

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**COMMENTS OF THE
ORGANIZATION OF PJM STATES, INC.**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. § 385.212, the Organization of PJM States, Inc. (“OPSI”),¹ respectfully submits these comments in response to the Transmission Owners’ (“TOs”) and PJM’s responses² to FERC’s September 9, 2024, deficiency letters.³

Despite their response to FERC’s deficiency letter, the TOs’ amendments to the Consolidated Transmission Owners Agreement (“CTOA”) continue to be unjust and unreasonable; therefore, the Commission should reject them. Further, because PJM has linked its proposed replacement rate to these CTOA amendments, if the Commission agrees the location of the Regional Transmission Expansion Planning (“RTEP”) Protocol in the Operating Agreement (“OA”) is unjust and unreasonable, it should establish paper hearing procedures to further develop

¹ OPSI’s following members support these Comments: 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 North Carolina Utilities Commission and Public Utilities Commission of Ohio abstained in the vote on this filing. The Indiana Utility Regulatory Commission did not participate in the vote on this filing.

² Duquesne Light Company, et al., Response to Deficiency Letter, Docket No. ER24-2336-001 (Oct. 9, 2024) (“TO Deficiency Response”); PJM Interconnection L.L.C, Response to Deficiency Letter, Docket No. ER24-2338-001 (“PJM Deficiency Response.”).

³ Duquesne Light Company, et al, Letter informing PJM Transmission Owners that the 06/21/2024 filing is deficient and requesting additional information to be filed within 30 days to assist in processing its Consolidated Transmission Owners Agreement under ER24-2336 (Sept. 9, 2024) (“CTOA Deficiency Letter”); PJM Interconnection L.L.C., Letter informing PJM Interconnection, L.L.C. that the 06/21/2024 filing is deficient and requesting additional information to be filed within 30 days to assist in processing its revisions to its Open Access Transmission Tariff etc. under ER24-2338, (Sept. 9, 2024) (“Tariff Deficiency Letter”).

the record to determine the just and reasonable and not unduly discriminatory or preferential set of replacement rules.⁴

I. The TOs Transferred the Authority to Determine the Location of the RTEP Protocol

PJM claims that the TOs are entirely within their rights to modify the location of the RTEP Protocol via revisions to the CTOA.⁵ For the reasons stated below and in its Limited Protest, OPSI disagrees.⁶ If the Commission amends the OA pursuant to the TOs' FPA § 205 filing to amend the CTOA without finding the location of the RTEP Protocol in the OA to be unjust and unreasonable, that would be a violation of the filed rate doctrine.⁷ Rules approved by the Commission remain in effect until altered as allowed by the FPA,⁸ and the Commission has not authorized a process allowing amendments to the OA pursuant to an FPA § 205 filing requesting to amend the CTOA.

A. Specific Language in the CTOA Allows PJM To Move the Location of the RTEP Protocol

There is no legal need to amend the CTOA to effectuate a transfer of the RTEP Protocol to the Tariff because the CTOA itself contemplates and authorizes such a transfer, even in the absence of any amendment to the CTOA. PJM's position stems from its erroneous belief that

Because the specification of the location of the RTEP Protocol is exclusively designated in the CTOA, and was not transferred to the Operating Agreement at all, the legal right to modify that location of the RTEP Protocol is explicitly reserved to the PJM Transmission Owners under the CTOA.⁹

⁴ Duquesne Light Company, et al., Limited Protest and Motion to Lodge of the Organization of PJM States, Inc., Docket Nos. ER24-2336-000, EL24-119-000, and ER24-2338-000 ("OPSI Limited Protest").

⁵ PJM Deficiency Response at p. 8.

⁶ OPSI Limited Protest at 17 ("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....**'") citing 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).

⁷ OPSI Limited Protest § III.B.1.

⁸ *Id.* citing *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.").

⁹ PJM's Deficiency Response at n. 14.

PJM bases this conclusion solely on the fact that the CTOA defines the RTEP Protocol as “Schedule 6 of the Operating Agreement, or any successor thereto.”¹⁰ Yet PJM’s interpretation of this definition wholly ignores the qualifying phrase “or any successor thereto.” In reality, by including that phrase the CTOA explicitly contemplates that the RTEP Protocol may be moved to a new location that is a successor to Schedule 6 of the Operating Agreement, and that such a move could occur *without* any further modification to the CTOA.

There would be no need for the CTOA to specify in a definitional cross-reference that the RTEP Protocol could be moved to a successor location if such a move could only occur if the CTOA itself was amended. The sole function of the phrase “or any successor thereto” is to ensure that the CTOA’s cross-reference to the location of the RTEP protocol can remain accurate in the event that it changes due to amendments to other PJM governing documents, even if no housekeeping amendments are made to the CTOA. The fact that the CTOA’s definition of the RTEP Protocol includes this qualification shows the intent of the parties to the CTOA was for PJM to have the ability to move the RTEP Protocol absent further amendments to the CTOA. The CTOA itself therefore transferred the legal right to modify the location of the RTEP Protocol to PJM.

B. Moving the Location of the RTEP Protocol without the Consent of the TOs Does Not Conflict with *Atlantic City v. FERC*

In addition to the reason above, FERC can grant PJM’s request to transfer the RTEP Protocol to the Tariff while rejecting the TOs’ proposed CTOA amendments without running afoul of *Atlantic City v. FERC*.¹¹ PJM’s belief to the contrary appears to stem from its mistaken assumption that the current CTOA did not give it filing rights to amend the location of the RTEP

¹⁰ *Id.* (quoting PJM, Rate Schedule No. 42, Consolidated Transmission Owners Agreement, Section 1.23).

¹¹ *Atlantic City Electric, et al. v. FERC*, 295 F.3d 1 at 10 (D.C. Cir. 2002) (“Atlantic City”).

Protocol and that somehow PJM's current FPA § 206 filing somehow requests an involuntary transfer of the TOs' FPA § 205 filing rights.¹²

The only reason the RTEP Protocol is in the OA and has been in the OA for the past 25 years is because the TOs originally proposed to house it in the Transmission Owners Agreement, which FERC found to be a "fundamental flaw" in the initial PJM ISO proposal because it constrained PJM's independence.¹³ Therefore, in voluntarily proposing to house the RTEP Protocol in the OA, the TOs themselves asserted that housing the RTEP Protocol in the OA would "provide a system of checks and balances that will assure non-discriminatory, open access transmission service throughout the PJM control area"¹⁴ in such a way that "no one industry segment can either force or block action."¹⁵

Consequently, the TOs collectively relinquished any ability to modify the RTEP Protocol via FPA § 205; therefore, a FERC Order granting PJM's complaint and rejecting the CTOA amendments would not represent an involuntary transfer of the TOs' FPA § 205 rights because they already voluntarily transferred them over 25 years ago. The D.C. Circuit Appeals wrote in

¹² PJM Deficiency Response at 9. ("Because the CTOA Amendments directly impact the manner in which the PJM Transmission Owners voluntarily transfer the rights to submit FPA section 205 filings regarding their facilities to PJM, PJM is concerned that an order in these proceedings under FPA section 206 that directs this transfer, without the agreement of the PJM Transmission Owners as reflected in the CTOA, risks conflict with *Atlantic City*, which precludes the involuntary transfer of public utility FPA section 205 filing rights, including under FPA section 206.")

¹³ *Atlantic City et. al.*, 77 FERC ¶ 61,148 at p. 38 (1996) ("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 decision-making 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.")

¹⁴ *Atlantic City et. al.*, 81 FERC 61,257 at pp. 59-63 (1997).

¹⁵ *Id.* at p. 60.

Atlantic City, “Of course, utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205.”¹⁶ That is exactly what the TOs have done.

II. Amendments to Articles 4, 5, and 6 of the CTOA continue to Contradict the Commission’s Policy of Promoting More Efficient and Cost-Effective Regional Transmission Development and Should be Rejected

A. Articles 4.1.4 (b)(ii) and 6.3.4(b)(ii) Would Hinder the Development of Efficient and Cost-Effective Regional Transmission

The Commission asks, what would happen if PJM finds an RTEP project would meet the need supporting a TO project, but the TO disagrees.¹⁷ The TOs continue to confirm that if they disagree with PJM, they can simply document the need for the project from their perspective and develop a local project anyway, even if PJM believes the need is already being solved by a regional project. Indeed, the TOs state that if PJM identifies a possible overlap between a regional project and local project, “[n]othing requires PJM to revise its proposed RTEP project and the Transmission Owners would not expect PJM to revise its proposed RTEP project.”¹⁸ In its Limited Protest, OPSI called this outcome “patently unjust and unreasonable.”¹⁹ Nothing in the TOs’ deficiency response renders their proposal just and reasonable.

In situations where two separate planning processes identify transmission solutions to solve the same need, it is not just and reasonable to allow both PJM and the transmission owner to move forward with separate projects that meet the same need. To address this concern, PJM’s Manual 14B contains notice provisions to relevant regulatory siting authorities. No notice provision exists in the CTOA amendments, and OPSI noted in its Limited Protest that PJM may unilaterally change its manual provisions at any point.²⁰ The TOs argue that if this process produces projects that are

¹⁶ *Atl. City Elec. Co. v. FERC*, 295 F.3d 1 at 10.

¹⁷ Tariff Deficiency Letter at 10.

¹⁸ CTOA Deficiency Response at 11.

¹⁹ OPSI Limited Protest at 26.

²⁰ *Id.* at 28.

duplicative that parties can file a 206, protest the TOs' formula rate proceedings, or rely on state jurisdictional processes to decline to find that the need exists for duplicative projects.²¹

As OPSI stated in response to the Commission's Technical Conference on Transmission Planning and Cost Management, "[R]etail regulators in the PJM region exercise varying levels of oversight of transmission development," therefore, "PJM's transmission planning process must operate transparently and in a manner that allows transmission to be built cost-effectively."²² However, it is not clear that PJM is conducting the required analysis when local projects and regional projects overlap.²³ Indeed, the TOs themselves contend PJM does not do this analysis.²⁴ As OPSI has written, "Since PJM is unwilling or unable to police the local transmission planning process independently, and given the fundamental role the process plays in leading to local and regional transmission facilities, there is a massive gap in oversight that affects wholesale rates, and, coupled with FERC's formula rate recovery, no review or economic regulation occurs."²⁵ Therefore, the TOs' response to the Commission's deficiency letter does not adequately clarify their proposal or otherwise render it just and reasonable. OPSI continues to urge the Commission to reject the proposed CTOA amendments.

B. The Addition of the Single Word "Replace" in Article 5 Does Not Clearly Convey the Limited Meaning the TOs Intend

The TOs state their use of the term "replace" in Article 5 "is intended to reflect and be consistent with the D.C. Circuit's holding in *American Municipal Power, Inc. v. FERC* ("AMP v.

²¹ PJM Deficiency Response at 11.

²² Transmission Planning and Cost Management, Comments of the Organization of PJM States, Inc., Docket No. AD22-8 at p. 1 (Mar. 23, 2023) (OPSI Cost Management Comments).

²³ *Id.* at 2 ("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.").

²⁴ CTOA Deficiency Response at 11 ("The question requires some clarification: PJM does not make a determination that Transmission Projects included in the RTEP can meet needs identified by Transmission Owners.").

²⁵ OPSI Cost Management Comments at p. 2.

FERC”) that the rights to retire and build assets encompass the right to replace existing transmission facilities as they are retired.”²⁶ Nothing in the PJM OATT, *AMP v. FERC*, or the underlying Commission Orders found that the TOs retained the right to replace assets in a way that expands or enhances the transmission system.²⁷ The TOs write, “[t]he proposed amendment merely removes possible ambiguity by adding the word ‘replace’ to avoid any uncertainty, and perhaps further litigation, on the matter.”²⁸

OPSI recognizes the TOs assert that simply adding the word replace does not expand their ability to replace their assets in a way that expands or enhances the transmission system, but adding the word replace to the CTOA without additional context does not clarify the role of PJM and the TOs when it comes to the interaction of end of life planning and regional planning. If the single word “replace” is in fact codifying the status quo, nothing will change should the Commission reject this provision.

III. The Commission is Not Required to, and Should Not, Afford *Mobile-Sierra* Protection to the Proposed CTOA Amendments

The TOs assert “Section 9.16.3... recognizes that the CTOA Amendments that address the allocation of filing rights and other rights and commitments should similarly be subject to the same *Mobile-Sierra* protection consistent with the Commission’s decision to accept the *Atlantic City* Settlement.”²⁹ As the TOs correctly note, the relevant “provisions of the *Atlantic City* Settlement make clear the parties’ intent that *Mobile-Sierra* protections should apply to the settlement

²⁶ TO Deficiency Response at 7.

²⁷ *Am. Mun. Power, Inc. v. FERC*, 86 F.4th 922 at 933 (D.C. Cir. 2023) (“*AMP v. FERC*) (“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.”).

²⁸ TO Deficiency Response at 7.

²⁹ *Id.* at 19.

agreement itself and conforming changes to the PJM Tariff and the Transmission Owners Agreement required by the agreement.”³⁰

However, the CTOA amendments before the Commission now are not part of the original settlement agreement or conforming changes to PJM’s governing documents. Any protection the Commission afforded in the settlement proceedings is not required to, and should not, be carried forward into this proceeding. The Commission should not limit its ability to regulate the planning practices implicated by Articles 4, 5, and 6 under a just and reasonable standard because they contain provisions that could hamper PJM’s ability to advance more cost-effective and efficient transmission.

Articles 4.1.4 (b)(ii) and 6.3.4(b)(ii) describe a process for coordination between local planning and regional planning, not the foundational allocation of filing rights, and Article 5 does not limit the TOs’ authority to replace assets in accordance with the definition of an Asset Management Project in the PJM Tariff.³¹ Many transmission assets in the PJM region are approaching the end of their useful life, and it is concerning that the TOs are attempting to limit the Commission’s ability to regulate the replacement of transmission assets under a just and reasonable standard by affording this provision *Mobile-Sierra* protection. Therefore, the Commission should not only decline to afford *Mobile-Sierra* protection to Articles 4.1.4 (b)(ii), 5, and 6.3.4(b)(ii), it should reject them outright.

³⁰ *Id.* at 18.

³¹ 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.”).

IV. Conclusion

The proposed CTOA amendments are not just and reasonable, and the Commission should reject them. The TOs' response to the Commission's deficiency letter does not correct the unjust and unreasonable proposal originally before the Commission. The CTOA amendments would constrain PJM's ability to advance cost-effective and efficient regional transmission, and the *Mobile-Sierra* provisions would make it harder for the Commission to regulate transmission planning processes going forward.

Separately, if the Commission agrees with PJM that the location of the RTEP Protocol is not just and reasonable, it should set the matter of the just and reasonable replacement rate for paper hearing because PJM has linked its replacement rate to the unjust and unreasonable CTOA amendments.

Respectfully Submitted,

Gregory V. Carmean
Executive Director
Organization of PJM States, Inc.
700 Barksdale Road, Suite 1
Newark, DE 19711
302-266-0914
greg@opsi.us

Benjamin B. Sloan
Director of Legal and Regulatory Affairs
Organization of PJM States, Inc.
700 Barksdale Road, Suite 1
Newark, DE 19711
601-214-8481
ben@opsi.us

Dated: October 30, 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 October 30, 2024.