power Producers of N.Y., Inc.*, 150 FERC ¶ 61,214, at P 63 (2015) (accepting motions to lodge because the documents provided aided in the Commission's disposition of matters raised in the complaint); *Xcel Energy Southwest Transmission Co.*, 149 FERC ¶ 61,182, at PP 9, 63 (2014) (accepting motion to lodge providing information that assisted FERC in its decision-making process).

VI. Conclusion

OPSI supports PJM having FPA § 205 filing rights over the RTEP Protocol. However, because it has linked its Complaint and Filing to Amend the Tariff to unjust and unreasonable CTOA Amendments, PJM's proposal to obtain those rights is not just and reasonable. Therefore, if the Commission grants PJM's complaint, it should only approve a set of replacement rules with the fewest number of CTOA amendments necessary to effectuate the transfer of the RTEP Protocol to the Tariff.

Respectfully Submitted,

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Dated: July 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Gregory V. Carmean
Gregory V. Carmean
Executive Director
Organization of PJM States, Inc.
700 Barksdale Road, Suite 1
Newark, DE 19711
Tel: 302-266-0914

Dated at Newark, Delaware this July 22, 2024.

Attachment A
OPSI Letter to PJM Board of Managers
April 3, 2024

Organization of PJM States, Inc. (OPSI)

President: **Hon. Kent A. Chandler** *Chairman, Kentucky PSC*
Vice President: **Hon. Emile C. Thompson** *Chairman, PSC of District of Columbia*
Secretary: **Hon. Dennis P. Deters** *Commissioner, PUC of Ohio*
Treasurer: **Hon. Michael T. Richard** *Commissioner, Maryland PSC*

Members:
Delaware Public Service Commission ● Public Service Commission of District of Columbia ● Illinois Commerce Commission Indiana Utility Regulatory Commission ● Kentucky Public Service Commission ● Maryland Public Service Commission Michigan Public Service Commission ● New Jersey Board of Public Utilities ● North Carolina Utilities Commission Public Utilities Commission of Ohio ● Pennsylvania Public Utility Commission ● Tennessee Regulatory Authority Virginia State Corporation Commission ● Public Service Commission of West Virginia.

April 3, 2024

Mr. Mark Takahashi, Chair, PJM Board of Managers
Mr. Manu Asthana, PJM President, and CEO
PJM Interconnection, L.L.C.
2750 Monroe Boulevard
Audubon, Pennsylvania 19403

Dear Mr. Takahashi and Mr. Asthana:

On February 6, 2024, a group of PJM Transmission Owners ("the Sponsors") posted proposed amendments to the Consolidated Transmission Owners Agreement ("CTOA"). In their cover letter, they note that in their view PJM needs additional independence to meet future reliability challenges. They state the proposed amendments to the CTOA would give the PJM Board unilateral and exclusive authority to file changes to the RTEP Protocol by moving it from the Operating Agreement ("OA") to the Open Access Transmission Tariff ("Tariff").

OPSI agrees[1] with the Sponsors that the PJM Board should have exclusive authority to amend the regional transmission planning rules commensurate with its responsibility to ensure the reliability of the grid. But, how the PJM Board comes about that authority is an important detail. The location of Schedule 6 in the OA reflects a long history of compliance and compromise. The process for amending the OA is clear and requires a two-thirds vote of the membership. Even after much engagement and independent research, it is still not clear to OPSI that parties to the CTOA have the authority to transfer the relevant 205 rights by simply amending the CTOA.

If the PJM Board is confident that Transmission Owners can transfer 205 rights over regional planning via amendments to the CTOA, OPSI strongly urges the PJM Board to only agree to the changes necessary to accomplish such a transfer. OPSI is very concerned that some of the proposed amendments to the

[1] This letter was approved by the OPSI Board on April 3, 2024 with the support of the following states: Delaware PSC, PSC of District of Columbia, Illinois CC, Kentucky PSC, Maryland PSC, Michigan PSC, New Jersey BPU, North Carolina UC, Pennsylvania PUC, Tennessee PUC, PSC of West Virginia. The following states abstained: Indiana URC, PUC of Ohio, Virginia SCC.

CTOA exceed what is necessary to give the PJM Board these filing rights, to the ultimate detriment of retail consumers. If objections are filed and FERC finds a single amendment to be unjust and unreasonable, it could reject the Sponsors' entire proposal. Therefore, OPSI encourages the PJM Board to limit its support of the Sponsors' proposal to only those amendments *strictly necessary* to transfer to the PJM Board FPA Section 205 rights over the RTEP Protocol.

Inclusion of superfluous and harmful modifications or new provisions in an amended CTOA filed at FERC will likely result in OPSI protesting the proposal, even though we agree with the primary purpose of the PJM Board having the relevant 205 rights.

OPSI identifies the following list of amendments to the CTOA proposed by the Sponsors, some of which may reduce PJM's independence, some which may reduce transparency into the PJM Board's decision-making processes, and some that could harm consumers. None of the amendments below appear necessary to transfer Section 205 rights over PJM's regional transmission planning rules to the PJM Board.

Definitions

CTOA Designated Party - The amendments create a new party to the CTOA, a CTOA Designated Party, that is not entitled to cast a vote to amend the CTOA but would nonetheless be subject to the rights and commitments created by the CTOA. The creation of this new party to the agreement could also exempt all transmission developers from entering into Designated Entity Agreements ("DEAs") based on PJM's current interpretation of the OA. DEAs provide important protections for consumers by requiring PJM to monitor whether projects are being completed timely and economically. PJM has interpreted the OA to not require DEAs for parties to the CTOA, and forcing more developers to join the CTOA could further erode PJM's oversight of transmission development after the PJM Board approves projects.

Regional Transmission Expansion Plan - The Sponsors also propose to change the definition of the Regional Transmission Expansion Plan from the plan PJM prepares to identify enhancements and expansions to the "Transmission System" to "the plan prepared… for the enhancement or expansion of the Parties' Transmission Facilities." The Sponsors have not explained the distinction between these terms. OPSI is concerned that this amendment could make it harder for non-incumbent transmission developers to participate in PJM's transmission planning process and that it could limit PJM's options to cost-effectively plan the transmission system.

9.16.3 – Other Matters; Modification

The amendments attempt to define five articles in a specific way to establish the facts necessary for FERC to extend *Mobile-Sierra* deference to these articles. If FERC grants *Mobile-Sierra* deference to these articles, it raises the bar for any entity opposing the outcomes of those terms and conditions and could limit FERC's ability to ensure the processes in these articles produce just and reasonable rates. FERC would be required to *presume* the terms are just and reasonable and would only be able to overcome that presumption with a showing that the articles harm the public

interest. This is a more difficult standard to overcome than FERC finding the rules produce unjust and unreasonable rates, an already difficult standard to meet.

This is very concerning for OPSI. PJM directs expenditures of billions of dollars on transmission each year, and much of this spending is driven not by PJM but by parties to the CTOA. Reducing FERC's ability to determine rates are unjust and unreasonable represents a very real risk to consumers that unjust and unreasonable spending could become prevalent in the PJM region.

Each of the articles discussed below would be subject to this heightened standard of review if FERC interprets amendments to these articles as a contract between the PJM Board and the Sponsors.

2.3 – Annual Meeting to Discuss the State of the Agreement

The Sponsors propose to create a new, closed meeting between the PJM Board and the Parties to the CTOA to discuss the State of the CTOA. All other stakeholders would be excluded. While closed sessions, from time to time, may be warranted when discussing critical electric infrastructure or other sensitive topics, designating all of these meetings as closed by default places a greater, and unnecessary, burden on the PJM Board to demonstrate that its decision-making process remains transparent and independent.

4.1.4 (b) (ii) – Rights and Responsibilities Transferred to PJM; 6.3.4 (b)(ii) – Obligations of PJM under this Agreement

The Sponsors propose to enshrine in the CTOA a process that may allow costly local projects to supersede more efficient regionally planned solutions. Specifically, this language indicates that when TOs disagree with PJM that a PJM project meets their local needs, they can proceed with their project anyway. The language does not provide any process by which such a disagreement could be resolved, thus implying that the transmission owner's determination is final. These amendments could allow less cost-efficient local transmission to obviate the need for more regionally cost-effective transmission. While this amendment would not stop PJM from *identifying* cost-effective transmission, if TOs proceed to build additional transmission that meets the same needs, PJM's ability to plan the grid cost-effectively could be seriously impacted. This is especially concerning because the new language asserting that the CTOA should receive *Mobile-Sierra* deference will force FERC to presume that the rates this process produces are just and reasonable.

This provision is clearly unnecessary to transfer 205 rights over the RTEP Protocol to the PJM Board. Indeed, this provision would seem to limit the PJM Board's ability to conduct efficient regional planning. Thus, given its potentially far-reaching implications, this provision should not be included in any version of the CTOA amendments to which the PJM Board agrees.

5.2 – Parties Retained Rights; Facility Rights

The amendments add the word *replace* to a list of actions the parties can take with respect to their assets. The Parties claim they are simply reflecting the status quo in this update of the CTOA. That may be true, but as with other sections, if FERC affords *Mobile-Sierra* deference to this article, it

could limit FERC's ability to regulate the interaction between asset management projects and PJM projects. OPSI supports FERC's ability to effectively regulate transmission spending, and this amendment could be counterproductive to achieving that goal.

6.3.5 – PJM's Rights and Commitments

The amendments include new language requiring PJM to maintain its RTO status, "provided such status is consistent with this Agreement." This language goes far beyond what is necessary to transfer 205 rights over the RTEP Protocol to the PJM Board and could be read as subordinating PJM's responsibilities as an independent RTO and its obligation to comply with FERC's requirements for RTOs to its contractual commitments to one set of members. This language implies that in certain circumstances PJM's mere act of maintaining its status as an RTO would constitute a breach of the CTOA.

If the goal is to allow PJM to continue to operate if it loses its RTO status despite its best efforts, this section should be rewritten to say that. PJM's independence in carrying out its responsibilities is crucial to stakeholder confidence in PJM as an organization. That independence should not be limited by new CTOA restrictions on PJM's ability to continue operating as an RTO.

6.3.11 – PJM's Rights and Commitments

Similar to the amendments in Article 6.3.5, this amendment would require that PJM "[m]ake no filing under Section 205 of the Federal Power Act that is inconsistent with this agreement." Limiting the 205 rights these amendments transfer only raises questions as to how independent the PJM Board truly is, recognizing the limits of their independence are defined by the CTOA and not by FERC. With all of the topics that could be included in the rights transferred to PJM, including storage as a transmission asset, grid enhancing technologies, resiliency, and interconnection, the PJM Board should not agree to amendments to the CTOA that could limit its ability to file proposals it otherwise would be able to if this language was not in effect.

7.3.1 – Filing of Transmission Rates and Rate Design Under Section 205

The Sponsors' proposed amendments to this section would allow conversations between them and PJM related to transmission rates to be designated as confidential and protected by various privileges, including attorney client privilege and attorney work product privilege, to the extent the Sponsors and PJM share a common interest in the rates, terms, and conditions to be applied pursuant to the PJM Tariff.

OPSI finds the proposed additions to Section 7.3.1 of the CTOA to be completely unacceptable. First, they are unnecessary to the stated goal of transferring Section 205 filing rights over the RTEP to PJM. Second, and more importantly, they are incompatible with PJM's status as an Independent System Operator. Of course, PJM shares with all of its Members and stakeholders an interest in rates that are sufficient to allow for investment in the facilities necessary to maintain reliability of the grid at just and reasonable rates. However, any contention that PJM has a common interest with TOs in the rates that justifies holding communications to be confidential as to all other interested parties flies in the face of the concept of independence.

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As indicated above, OPSI has grave concerns with the harms presented in some of the proposed amendments. Therefore, we ask the PJM Board to reject the unnecessary, harmful, or superfluous provisions in the current proposal.

OPSI supports the PJM Board having 205 rights over the RTEP Protocol, but the CTOA edits before you are not the appropriate path. The PJM Board should instead look for another way to obtain those 205 rights, either by amendment of the OA by Members, a Section 206 filing, or a cleaner amendment to the CTOA that makes only the minimum number of changes necessary to transfer 205 rights. The OPSI Board looks forward to working with the PJM Board on whichever path it chooses.

Sincerely,

Kent A. Chandler, President
Organization of PJM States, Inc