UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, LLC	**)**	**Docket Nos. EL24-119,**
	)	**ER24-2338,**
	)	**ER24-2336**

PROTEST OF ILLINOIS CITIZENS UTILITY BOARD, DELAWARE DIVISION OF THE PUBLIC ADVOCATE, OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA, NATURAL RESOURCES DEFENSE COUNCIL, SUSTAINABLE FERC PROJECT, AND SIERRA CLUB

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Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[1] the Illinois Citizens Utility Board ("Illinois CUB"), Delaware Division of the Public Advocate, Office of the People's Counsel for the District of Columbia, Natural Resources Defense Council, Sustainable FERC Project, and Sierra Club (collectively "Advocates") submits this Protest to PJM Interconnection, LLC's ("PJM") and PJM Transmission Owners' ("TO") filings under sections 205 and 206 of the Federal Power Act ("FPA") in the above-captioned dockets, which propose changes to PJM's foundational documents, including its Open Access Transmission Tariff ("Tariff"), Operating Agreement ("OA"), and Consolidated Transmission Owners Agreement ("CTOA").

These filings before the Commission include a complaint by PJM under section 206 of the FPA and an identical filing under section 205, both arguing that PJM's own governance practices are unjust and unreasonable and that PJM should be free to disregard its Members' votes regarding transmission planning.[2] Also before the Commission is the TOs' proposal under section 205 of the FPA for changes to the CTOA, including the strongest possible form of legal protection for TOs' own local transmission planning.[3] Because PJM and the TOs ask the

[1] 18 CFR § 385.211.
[2] *PJM Interconnection, LLC*, Facilitating PJM Independent 205 Filing Rights Over Transmission Planning ("PJM 206 Complaint"), Docket Nos. EL24-119 & ER24-2338 (June 21, 2024), Accession No. 20240621-5078.
[3] *PJM Interconnection, LLC*, Amendments to the Consolidated Transmission Owners Agreement ("TOs' 205 Filing"), Docket No. ER24-2336 (June 21, 2024), Accession No.20240621-3069.

Commission to treat these filings as an integrated package,[4] this Protest refers to these three filings collectively as "the CTOA Filings."

Because the CTOA Filings will result in unjust and unreasonable rates, and because PJM fails to carry its burden of proving that existing governance practices are unjust and unreasonable, Advocates respectfully request that the Commission reject the CTOA Filings.

INTRODUCTION

These dockets present the Commission with a wolf in sheep's clothing. The CTOA Filings purport to promote PJM's independence from its Members by ensuring that PJM may unilaterally file changes to its transmission planning processes regardless of how its Members vote on those changes. However, the TOs' filing reveals another core purpose: obtaining the "highest level of contractual protection available under the FPA" for their own inefficient local transmission planning.[5] The CTOA Filings thus represent one stakeholder sector's attempt at economic protectionism, which would guarantee that consumers may be forced to pay to rebuild the grid of the past, even where regional transmission solutions are more efficient and cost effective.[6]

Section I of this Protest explains that by burdening consumers with the costs of less efficient local transmission projects as well as the costs of more efficient regional transmission projects, the CTOA Filings will result in unjust and unreasonable rates. Similarly, by raising the

[4] *See* PJM 206 Complaint, *supra* note 2, at 5 ("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."); *see also* TOs 205 Filing, *supra* note 3, at 19 (stating that "the CTOA Amendments are part of an integrated whole").

[5] TOs' 205 Filing, *supra* note 3, at 41–42 (arguing that "[t]he highest level of contractual protection available under the FPA" is purportedly necessary to protect "more than $70 billion of their assets," as well as their ability "to expand their facilities").

[6] *Id.* (arguing that "Protected Provisions" are necessary to protect TOs' investment); *see also infra* § I(A) (discussing one such Protected Provision that would allow TOs to proceed with local transmission projects even where overlapping regional transmission projects are more efficient and cost effective).

overall cost of transmission development in the PJM region, the CTOA Filings will make it more likely that regional transmission solutions face challenges based on their costs and less likely that regional transmission projects will reach fruition—thus frustrating the Commission's goals in enacting Order No. 1920. Section I also explains that the CTOA Filings are not entitled to *Mobile-Sierra* protection as a matter of law or policy.

Section II explains that PJM has failed to carry its burden of proving that existing governance practices are unjust and unreasonable. While complaining that stakeholder voting on transmission planning proposals purportedly constitutes undue influence, PJM offers no factual evidence to support its complaint, failing to identify any instance in which any stakeholder or industry segment actually thwarted PJM's transmission planning. Nor does PJM explain how stakeholder voting could constitute undue influence given the sector-weighted voting system—which the Commission has already approved. Instead, PJM relies entirely on theoretical, speculative arguments that are unmoored from any factual evidence and contrary to PJM's own arguments in recent matters before the Commission.

Section III explains that the CTOA Filings are misleading when they claim to place PJM on a similar footing to other Regional Transmission Organizations ("RTO") or Independent System Operators ("ISO"). PJM is currently an outlier among RTOs with regard to transmission planning, because every other multi-state RTO provides states with significantly greater ability to ensure that agreed-upon approaches to cost allocation are included in FPA section 205 filings. The CTOA Filings would not change this situation, because they would not alter TOs' exclusive section 205 filing rights about cost allocation.

Section IV explains that the CTOA Filings suffer from several fatal procedural defects. First, these Filings wrongly attempt to constrain the Commission's statutory role to determine the

just and reasonable rate to replace a provision that the Commission finds unjust or unreasonable. Second, the CTOA Filings inappropriately attempt to use a bilateral agreement to constrain the voting rights of hundreds of other stakeholders. And third, the CTOA Filings defy PJM's purported commitment to its stakeholder process, because PJM failed to conduct any meaningful negotiations with its Members to identify a workable solution to the issues PJM raises here. Rather than protecting PJM from undue influence, the CTOA Filings would expose PJM to undue influence from TOs. Indeed, the history of the CTOA Filings already demonstrates that PJM is vulnerable to undue influence from TOs, as these Filings represent the product of negotiations that PJM undertook exclusively with TOs—and not with its other Members—to deprive Members' votes of meaningful effect.

DISCUSSION

I. The CTOA Filings Would Result in Unjust and Unreasonable Rates by Providing the Strongest Possible Legal Protections for Inefficient "Supplemental" Transmission Projects.

The CTOA Filings propose to provide the strongest possible form of legal protection under the FPA for certain "Protected Provisions," which include a provision allowing TOs to proceed with local transmission projects (known euphemistically and inaccurately as "Supplemental Projects") even where regional transmission projects are more efficient and cost-effective.[7] The CTOA Filings would protect TOs' ability to proceed with supplemental projects with the shield of the *Mobile-Sierra* doctrine,[8] which would significantly constrain the Commission's ability to regulate spending on local transmission projects.[9] In doing so, the

[7] TOs' 205 Filing, *supra* note 3, at Exhibit B p. 13, 25, §§ 4.14(b)(ii), 6.3.4(b)(ii).
[8] *Id.* at 41–48 (advancing various arguments for *Mobile-Sierra* protection).
[9] *See*, *e.g.*, *NRG Power Marketing v. Maine Public Utilities*, 558 U.S. 165, 167 (2010) (noting that "[u]nder this Court's *Mobile-Sierra* doctrine FERC must presume that a rate set by a freely negotiated wholesale-energy contract meets the statutory just and reasonable requirement" and that "[t]he presumption may be overcome only if FERC concludes that the contract seriously harms the public interest" (cleaned up)).

CTOA Filings would cause significant harm to consumers and to the Commission's ability to resolve active proceedings and successfully implement its seminal recent Order No. 1920.

A. The CTOA Filings would unreasonably allow Supplemental Projects to proceed even where regional projects are more efficient and cost-effective.

The CTOA Filings propose a new provision that would allow utilities to proceed with local projects even where those local projects are less efficient and more costly than a regional transmission project. In particular, the Filings would add the following language to the CTOA:

> Where Transmission Facilities planned by a Party may overlap with Transmission Facilities proposed to be included in the Regional Transmission Expansion Plan such that the Transmission Facilities proposed to be included in the Regional Transmission Expansion Plan would more efficiently or cost effectively address the need for which the Party's Transmission Facilities are planned, PJM shall consult with the Party to determine if the need for which the Party's Transmission Facilities are planned will be addressed. If the Party determines that such need will not be addressed and that it must continue to plan the Party's Transmission Facilities, it shall document to PJM and the relevant PJM transmission planning committee the rationale supporting its determination.[10]

Although TOs state that the CTOA Filings merely "reflect the more recent addition of PJM Tariff, Attachment M-3,"[11] this provision is in fact significantly broader than the existing provision in Attachment M-3. That provision focuses solely only on certain end-of-life projects that aim to replace a limited type of transmission facility.[12] In contrast, the new CTOA provision would authorize TOs to proceed with *any* local transmission project.

Significantly, the CTOA Filings contain no principle limiting TOs' ability to proceed with transmission projects. For example, under the CTOA Filings, if a TO unilaterally

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[10] TOs' 205 Filing, *supra* note 3, at Exhibit A p. 15, 28, §§ 4.14(b)(ii), 6.3.4(b)(ii).
[11] *Id.* at 10.
[12] *See* PJM Tariff, Attachment M-3 § (d)(2)(ii), available at https://agreements.pjm.com/oatt/31552 (addressing coordination of an "EOL Need" with PJM planning criteria needs); *id.* at §(b)(5) (defining "EOL Need" as "a need to replace a transmission line between breakers operating at or above 100 kV or a transformer, the high side of which operates at or above 100 kV and the low side of which is not connected to distribution facilities, which the Transmission Owner has determined to be near the end of its useful life, the replacement of which would be an Attachment M-3 Project").

determines that a regional transmission project more efficiently and cost-effectively satisfies 99.9% of the identified need for a local transmission project, nothing in the CTOA prevents the TO from determining that the full local "need will not be addressed" and burdening consumers with the full cost of the local transmission project. Indeed, there is no requirement for TOs to *even consider* how to right-size a local transmission project to account for how a regional transmission project more efficiently and cost-effectively meets local needs.

Nor does the CTOA Filing contain any mechanism for oversight of TOs' unilateral determination that some need purportedly justifies a local transmission project. Instead, a TO's only obligation would be to "document to PJM and the relevant PJM transmission planning committee the rationale supporting its determination" to proceed with the local transmission project.[13] But there would be no mechanism for PJM or any affected stakeholder to challenge the TO's determination. Supplemental Projects "are not subject to approval by the PJM Board."[14] Nor, as described below, is there any consistent approach among state regulators that ensures meaningful oversight of local transmission projects.[15] Nor does prudence review before the Commission ensure effective oversight of local transmission projects.[16] In short, the CTOA Filings would allow TOs to burden consumers with redundant and excessive costs—even where

[13] TOs' 205 Filing, *supra* note 3, at Exhibit A p. 15, 28, §§ 4.14(b)(ii), 6.3.4(b)(ii).
[14] PJM Operating Agreement, Schedule 6 § 1.5.6(n), available at https://agreements.pjm.com/oa/4771.
[15] *See infra* § I(B) (discussing lax oversight of local transmission planning); *see also Office of the Ohio Consumers' Counsel v. PJM Interconnection*, *LLC*, 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 ("Ohio Supplemental Projects Complaint"), Docket No. EL23-105 (Sept. 28, 2023), Accession No. 20230928-5134 (discussing a "regulatory gap" that results in negligible oversight of local transmission projects).
[16] *See*, *e.g.*, *Office of the Ohio Consumers' Counsel v. PJM Interconnection, LLC*, Industrial Consumers' Comments in Support of Complaint ("Industrial Consumers Comments on Ohio Complaint"), at 5–7, Docket No. EL23-105 (November 17, 2023), Accession No. 20231117-5185 (explaining that "[p]rudence challenges are not a viable option for consumers to contest the level of transmission owners' spend on Supplemental Projects" and that "there appear to be no cases at least in the past 20 years in which FERC has rejected transmission expenditures as imprudent" due to the highly deferential presumption of prudence of transmission expenditures).

more efficient and cost-effective transmission solutions have been identified—with essentially no recourse for consumers who will pay unreasonable costs.

B. Supplemental Projects are a leading cause of cost increases in the PJM region, are poorly overseen by state or federal regulators, and are the subject of ongoing proceedings before the Commission.

In Order No. 1920, the Commission explained that the transmission planning "status quo" leads to lopsided investment in piecemeal local transmission projects that are inefficient in comparison to regional solutions and expose consumers to costs that are unjust and unreasonable.[17] In particular, the Commission noted that the existing system "causes transmission providers to fail to appropriately evaluate the benefits of transmission infrastructure, and results in piecemeal transmission expansion to address relatively near-term transmission needs."[18] This trend results in "relatively inefficient investments in transmission infrastructure," as well as "customers paying more than necessary or appropriate to meet their transmission needs and forgoing benefits that outweigh their costs, which results in less efficient or cost-effective transmission investments."[19] "This gap in existing regional transmission planning results in piecemeal, inefficient, and less cost-effective transmission planning that imposes real costs on consumers."[20]

As the Commission also explained, "local transmission planning, with its focus on the needs of individual utility footprints, does not necessarily provide sufficient, comprehensive analysis of broader regional transmission needs."[21] Further, "transmission expansion in this incremental manner also misses the potential for transmission providers to identify, evaluate, and

[17] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation* ("Order No. 1920"), 187 FERC ¶ 61,068 at P 85.
[18] *Id.*
[19] *Id.*
[20] *Id.* at P 87.
[21] *Id.* at P 110.

select more efficient or cost-effective transmission facilities."[22] Overall, "the result is relatively inefficient or less cost-effective transmission development for customers, which contributes to rates for transmission that are unjust and unreasonable."[23] Order No. 1920 aims to correct this lopsided trend of unreasonable investment in inefficient local transmission projects.[24]

As the Commission also noted, the PJM region suffers significantly from lopsided, inefficient transmission planning that favors local projects over regional projects. For example, in 2019 "PJM approved 383 transmission-owner planned supplemental projects at a total cost of $3.75 billion, compared to only 80 regionally planned baseline projects at a total cost of $1.27 billion."[25] This trend continued in 2020, when "PJM approved 236 supplemental projects at a total cost of $4.7 billion, compared to only 43 regionally planned baseline projects at a total cost of $413 million."[26] Importantly, Supplemental Projects are ones that "may not be required for . . . system reliability, market efficiency or operational performance" and "are not subject to approval by the PJM Board."[27]

A currently pending proceeding before the Commission under section 206 of the FPA highlights that although Supplemental Projects are the dominant form of transmission spending in the PJM region, they are subject to lax oversight at the federal and state levels. In September 2023, the Ohio Consumers Counsel submitted a complaint under section 206 of the FPA explaining that "more than 85% of the estimated costs for proposed new transmission between

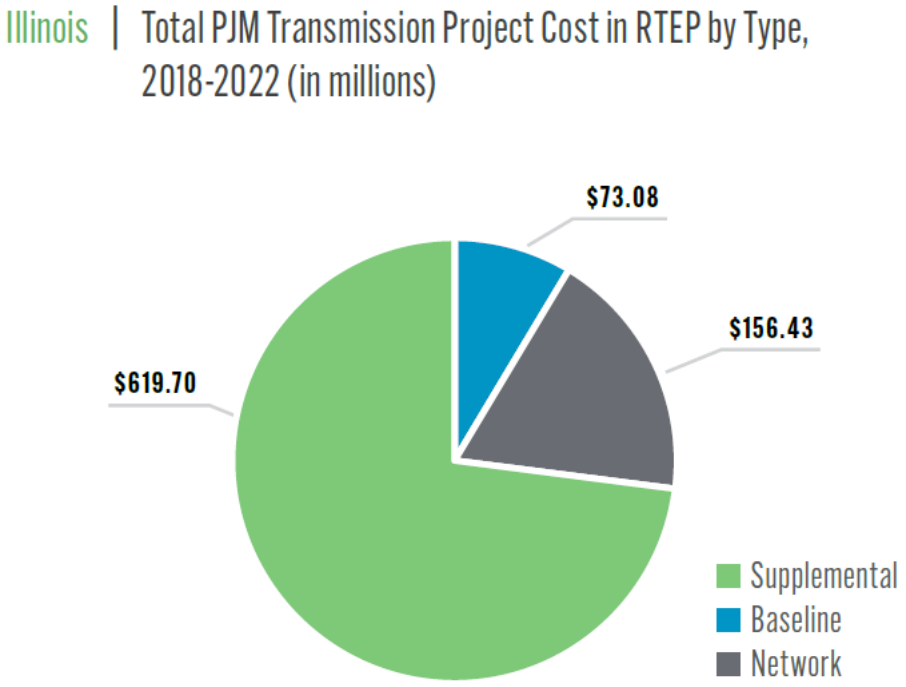
[22] *Id.*
[23] *Id.*
[24] *Id.* at P 111 (noting that because local transmission planning "processes, as well as in-kind replacement processes, provide additional evidence . . . .that existing regional transmission planning and cost allocation requirements are inadequate without reform," the rule aims to address "critical deficiencies in the Commission's current regional transmission planning and cost-allocation requirements" in order "to help to ensure that customers receive the benefits of long-term, forward-looking, and more comprehensive regional transmission planning."
[25] *Id.* at P 109.
[26] *Id.*
[27] PJM Operating Agreement, Schedule 6 § 1.5.6(n), available at https://agreements.pjm.com/oa/4771.

2018 and 2022 in Ohio are a function of utilities' spending on supplemental projects" and that these supplemental projects "outstrip regional projects by 4–1."[28] However, the Ohio Consumers Counsel also explained that Ohio does not oversee the need or cost-effectiveness of most of these projects, including any project under 100 kilovolts (kV) or rebuilds of existing transmission facilities.[29] The Complaint further stresses that "no entity—not the [Public Utilities Commission of Ohio], not the Ohio Power Siting Board, not PJM and not FERC oversees the planning process for most local projects in Ohio, or the need, prudence and cost-effectiveness of those planned local transmission projects."[30]

Numerous other state consumer advocates submitted answers in that proceeding documenting that the pattern of extreme spending on, and lax oversight for, supplemental projects also adversely affects consumers in states throughout the PJM region. For example, in Indiana, this trend is true as well, with supplemental projects representing the vast majority of transmission spending.[31] In New Jersey, spending on supplemental projects exceeds regional projects by more than $2 billion.[32] And in Maryland, "Supplemental Projects account for more than 76 percent of total Maryland transmission infrastructure investment, at a cost of more than $1 billion."[33]

[28] Ohio Supplemental Projects Complaint, *supra* note 15, at 25.
[29] *Id.* at 22–25.
[30] *Id.* at 30.
[31] *Office of the Ohio Consumers' Counsel v. PJM Interconnection, LLC*, Indiana Office of Utility Consumer Counselor's Motion To Intervene And Comments in Support of the Complaint Filed By The Ohio Office Of Consumers' Counsel at 7 Docket No. EL23-105, Accession No. 20231117-5162 (table showing spending on supplemental projects in Indiana).
[32] *Office of the Ohio Consumers' Counsel v. PJM Interconnection, LLC,* Answer Of The New Jersey Board Of Public Utilities In Support Of The Complaint Of The Office Of The Ohio Consumers' Counsel ("New Jersey Answer to Ohio Complaint"), at 6, Docket No. EL23-105 (Nov. 17, 2023), Accession No. 20231117-5244.
[33] *Office of the Ohio Consumers' Counsel v. PJM Interconnection, LLC*, Comments Of The Maryland Office Of People's Counsel at 8–9, Docket No. EL23-105 (Nov. 17, 2023), Accession No. 20231117-5222.

This lopsided investment in supplemental projects occurs in Illinois as well. For example, from 2018 to 2022, spending on supplemental projects in Illinois (solely in PJM) amounted to over $619 million, or roughly 75% of all spending on transmission, as depicted below.[34]



The pattern of spending vastly more on supplemental transmission projects than regional transmission projects is especially problematic for Illinois, because regional transmission projects would be far more beneficial in alleviating transmission constraints that present significant problems for Illinois ratepayers in PJM.

Indeed, lopsided spending on supplemental projects is not isolated to any one state but is pervasive throughout the PJM region.[35] As the Ohio Consumer Counsel noted, "[i]n 2019 alone,

[34] *See* David Gardiner & Associates, *Consumer Advocates of the PJM States' Transmission Handbook*, Vol. IV at 21 (Feb. 2024) available at https://www.dgardiner.com/caps-pjm-transmission-handbook/. (Attachment 1)
[35] *See id.* at 20–32.

throughout PJM, planned Supplemental Projects totaled $4.8 billion."[36] Moreover, between 2012 and 2022, spending on regional projects in PJM "totaled only about $23.0 billion, while cumulative spending on Supplemental Projects neared $43.5 billion."[37] As the New Jersey Board of Public Utilities summarized, "[t]he term 'Supplemental Projects' has [] become a misnomer, as they now constitute the main form of transmission investment in PJM."[38]

Since the Ohio Consumer Counsel's complaint and other states' filings identified the lopsided spending on Supplemental Projects as the dominant form of transmission investment in the PJM region, consumer advocates have also stressed to PJM that transmission costs are rising precipitously. For example, at the recent PJM Annual Meeting, consumer advocates noted a whopping 141% increase in transmission costs in the decade since 2014.[39] Similarly, consumer advocates explained that transmission costs have increased significantly as a percentage of overall wholesale costs in PJM, up from 8.17% of the total wholesale cost in 2014 to 26.25% of total wholesale cost in 2024.[40] Hence, relatively inefficient locally planned supplemental projects, including replacement projects, constitute an extremely significant and growing expense for consumers in the PJM region. Moreover, the lopsided investment pattern in PJM that favors supplemental projects over regional transmission projects is unjust and unreasonable, because in contrast to regional transmission projects—which must demonstrate that benefits outweigh costs—there is no comparable showing of benefits necessary for supplemental projects.

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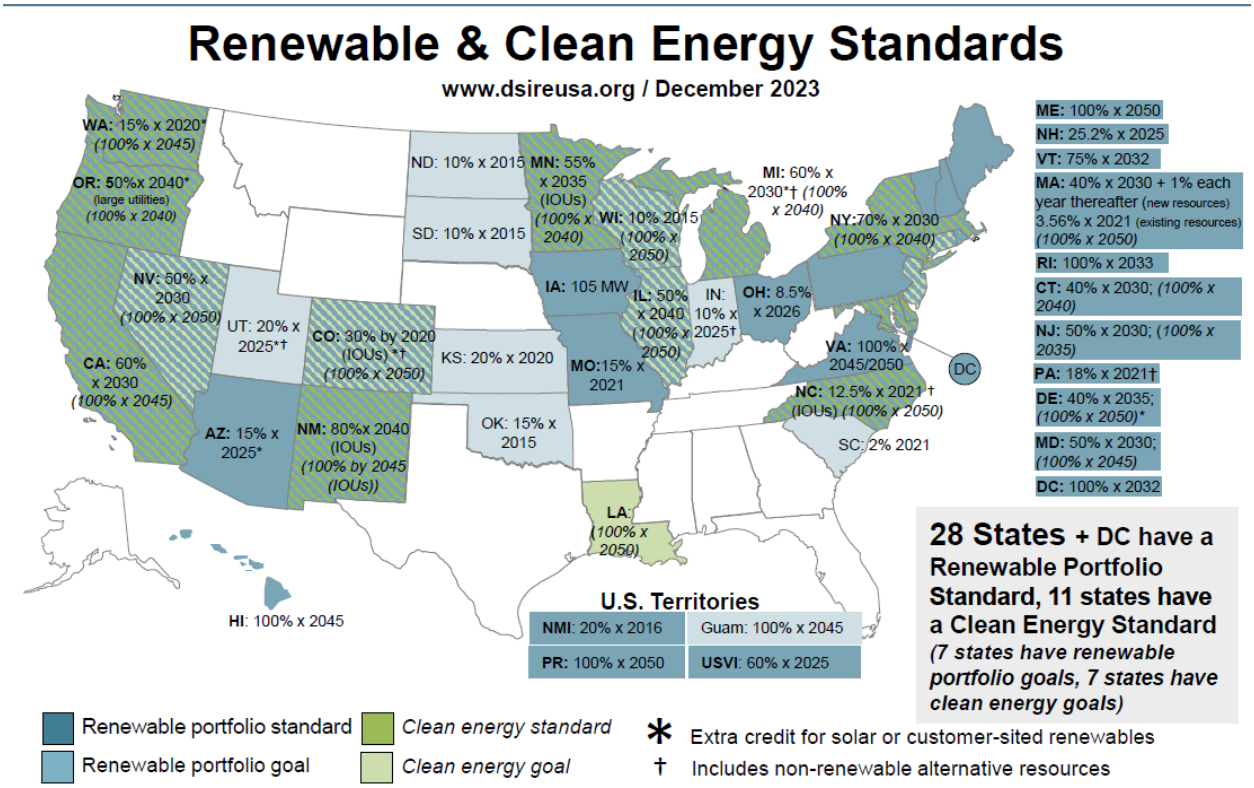
[36] Ohio Supplemental Projects Complaint, *supra* note 15, at 25. The Ohio Consumers' Counsel and the Commission report somewhat different figures for the overall cost of supplemental projects in PJM in 2019. *See* Order No. 1920, at P 109 (identifying $3.75 billion in supplemental projects throughout PJM in 2019). These different figures highlight the need for greater transparency and oversight of supplemental projects.
[37] New Jersey Answer to Ohio Complaint, *supra* note 32, at 6–7.
[38] *Id.*
[39] Consumer Advocates of the PJM States (CAPS), *PJM Annual Meeting: Public Interest Environmental Organization Users Group (PIEOUG, Consumer Advocates of the PJM States Presentation* at 17 (May 8, 2024), https://www.pjm.com/-/media/committees-groups/user-groups/pieoug/2024/20240508/20240508-caps-pieoug---presentation.ashx (depicting the rise in transmission spending in the region).
[40] *Id.* at 16.

C. Supplemental Projects are not facilitating the achievement of state policies that are driving the energy transition.

Numerous states in the PJM region, including Illinois, have ambitious policies that aim to promote the energy transition by establishing requirements or goals for procurement of renewable energy or target dates for significant reductions in emissions of greenhouse gases and other pollutants from the energy sector. For example, as depicted below, Delaware, Illinois, Maryland, Michigan, Ohio, Pennsylvania, Maryland, New Jersey, Virginia, and Washington DC have Renewable Portfolio Standards.[41]



Illinois has one of the region's strongest policies driving the energy transition. The Illinois Climate and Equitable Jobs Act ("CEJA") requires the state to achieve 100% carbon-free

[41] DSIRE, *Detailed Summary Maps* at Renewable Portfolio Standards and Clean Energy Standards (Dec. 2023), https://www.dsireusa.org/resources/detailed-summary-maps/.

electricity by 2045.[42] The law also promotes energy efficiency and other cost-saving measures and includes provisions aiming to promote equity by increasing funding for access to renewable energy by lower-income customers and supporting communities impacted by closure of existing power plants.[43] As Illinois CUB notes, the law promotes consumers' interests "because fighting climate change is necessary to reduce consumers' future costs" and because CEJA reflects "the most cost-effective way for the state to fight climate change."[44]

Achieving state clean energy and climate policies, including CEJA, will require the interconnection of significant amounts of new, clean generating resources, as well as properly planned regional and interregional transmission projects necessary to transmit clean energy to consumers. An important part of Illinois CUB's mission is to ensure that these necessary steps toward the achievement of the state's clean energy and climate policies are undertaken as efficiently and cost-effectively as possible.

However, far from achieving state policy in an efficient and cost-effective manner, the current pattern of lopsided investment in local transmission projects exposes consumers to soaring costs without facilitating the necessary interconnection of clean energy or the development of efficient regional and interregional transmission. For example, despite spending on local "supplemental" projects soaring in the PJM region over the last decade (as described above), the cost to interconnect new generating resources has also increased precipitously during a similar time period. Lawrence Berkeley National Laboratory reports that in PJM, "[c]osts for recent 'complete' projects have doubled on average relative to costs from 2000-2019."[45]

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[42] Illinois CUB, *What is the Climate & Equitable Jobs Act: An in-depth look at the latest energy legislation* at 1 https://www.citizensutilityboard.org/wp-content/uploads/2021/07/Climate-Equitable-Jobs-Act-CEJA.pdf.
[43] *Id.* at 1–2.
[44] *Id.* at 2.
[45] Lawrence Berkeley National Laboratory, *Interconnection Cost Analysis in the PJM Territory* at 1 (Jan. 2023), https://emp.lbl.gov/publications/interconnection-cost-analysis-pjm.

Moreover, "[b]roader network upgrade costs are the primary driver of recent cost increases."[46] Additionally, interconnection delays continue to be a significant problem in the PJM region, as Illinois CUB explained in a recent protest to PJM's failure to comply with the Commission's recent interconnection reforms.[47]

In short, consumers in the PJM region are paying vast and increasing amounts for inefficient local transmission projects that are not making it faster or cheaper to interconnect new generating resources or achieve state climate and clean energy policies. As discussed below, the CTOA Filings would further entrench TOs' ability to unilaterally foist local transmission costs onto consumers, particularly by providing the strongest form of legal protection under the FPA for TOs' local transmission planning.

D. The CTOA Filings are not entitled to *Mobile-Sierra* protection as a matter of law or policy.

The CTOA Filings seek the protection of the *Mobile-Sierra* doctrine for terms that the TOs describe as "Protected Provisions," which include Articles 2, 4, 5, 6, and 7 of the CTOA, as well as Attachment B.[48] These Protected Provisions include numerous terms describing the respective rights and obligations of TOs and PJM and, critically, include the provisions in Articles 4 and 6 of the CTOA that would allow TOs to proceed with local transmission projects even where regional transmission projects are more efficient and cost effective.[49]

[46] *Id.*
[47] *PJM Interconnection LLC*, Protest of Public Interest Organizations at 6–11, Docket No. ER24-2045 (June 20, 2024), Accession No. 20240620-5242.
[48] TO 205 Filing, *supra* note 3, at 10.
[49] *Id.* at Exhibit B p. 13, 25, §§ 4.14(b)(ii), 5.3.4(b)(ii).

The *Mobile-Sierra* doctrine establishes the strongest possible legal protection available under the FPA and is applicable only under limited circumstances.[50] The doctrine applies to a "mutually agreed-upon contract rate" between "the party charging the rate and the party charged."[51] By contrast, the doctrine does not apply, "of its own force, when the parties have not agreed to set rates by contract."[52] In addition, the Commission may, as a matter of discretion, apply *Mobile-Sierra* protection to non-contract rates such as those set through tariffs that the Commission has approved as just and reasonable.[53] The Commission has explained that in exercising that discretion, "[a]s in any just and reasonable inquiry, the focus will be on the particular circumstances presented."[54] As the Commission has explained, "[i]mportantly, if the Commission believes that, in other circumstances outside the context of the type of 'contract rates' addressed in *Morgan Stanley*, it is unjust and unreasonable to lock in a more stringent application of the just and reasonable standard, then the Commission has the discretion not to impose that more stringent standard of review."[55]

The Commission's close scrutiny of a filing proposing *Mobile-Sierra* protection is essential because the stringent constraints that the doctrine imposes on subsequent proceedings can lead to inequitable results if the doctrine is carelessly applied. The doctrine limits challenges to unjust and unreasonable outcomes not only from the parties to a contract, but also from adversely affected third parties including consumers, as well as from the Commission itself. In

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[50] *See Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527, 545-46 (2008) (noting that although there is only one "just and reasonable" standard of review for rates under the FPA, where "sophisticated businesses enjoying presumptively equal bargaining power" enter into a contract between "the party charging the rate and the party charged," that "mutually agreed-upon contract rate" is subject to a presumption that it is just and reasonable, and only when the contract rate "seriously harms the consuming public may FERC declare it not just and reasonable").
[51] *Id.*
[52] *Devon Power LLC*, 134 FERC ¶ 61,208, at P 11 (2011).
[53] *Id.* at PP 14-17.
[54] *Id.* at P 24.
[55] *Id.*

short, as the Court of Appeals for the D.C. Circuit explained, "the *Mobile-Sierra* public interest standard confers an advantage on a party claiming it applies."[56]

In these dockets, TOs seek *Mobile-Sierra* protection for their proposed CTOA changes precisely because the application of the *Mobile-Sierra* doctrine would confer a profound advantage for their own economic interests in planning and building—and forcing consumers to fund high rates of return for—local transmission projects.[57] The high cost and lax oversight of local transmission projects are the subject of multiple ongoing proceedings before the Commission. The fact that inefficient local transmission planning contributes to unjust and unreasonable rates is also a foundational finding underpinning the Commission's recent Order No. 1920. The extension of *Mobile-Sierra* protection to the CTOA changes proposed here would profoundly advantage the TOs by establishing that their local transmission projects are entitled to a presumption of justness and reasonableness that may only be overcome by a showing of serious harm to the public interest. However, the CTOA Filings are not entitled to *Mobile-Sierra* protection as a matter of law, and it would be an abuse of discretion for the Commission to extend that protection as a matter of policy.

1. The CTOA Filings are not entitled to Mobile-Sierra protection as purportedly mere updates to the existing CTOA.

In a misleading "nothing to see here" narrative, TOs and PJM present the CTOA Filings as making no significant substantive changes and instead merely updating the existing CTOA.[58]

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[56] *Maine Pub. Utilities Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010)

[57] *See*, *e.g.*, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection,* Comments of Public Interest Organizations at 62–65, Docket No. RM21-17 (Oct. 12, 2021), Accession No. 20211012-5519 (describing how the high rates of return for local transmission projects create perverse incentives for utilities and encouraging the Commission to address this issue).

[58] *See* PJM 206 Complaint, *supra* note 2, at 21 (suggesting that the CTOA Filings "*will not in any way* diminish, reduce, or otherwise change the current PJM stakeholder process as it exists today"); *see also* TOs 205 Filing, *supra* note 3, at 8 (suggesting that the CTOA Filings "will not mean the end of existing collaboration and coordination processes among PJM the Transmission Owners, stakeholders, and states" and that the CTOA Filings "do not increase the power or influence of the Transmission Owners").

But in fact, the CTOA Filings would profoundly change governance in PJM. For example, while TOs and PJM contend that the CTOA Filings would not change the existing stakeholder process,[59] these filings would in fact allow PJM to disregard stakeholder votes opposing a proposal. Converting the existing sector-weighted voting process from a mandatory requirement into a merely advisory role is a significant change in governance. For PJM and TOs to pretend otherwise is misleading and should cause the Commission to scrutinize these Filings closely.

It is equally misleading for TOs to present their proposed changes to the CTOA as mere "clarifications and updates."[60] The CTOA Filings would significantly alter the ability of adversely affected consumers to challenge, or the Commission to regulate, the unjust and unreasonable rates that result from inefficient local transmission planning. For example, as described above, while TOs claim that the CTOA Filings incorporate the addition of Attachment M-3 to the PJM Tariff,[61] the CTOA Filings' provision that would allow *all* local transmission projects to proceed even where regional projects are more efficient and cost-effective is far broader than a related provision in Attachment M-3 that applies only to certain end-of-life projects.

Similarly, TOs seek *Mobile-Sierra* protection for a much larger swath of the proposed CTOA than the much more limited provisions to which the doctrine currently applies. In particular, TOs identify as "Protected Provisions" Articles 2, 4, 5, 6, and 7 of the CTOA, as well as Attachment B.[62] Critically, these proposed "Protected Provisions" include the identical provisions in Articles 4 and 6 that would allow TOs to proceed with local projects even where a

[59] *See* PJM 206 Complaint, *supra* note 2, at 5 (claiming that "[n]othing in this filing changes the processes (nor PJM's commitment to those processes) that PJM has employed to obtain stakeholder feedback and gauge stakeholder support through voting").
[60] TOs 205 Filing, *supra* note 3, at 10.
[61] *Id.*
[62] *Id.* at 11 n. 17.

regional project is more efficient and cost effective,[63] as well as numerous others.[64] In sharp contrast, when approving the CTOA's current division of filing rights, the Commission was careful to limit the scope of *Mobile-Sierra* protection solely to the "division between, essentially, rate-related filings and terms and conditions-related filings—with the PJM TOs filing the former and PJM the latter."[65] The Commission did not similarly extend *Mobile-Sierra* protections to other provisions; instead, the Commission required modifications to establish that any TO withdrawal from PJM would require the Commission's approval of a section 205 filing.[66]

Just as it did when reviewing the settlement that established the current division of section 205 filing rights between PJM and TOs, the Commission should carefully scrutinize each of the "Protected Provisions" for which TOs seek *Mobile-Sierra* protection. The proposed changes to the CTOA are not identical to existing provisions in the existing CTOA, OA, or Tariff. In some instances, such as the critical provision regarding local planning discussed above, the proposed CTOA terms are broader, and TOs are seeking *Mobile-Sierra* protection for terms to which that doctrine has not previously applied. The Commission's close scrutiny of each term is essential to prevent application of the *Mobile-Sierra* from foreclosing the ability of adversely affected consumers to challenge—or the Commission to regulate—unjust and unreasonable rates stemming from inefficient transmission planning processes.

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[63] *Id.* at Exhibit B p. 13, 25, §§ 4.14(b)(ii), 6.3.4(b)(ii).
[64] *See generally* Letter from Ari Peskoe, Harvard Electricity Law Initiative, Mark Takahashi, Chair, PJM Board of Managers and Manu Asthana, PJM President and CEO (May 9, 2024), available at https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240509-peskoe-letter-re-pieoug-remarks.ashx (describing various new provisions in the CTOA and explaining their adverse policy implications).
[65] *Pennsylvania-New Jersey-Maryland Interconnection*, 105 FERC ¶ 61,294, at P 33 (2003) (stating that "we accept the proposed *Mobile-Sierra* 'public interest' clause governing revisions to the parties' voluntary agreement (as to the division between, essentially, rate-related filings and terms and conditions-related filings – with the PJM TOs filing the former and PJM the latter").
[66] *Id.* at PP 35–36.

2. The CTOA Filings do not establish contract rates subject to Mobile-Sierra *protection as a matter of law.*

The *Mobile-Sierra* doctrine "always applies" as a matter of law only to the limited "context of a power sales contract."[67] Outside of that limited context, whether the *Mobile-Sierra* doctrine should apply is a matter of the Commission's discretion.[68] The Commission has explained the characteristics of "contract rates" to which the doctrine applies, which are situations in which 'the party charging the rate and the party charged" are "sophisticated businesses enjoying presumptively equal bargaining power."[69] In other words, the doctrine applies where sophisticated businesses negotiate a contract that sets the price for the purchase of electric power. In contrast, where a filing before the Commission establishes a market mechanism that applies "not just to the settling parties," but also to a large number of third parties such that "a non-settling party's" rights or obligations "cannot be said to be based on a contract executed by that party," the filing does not establish a "contract rate" to which the *Mobile-Sierra* doctrine applies as a matter of law.[70] For example, where a filing established a capacity market mechanism, the Commission found that "[s]ince this rate methodology applies even to parties who did not agree contractually to its adoption, the rates set through the forward capacity auction more closely resemble a tariff rate than a contract rate," and thus the Commission held that the *Mobile-Sierra* doctrine did not apply as a matter of law.[71]

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[67] *See Devon Power*, 134 FERC ¶ 61,208 at P 23; *see also id.* at P 10 ("Under *Mobile-Sierra*, as interpreted by the Supreme Court in *Morgan Stanley*, the Commission must presume that rates set by power sales contracts that are freely negotiated at arm's-length between willing buyers and sellers meet the statutory 'just and reasonable' standard of review.").

[68] *Id.* at P 11 (noting that the doctrine "does not apply, of its own force, when the parties have not agreed to rates set by contract"); *see also id.* at P 14 (noting that the Commission "has discretion to apply" the doctrine).

[69] *Id.* (citing *Morgan Stanley*, 554 U.S. at 545).

[70] *Id.* at P 12.

[71] *Id.* at P 13. The Commission did apply the *Mobile-Sierra* doctrine as a matter of discretion in that instance. *Id.* at PP 15–24.

The CTOA Filings are not entitled to *Mobile-Sierra* protection as a matter of law because they do not establish "contract rates." As an initial matter, the CTOA Filings do not establish power prices, which distinguishes these Filings from the type of contract rates addressed in *Morgan Stanley*. Nor do the CTOA Filings merely govern the rights and obligations of PJM and the TOs, which are the only parties to this agreement. Instead, the CTOA Filings have broad impacts on numerous PJM Members by significantly diminishing the practical effect of their votes in the PJM stakeholder process; if the Commission approves these Filings, Members' votes will no longer have any binding impact on PJM's transmission planning processes but will become merely advisory. That broad application to non-parties is sufficient to demonstrate that the CTOA Filings do not establish contract rates.[72]

Further, the CTOA Filings threaten broad and significant adverse impacts on consumers throughout the PJM region who are not parties to this agreement between TOs and PJM. As discussed above, the CTOA Filings contain a crucial provision establishing that TOs may proceed with local transmission projects even where regional transmission projects are more efficient and cost effective. Indeed, because this provision contains no limiting principle, consumers may be forced to bear the full cost of a local project even where a regional project meets the vast majority of the purported need for the local project—and TOs will face neither any obligation nor any economic incentive to downsize a local project to account for the portion of the need satisfied by the more efficient and cost effective regional project. Again, the broad practical harms to third parties are sufficient to demonstrate that the CTOA Filings do not establish "contract rates."

[72] *See id.* at P 13 ("Since this rate methodology applies even to parties who did not agree contractually to its adoption, the rates set through the forward capacity auction more closely resemble a tariff rate than a contract rate.").

3. *The Commission should not extend* Mobile-Sierra *protections to the CTOA Filings as a matter of discretion.*

As the Commission has described, it "may require varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances."[73] Only "[w]hen power sales rates are set by contracts resulting from fair, arm's-length negotiations between willing sellers and buyers" do "*Sierra* and the more recent *Morgan Stanley* require application of the more rigorous 'public interest' presumption."[74] In other circumstances, the Commission may determine the appropriate approach "as a matter of discretion, if considerations relevant to what is 'just and reasonable' make that approach appropriate."[75] As the Commission stressed, when exercising discretion, "[i]mportantly, if the Commission believes that . . . it is unjust and unreasonable to lock in a more stringent application of the just and reasonable standard, then the Commission has the discretion not to impose that more stringent standard of review."[76]

a. The CTOA Filings meet none of the criteria that the Commission has used to justify the discretionary application of the *Mobile-Sierra* doctrine.

In exercising its discretion to determine whether a filing should be accorded *Mobile-Sierra* protection, the Commission evaluates whether the filing "share[s] with freely negotiated contracts certain market-based features that tend to assure just and reasonable rates."[77] Factors that the Commission has found relevant include whether a filing: (1) "provide[s] a market-based mechanism to appropriately value [] resources"; (2) "satisf[ies] cost-causation principles"; (3) provides appropriate signals to investors when infrastructure resources are necessary"; (4) would

[73] *Devon Power*, 134 FERC P 61,208 at P 16.
[74] *Id.*
[75] *Id.*
[76] *Id.* at P 24.
[77] *Id.* at P 19.

"promote rate stability"; (5) "advance[s] the interest of all market participants"; and (6) "is the result of extensive negotiations among market participants . . . [that] might not have been reached without the inclusion of the 'public interest' standard."[78]

The CTOA Filings have none of the characteristics that the Commission identified as justifying the extension of *Mobile-Sierra* protection as a matter of discretion. The CTOA neither establishes any "market-based mechanism" to appropriately value resources nor satisfies "cost-causation principles." Both of those factors aim to ensure that consumers pay reasonable costs for electric infrastructure, but by allowing local transmission projects to proceed even where regional transmission solutions are more efficient and cost-effective, the CTOA Filings would instead cause customers to bear excessive, unnecessary costs associated with inefficient transmission buildout. For the same reason, the CTOA Filings would not lead to "appropriate signals to investors when infrastructure resources are necessary," but would instead allow the development of less efficient and less cost-effective local transmission projects even where more appropriate regional transmission projects significantly overlap and satisfy local needs. Similarly, the CTOA Filings would not "promote rate stability." As described above, the costs of "Supplemental" projects are soaring throughout the PJM region and are a significant contributor to rising wholesale prices; by allowing local transmission to proceed even where it is less efficient and cost-effective, the CTOA Filings would ensure that trend continues, causing excessive and increasing costs to consumers rather than stable rates. For this reason also, the CTOA Filings would not "advance the interests of all market participants." Rather than keeping prices stable and reasonable, the CTOA Filings would cause significant harm to consumers.

[78] *Id.* at PP 19-23.

Moreover, the CTOA Filings are not "the result of extensive negotiations among market participants . . . [that] might not have been reached without the inclusion" of *Mobile-Sierra* protections. Instead, as the TOs make clear, the CTOA Filings are "bilaterally negotiated individualized terms *between PJM and the Transmission Owners alone*."[79] Indeed, PJM and the TOs failed to engage in negotiations with affected stakeholders despite repeated requests for a more open process that could reach results that better protect the public interest. For example, the Organization of PJM States ("OPSI") objected that the proposed CTOA changes "exceed what is necessary to give the PJM Board [section 205] filing rights [over transmission planning], to the ultimate detriment of retail consumers," advised that the "PJM Board should instead look for another way to obtain those 205 rights," and noted that "[t]he OPSI Board looks forward to working with the PJM Board."[80] Similarly, Gregory Poulos, the Executive Director of the Consumer Advocates of the PJM States, noted that "PJM and the [TOs] had private closed door discussions regarding proposed changes that would have a significant impact on regional planning," but that Consumer Advocates were "[u]nfortunately . . . not aware of any effort or opportunity that PJM has made to have similar discussions of the matter with other entities, such as the consumer advocates that represent ratepayers."[81] Finally, the members of the Public Interest Environmental Organization User Group invited Ari Peskoe from the Harvard Electricity

[79] TOs' 205 Filing, *supra* note 3, at 45 (emphasis added).
[80] Letter from Organization of PJM States, Inc. to Mark Takahashi, Chair, PJM Board of Managers and Manu Asthana, PJM President and CEO ("Letter from OPSI") (Apr. 3, 2024), available at https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240403-opsi-letter-re-proposed-ctoa-revisions.ashx.
[81] Letter from Gregory Poulos to Mark Takahashi, Chair, PJM Board of Managers and Manu Asthana, PJM President and CEO (Apr. 11, 2024), available at https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240412-caps-letter-regarding-proposed-ctoa-revisions.ashx.

Law Initiative to speak at the PJM Annual Meeting, at which Mr. Peskoe advised PJM "to begin a new process with the Members."[82]

Despite these requests, PJM and the TOs never had any meaningful negotiations with affected stakeholders regarding the CTOA Filings or any alternative solutions. Instead, PJM demanded that its Members vote on transferring regional planning provisions from the Operating Agreement into the Tariff on exceptionally short notice. On April 17, the PJM Board asked Members to vote on this issue at the PJM Annual Meeting that occurred on May 7—less than three weeks later. In those three weeks, PJM offered no meaningful opportunity for discussion or negotiation. Moreover, even when PJM Members had to vote on this issue, PJM failed to make clear whether it would treat the Members' vote as support for the CTOA Filings as a whole or instead for a more limited revision of PJM's governing documents. With the proposed CTOA changes looming over the vote, Members voted in overwhelming opposition. And because PJM never provided Members with any meaningful chance to negotiate or vote on any more limited amendment to PJM's governing documents or any alternative approach to transmission planning, there is no record of whether Members might support a more limited or nuanced approach—although some stakeholders, such as OPSI, have indicated they would.[83]

For all these reasons, the CTOA Filings satisfy none of the criteria that the Commission has previously invoked when extending the *Mobile-Sierra* doctrine as a matter of discretion.

[82] *See* Letter from Ari Peskoe, Harvard Electricity Law Initiative, Mark Takahashi, Chair, PJM Board of Managers and Manu Asthana, PJM President and CEO (May 9, 2024), available at https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/2024/20240509-peskoe-letter-re-pieoug-remarks.ashx.

[83] *See* Letter from OPSI, *supra* note 80, at 1 (explaining that OPSI opposed the CTOA Filings but supported PJM obtaining unilateral 205 rights over transmission planning).

b. *Mobile-Sierra* protections for the CTOA Filings would thwart competition, harm consumers, and impair the Commission's ability to resolve ongoing proceedings.

The Commission previously rejected the application of the *Mobile-Sierra* doctrine to the CTOA where TOs proposed provisions aimed at "protecting themselves from competition in transmission development."[84] While the CTOA Filings here are slightly more subtle than the Right of First Refusal ("ROFR") at issue in that prior proceeding, the difference is slim. Just as the ROFR at issue in that proceeding would have protected the economic interests of incumbent TOs, the CTOA Filings would also promote incumbent TOs' economic interests by allowing them to proceed with local transmission projects even where competitive, regional transmission projects are more efficient and cost effective. The result is the same: the insulation of transmission projects from competition, leading to excessive rates for consumers. The outcome should also be the same with regard to *Mobile-Sierra* protection; just as the Commission refused to extend the doctrine to the CTOA previously, it should decline to extend the doctrine to the CTOA Filings now.

Similarly, the Commission should decline to extend *Mobile-Sierra* protection to the CTOA Filings because applying that doctrine here would wrongly constrain the Commission's ability to protect consumers by exercising oversight of local transmission projects in several ways. First, the extension of *Mobile-Sierra* protection for the CTOA's Protected Provisions—and especially to the provision allowing TOs to proceed with local projects even where overlapping regional projects are more efficient and cost effective—would provide TOs with the ability to argue that the Commission must presume that spending on local transmission projects is just and reasonable and that the presumption may be overcome only upon a showing that such

[84] *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 189 (2013).

spending "seriously harms the public interest."[85] Although the Commission's oversight of local transmission projects is already lax due to its presumption of prudence for transmission spending,[86] the CTOA Filings would erect yet another nearly insurmountable barrier to consumers seeking the Commission's protection from unjust and unreasonable rates.

Second, the extension of *Mobile-Sierra* protection for TOs' planning of local transmission projects would constrain the Commission's ability to resolve currently pending matters. For example, the pending complaint by the Ohio Consumers' Counsel and the various answers in support of that complaint from numerous other states in the PJM region advance arguments under the currently applicable standard of section 206 of the FPA—i.e. that lax oversight of supplemental projects results in rates that are unjust, unreasonable, or unduly discriminatory or preferential.[87] However, granting the TOs' request for *Mobile-Sierra* protection of local transmission planning would impose a significantly more difficult standard of review; the Commission would only be able to grant relief in that docket if it were to find that the existing practice "seriously harms the public interest."[88] The Commission should not take up TOs' invitation to tip the scales in their favor by imposing a more difficult legal standard in the middle of a fully briefed proceeding.

Similarly, extending *Mobile-Sierra* protection for TOs' local transmission planning could thwart the Commission's effort to identify sensible reforms in its ongoing administrative docket regarding "Transmission Planning and Cost Management."[89] In that docket, the Commission

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[85] *NRG Power Marketing*, 558 U.S. at 167 (describing the *Mobile-Sierra* doctrine).
[86] *See*, *e.g.*, Industrial Consumers Comments on Ohio Complaint *supra* note 16, at 5–7 (explaining that "[p]rudence challenges are not a viable option for consumers to contest the level of transmission owners' spend on Supplemental Projects" and that "there appear to be no cases at least in the past 20 years in which FERC has rejected transmission expenditures as imprudent" due to the highly deferential presumption of prudence of transmission expenditures).
[87] *See* Ohio Consumers' Counsel Complaint, *supra* note 15, at 38.
[88] *NRG Power Marketing*, 558 U.S. at 167.
[89] *See Transmission Planning and Cost Management*, Notice of Technical Conference, Docket No. AD22-8 (April 21, 2022), Accession No. 20220421-3091.

sought information on, among other topics, "how transmission owners establish local transmission planning criteria and use their local transmission planning criteria to identify local transmission needs, and the effectiveness of cost management, transparency, and oversight measures in those processes."[90] The Commission sought this information to help it evaluate "whether enhanced cost management, transparency, and oversight measures over . . . local and regional transmission planning . . . could help to ensure just and reasonable transmission rates."[91]

Numerous entities submitted comments in that docket, with damning evidence regarding local transmission planning processes and their impacts on consumers. For example, Gregory Poulos, the executive director of the Consumer Advocates of PJM States, Inc., explained that the notion that local transmission planning in PJM "provides some level of oversight and cost management" is "misguided and must be corrected," because in fact the process "provides less transparency and opportunity to participate than any traditional stakeholder PJM process."[92] Mr. Poulos went on to explain that the process "is essentially designed for the convenience of the transmission owners—not consumers or other stakeholders."[93] As Mr. Poulos summarized, "[t]he reality is simple—the process is fundamentally designed to serve the needs of the transmission owners at the expense of customers."[94] Because consumers face a lack of regulatory oversight of local transmission projects or procedural recourse for unreasonable costs, Mr. Poulos explained that "[m]oving forward, consumers and other stakeholders, who often lack both the basic information and sophisticated expertise of the transmission owners, need help."[95]

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[90] *Id.* at 1.
[91] *Id.*
[92] *Transmission Planning and Cost Management*, Pre-Conference Statement of Gregory J. Poulos, at 2, Docket No. AD22-8 (Oct. 4, 2022), Accession No. 20221004-5185 (Attachment 2).
[93] *Id.*
[94] *Id.* at 6.
[95] *Id.* at 2.

The CTOA Filings reflect the exact opposite of the help that consumers need. Rather than allowing the Commission to even-handedly evaluate the information that it solicited in this technical conference regarding local planning, the TOs' proposed extension of *Mobile-Sierra* protection for the CTOA's provisions regarding local transmission planning would require the Commission to presume that TOs' local planning process, and the resulting costs, are just and reasonable.[96] The Commission should decline the TOs' invitation to impose blinders on its own review of evidence that it requested regarding local transmission planning processes and their impacts on consumers.

Third, extending *Mobile-Sierra* protection to the CTOA provisions regarding local transmission projects would make it much more difficult for the PJM region to achieve the objectives of Order No. 1920. As an initial matter, PJM's contention that the CTOA Filings would promote compliance with Order No. 1920 is wholly without merit; PJM does not require any different rights under the FPA in order to comply with the Commission's Order. Instead, PJM simply needs to make the appropriate compliance filing at the appropriate time.[97] Moreover, PJM's request for rehearing of Order No. 1920—which challenges numerous core features of the Order—casts significant doubt on PJM's stated interest in reforms to enable compliance with that Order.[98] Furthermore, contrary to PJM's assertion, the CTOA Filings would make regional transmission development in PJM vastly more difficult by ensuring that consumers must pay for local transmission projects even where regional projects are more

[96] *NRG Power Marketing*, 558 U.S. at 167.
[97] To the extent that PJM needs Member support in sector-weighted votes for any compliance with Order No. 1920—which is unlikely—the Commission has provided an ample time period for compliance efforts.
[98] *See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Request for Rehearing and Clarification of PJM Interconnection, LLC ("PJM Order No. 1920 Rehearing Request"), at 3–7 Docket No. RM21-17 (June 12, 2024), Accession No. 20240612-5233 (describing PJM's objections to core aspects of Order No. 1920, such as the mandatory consideration of enumerated benefits, and requesting "flexibility" for PJM to implement a transmission planning process that PJM admits "does not strictly comply with all the requirements of the Final Rule").

efficient and cost-effective. The outcome of such an approach will be to needlessly impose excessive costs on consumers. Moreover, because *Mobile-Sierra* protection would make local transmission projects extremely difficult to challenge, when consumers are burdened with excessive costs, the likely outcome would be an increase in challenges to regional transmission projects—even though those projects should be more beneficial because they are more efficient and cost effective. Hence, the CTOA Filings would profoundly disadvantage regional transmission projects while favoring TOs' own local transmission projects, thus presenting a meaningful impediment to the achievement of Order No. 1920's goals.

II. PJM Fails to Carry its Burden of Proving that Stakeholder Voting is Unjust and Unreasonable.

Because PJM failed to attempt any meaningful negotiation with its Members on reforms that could earn the level of support required under its OA for a proposal under section 205 of the FPA, PJM instead tries to shoulder the burden under section 206 to prove that its own governance practices are unjust and unreasonable. PJM falls far short of carrying that burden, offering three threadbare arguments that are devoid of support in fact or law. First, PJM argues that its own governance practices "unreasonably hamper[] PJM in meeting its legal responsibilities to plan its system,"[99] but PJM offers no factual support for this argument. It neither argues that its current planning practices fail to meet its obligations, nor suggests any obligation it anticipates being unable to meet, nor identifies any instance in which the OA's existing voting requirement has prevented necessary reform. The total lack of factual support for this argument should lead the Commission to reject it.

[99] PJM 206 Complaint, *supra* note 2, at 3.

Second, PJM argues that its current governance structure—which has been in place for decades—now "unduly discriminates against PJM by requiring PJM to meet a higher legal standard when proposing independent planning rule changes to the Commission than all other RTOs."[100] Even setting aside how PJM perversely argues that it is discriminating against itself, PJM's argument regarding undue discrimination is faulty, because PJM ignores critical differences between various planning regions—differences that PJM routinely invokes as a purported justification for variances from the Commission's nationwide standards, as discussed below. Because PJM fails to demonstrate that it is similarly situated to other RTOs, the Commission should reject this argument as well.

Third, PJM argues that its governance practices harm the Commission by "limit[ing] the Commission's ability to ensure comparability in its consideration of planning proposals from various RTOs."[101] PJM's stated basis for this harm is that "PJM proposals are subject to a higher burden that limits the Commission's ability to analyze such proposals consistently across the nation."[102] However, PJM cites absolutely no precedent to suggest that the Commission has ever found this to be a basis for approving a filing under section 206 of the FPA. Nor should the Commission do so here. Because PJM frequently seeks independent entity variations to deviate from nationwide standards, its purported concern for the Commission's ability to treat RTO proposals consistently is unpersuasive.

A. PJM's arguments fly in the face of its own history and Commission precedent.

A pervasive problem with all of PJM's arguments is that they ignore the fact that PJM's requirement for sector-weighted voting serves its intended function of preventing undue

[100] *Id*.
[101] *Id*.
[102] *Id.*

influence. As PJM notes, the placement of regional transmission planning provisions in the PJM OA was a deliberate choice that aimed to prevent "'undue influence from the Members, individually or as a whole.'"[103] Indeed, as PJM also recognizes, this decision aimed to "ensure that '*[n]o stakeholder or industry segment has the ability to control the ISO's functions or to prevent the ISO from acting*," with voting rights "'*structured so that no one industry segment can either force or block action.*'"[104] Further, the placement of regional planning provisions in the OA was done with the specific knowledge that "[a]ll affirmative actions of the Members Committee require a two-thirds vote of the sectors using a voting protocol that prevents any sector from controlling or vetoing actions, and that gives Members voting rights within a sector without regard to size."[105] As that original decision noted, this "structure protects the independence" of PJM by preventing any individual Member or industry segment from controlling the RTO's decisions.[106]

The system of sector-weighted voting was designed to advance these goals by ensuring that each market segment has an equal weighted vote. That structure prevents any industry segment from controlling a vote's outcome. Similarly, the structure significantly limits any individual Member's influence. PJM's limit on affiliate voting in upper-level committees, including the Members Committee (whose voting is at issue here), serves a similar purpose, ensuring that even if a corporate family has many subsidiaries within the PJM region, that

[103] PJM 206 Complaint, *supra* note 2, at 8–9 (quoting *Atl. City Elec. Co.*, Tariff Filing of PJM Supporting Companies, at Attachment B, Docket No. EC97-38-000 (June 2, 1997), Accession No. 19970610-0038.
[104] *Id.*
[105] *Atl. City Elec. Co.*, Tariff Filing of PJM Supporting Companies, at Attachment B p. 1, Docket No. EC97-38-000 (June 2, 1997), Accession No. 19970610-0038.
[106] *Id.*

corporate family cannot exert undue influence in the sector-weighted voting process in the Members Committee.[107]

The Commission has repeatedly upheld PJM's existing sector-weighted voting process as a means of preventing undue influence. First, when this structure was proposed to preserve PJM's independence, the Commission found that "[t]he voting rules are reasonably designed to prevent any member from exercising undue influence."[108] Similarly, after the Commission promulgated governance reforms in Order No. 719, the Commission rejected an argument that the sector-weighted voting utilized in the PJM stakeholder process is not just and reasonable, including an argument—similar to the ones advanced here—that "PJM and its members frequently find themselves at an impasse, with no clear recommendation to the PJM board and little incentive for further compromise."[109] Rejecting these arguments, the Commission found "that PJM's sector-weighted voting procedures at the senior level committees in PJM (e.g., the Members Committee and the Markets and Reliability Committee) ensure that PJM's practices and procedures for decision making consider and balance the interests of its customers and stakeholders, and *ensure that no single stakeholder group can dominate*."[110]

B. PJM provides no factual support for its argument against its own voting structure.

Because PJM is now arguing against a voting structure that was a deliberate decision put in place to prevent undue influence—and against repeated decisions by the Commission finding

[107] This is not to say that there are no issues with the stakeholder process that merit reform. Simply, in this case, PJM has not met its burden of proof to demonstrate that sector-weighted voting at the senior-level committees is unjust and unreasonable. In addition, the remedy PJM suggests through the CTOA filings would actually render PJM more vulnerable to undue influence by concentrating decision-making power with the TOs and bypassing all other sectors through the removal of Members' voting power.
[108] *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, 62,278 (1997).
[109] *PJM Interconnection, L.L.C.*, 133 FERC ¶ 61,071, at PP 15-16 & n.14 (2010).
[110] *Id.* at P 44 (emphasis added).

that this structure is just and reasonable—PJM faces a heavy burden of demonstrating that this voting structure has somehow become unjust and unreasonable. However, PJM wholly fails to provide any such proof. Indeed, PJM fails to identify even a single instance in which existing voting practices have unjustly or unreasonably prevented PJM from proposing a reform to regional transmission planning. Nor does PJM provide even a single example of a potential reform that it would like to bring forward that it believes that Members might block through the sector-weighted voting process. This lack of factual proof should be fatal to PJM's complaint.

Instead of any facts regarding prior or potential situations in which the requirement for sector-weighted voting in the Members Committee has thwarted, or even may thwart, progress, PJM provides a vague discussion of the energy transition in the region and its concerns about potential reliability issues. However, the Commission has already put forth recent Orders that address the issues about which PJM complains. For example, while PJM raises concerns about the retirement of existing resources and the pace of new entry, the Commission's Order No. 2023 provides standards to significantly increase the rate of interconnection of new resources (if PJM complies).[111] Similarly, PJM worries that new regional transmission may be needed to facilitate the energy transition. Advocates agree that regional transmission is needed in the PJM region, but notes the Commission's recent Order No. 1920 included pervasive reforms to facilitate regional transmission planning and solution development. PJM's suggestion that it might need unilateral 205 filing rights over regional transmission planning to comply with Order No. 1920 is

[111] *See generally Improvements to Generator Interconnection Procedures and Agreements* ("Order No. 2023"), 184 FERC ¶ 61,054 (2023). Illinois CUB has significant concerns that PJM is failing to comply with Order No. 2023, despite the fact that compliance would significantly ameliorate PJM' stated reliability concerns. *See PJM Interconnection LLC*, Protest of Public Interest Organizations at 6–11, Docket No. ER24-2045 (June 20, 2024), Accession No. 20240620-5242.

wholly without merit; all that PJM needs to do to comply with that rule is to make a timely compliance filing, as the Commission has already required.

Notably, PJM does not itself even offer the purported factual arguments that TOs recite in support of the CTOA Filings. TOs provide a declaration that describes three instances in which sector-weighted voting ostensibly blocked just and reasonable proposals.[112] This declaration's one-sided, self-serving description of the stakeholder process is simply not credible. For example, the description of the stakeholder process lacks any detail regarding the proposals themselves—details which were critical to stakeholders' evaluation of the proposals and which would have been critical to the Commission's evaluation of whether those proposals actually were just and reasonable—or any detail of why stakeholders voted against them. Notably, when describing the stakeholder process regarding storage as a transmission asset, the TOs' declaration omits the fact that roughly half of the TO sector voted to defer this process, which illustrates the misleading nature of the TOs' narrative.[113] Further, the speculation in this declaration that voting Members acted in these stakeholder processes to protect their own economic interests is not persuasive, because that statement comes from a Transmission Owner that would stand to gain significantly from the approval of these CTOA Filings. It is telling that PJM itself does not include these examples in its own section 206 filing.

C. PJM fails to demonstrate undue discrimination.

PJM's argument that the requirement for sector-weighted voting support for regional transmission planning reforms unduly discriminates against PJM should fail for several reasons. As an initial matter, the FPA's bar on undue discrimination typically applies to the treatment of

[112] TOs' 205 Filing, *supra* note 3, Declaration of Pulin Shah PP 10–25.
[113] *See* PJM, *Summarized Voting Report*, https://www.pjm.com/-/media/committees-groups/committees/mrc/2021/20210224/20210224-summarized-voting-report.ashx (noting that 5 of 11 TOs voted in favor of deferring consideration of Storage as a Transmission asset).

customers in electric markets.[114] PJM's claim that its governance practices unduly discriminate against itself in comparison to other RTOs is at the very least unusual—and is unmoored from the FPA's general focus on protecting consumer interests. Indeed, PJM makes no effort to demonstrate that its voting structure—which enables the few consumer advocates in the PJM region to vote on issues that affect their interests—unduly discriminates against consumers, instead arguing only that the structure discriminates against PJM. In contrast, the CTOA Filings, which PJM's arguments under section 206 serve, would harm consumers by rendering consumer advocates' votes merely advisory and by exposing consumers to unjust and unreasonable rates, as described above.

Additionally, PJM wholly fails to prove that it is similarly situated to other RTOs. Indeed, PJM's claim in these dockets that all RTOs are similarly situated with regard to regional transmission planning flatly contradicts arguments that PJM advanced to the Commission *only nine days prior*. PJM submitted this section 206 complaint on June 21, 2024, arguing that it "is unquestionably similarly situated to MISO, SPP, and ISO-NE" because it is subject to the same regulations.[115] However, on June 12, 2024, PJM filed a request for rehearing arguing that the Commission's Order No. 1920—reforming regional transmission planning—is arbitrary and capricious because it provides standards that apply to all RTOs and ostensibly fails to "accommodate[] regional differences."[116] In that docket, PJM asserts that different RTOs have "long-standing regional differences" that PJM claims should allow them to propose fundamentally different approaches to regional transmission planning.[117] Indeed, PJM routinely

[114] *See*, *e.g.*, *New York v. FERC*, 535 U.S. 1, 11 (2002) (describing FERC's finding in Order No. 888 that "electric utilities were discriminating in the 'bulk power markets,' in violation of § 205 of the FPA, by providing either inferior access to their transmission networks or no access at all to third-party wholesalers of power").
[115] PJM 206 Complaint, *supra* note 2, at 25.
[116] PJM Order No. 1920 Rehearing Request, *supra* note 97, at 12.
[117] *Id.* at 14.

claims that regional differences justify variations from the Commission's nationwide regulations.[118] As a matter of logic—and of equity—PJM cannot have it both ways.

Further, as a matter of fact, PJM is not similarly situated to other RTOs regarding critical aspects of regional transmission planning. As described below, every other multi-state RTO provides the states in those regions with a much more significant role when it comes to cost allocation, which is a critical aspect of successful regional transmission planning. Similarly, the different RTOs take significantly different approaches to regional transmission planning.[119] PJM entirely fails to grapple with these facts, which demonstrate that the RTOs are not similarly situated in this case and thus that PJM's claim of undue discrimination is without merit.

D. PJM's stated concern for the Commission's ability to ensure consistency is unsupported.

PJM's final argument in its section 206 complaint is that its current requirement for a sector-weighted vote in support of changes to regional transmission planning somehow impairs the Commission's ability to ensure "comparability" in evaluating RTO proposals regarding transmission planning.[120] As an initial matter, PJM cites zero precedent indicating that the Commission has ever granted a section 206 complaint on this basis, or even cited this reasoning as a persuasive point in favor of such a ruling. Nor are Advocates aware of any such Commission precedent.

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[118] *See*, *e.g.*, *Improvements to Generator Interconnection Procedures and Agreements*, Order Nos. 2023 and 2023-A Compliance Filing of PJM Interconnection, LLC, Docket No. ER24-2045 (May 16, 2024), Accession No. 20240516-5155 (arguing for numerous independent entity variations from the Commission's Order regarding interconnection).

[119] *See*, *e.g.*, Claire Lang-Ree, Natural Resources Defense Council, *What PJM Can Learn from MISO About Transmission Planning* (Jan. 9, 2024), https://www.nrdc.org/bio/claire-lang-ree/what-pjm-can-learn-miso-about-transmission-planning (highlighting differences between PJM and MISO that make regional transmission planning in MISO much more effective and advising that PJM adopt a similar approach to transmission planning).

[120] PJM 206 Complaint, *supra* note 2, at 27-28.

Additionally, PJM's stated concern for "comparability" is, again, at odds with its approach to Order No. 1920. In Order No. 1920, the Commission has already achieved the "comparability" that PJM seeks by promulgating standards that all RTOs must comply with in identifying the needs for regional transmission, evaluating the benefits of potential regional transmission solutions, and identifying appropriate ways to allocate costs. However, rather than simply abide by these nationwide standards, PJM has argued that the comparable treatment of various RTOs is arbitrary and capricious because it ostensibly fails to accommodate regional variations. In particular, PJM has challenged the Commission's unwillingness to consider independent entity variations from Order No. 1920.[121] Again, PJM's argument in that docket—advanced only nine days prior to these CTOA Filings—belie any stated concern for "comparability" here.

Furthermore, the CTOA Filings would not promote the Commission's ability to consider transmission issues in PJM in a manner that is comparable to other regions. Instead, by extending *Mobile-Sierra* protection to TOs' local transmission planning, the CTOA Filings would make it more difficult for the Commission to rein in inefficient transmission planning that is leading to excessive costs for consumers and unjust and unreasonable rates in the PJM region.[122] Because the Commission would face a more rigorous legal standard in regulating local transmission in PJM than in any other RTO, the CTOA Filings would not promote comparability.

For all these reasons, PJM's section 206 complaint lacks merit, and the Commission should reject it. However, Advocates note that a rejection of PJM's current complaint would not

[121] PJM Order No. 1920 Rehearing Request, *supra* note 97, at 13.

[122] *See* Order No. 1920, 187 FERC ¶ 61,068, at P 110 (noting that "local transmission planning, with its focus on the needs of individual utility footprints, does not necessarily provide sufficient, comprehensive analysis of broader regional transmission needs," that "transmission expansion in this incremental manner also misses the potential for transmission providers to identify, evaluate, and select more efficient or cost-effective transmission facilities," and that "the result is relatively inefficient or less cost-effective transmission development for customers, which contributes to rates for transmission that are unjust and unreasonable").

foreclose more reasonable, narrowly tailored reforms to PJM's regional transmission planning or governance processes. Nothing in a rejection of the CTOA Filings would prevent PJM from engaging in a meaningful negotiation with its Members to build support for its effort to obtain unilateral section 205 rights over the regional transmission planning process, or to identify other solutions such as a potential change to the voting threshold for regional transmission planning issues. Nor would a rejection of the CTOA Filings prevent PJM from submitting another complaint later with stronger factual or legal support.

III. The CTOA Filings Would Not Place PJM on a Similar Footing as Other RTOs Because These Filings Would Not Change TOs' Control Over Cost Allocation.

The CTOA Filings misleadingly suggest that they would put PJM in the same position as other RTOs with regard to transmission planning.[123] Notably, the CTOA Filings would alter only PJM's control over filings as to one aspect of transmission planning—but would not change the fact that TOs would continue to exercise exclusive filing rights regarding cost allocation in the PJM region. In that manner, the CTOA Filings will leave PJM as an outlier among RTOs, because every other RTO or ISO provides states with significantly greater ability to influence section 205 filings to reflect states' mutually agreed-upon approaches to transmission cost allocation. Cost allocation is a key component of successful transmission planning and a leading cause of litigation over transmission issues. Hence, the CTOA Filings will continue to leave states in the PJM region with less ability than states in any other wholesale market to ensure that agreed-upon approaches to cost allocation appear in section 205 filings before the Commission. Instead, the CTOA Filings will leave TOs with both the ability to control cost allocation for regional transmission projects and the ability to proceed with local projects even where regional

[123] *See*, *e.g.*, PJM 206 Complaint, *supra* note 2, at 1.

solutions are more efficient and cost-effective. Thus, the CTOA Filings will not meaningfully promote the successful regional transmission development that PJM and the TOs purport to address.[124]

Every other multi-state RTO and ISO provides states with greater ability to ensure that agreed-upon approaches to cost allocation are included in section 205 filings before the Commission. For example, in ISO-NE, states acting through the New England States Committee on Electricity have the right to include a competing proposal in certain transmission cost allocation filings made by TOs.[125] Indeed, the Commission recently approved revisions to transmission planning in ISO-NE that guarantee that "when a state or states voluntarily agree to an alternative cost allocation method, the relevant [utility] must file such cost allocation method with the Commission for approval."[126] Similarly, in MISO, states, through the Organization of MISO States, can include an alternative to MISO's transmission cost allocation filings under certain circumstances.[127] And in SPP, the SPP Board and states, through a Regional State Committee, may both make 205 filings regarding transmission cost allocation.[128] The CTOA Filings would not align PJM with any of these practices. Nor would the proposal align PJM with any single-state Independent System Operator, in which state policies have significantly greater

[124] To be clear, Illinois CUB does not maintain that cost allocation reforms are strictly necessary in the PJM region; instead, this protest merely notes that the CTOA Filings rest on a false premise, because they would not actually put PJM on a similar footing as other RTOs.
[125] Christopher Parent et al., Exeter Associates, *Governance Structure and Practices in the FERC-Jurisdictional ISOs/RTOs*, at 3-9 (2021), available at https://nescoe.com/wp-content/uploads/2021/02/ISO-RTOGovernanceStructureandPractices_19Feb2021.pdf (noting that "NESCOE has the right to advance an alternative proposal in response to proposed changes to certain transmission cost allocation provisions," and that "transmission owners must include NESCOE's alternative proposal in their Section 205 filing with the FERC").
[126] *ISO New England, Inc.*, 188 FERC ¶ 61,010, at P 38 (2024).
[127] Parent et al., *supra* note 125, at 4-9 ("OMS is able to request that MISO file an alternative transmission cost allocation when MISO plans to submit its own Section 205 filing proposing a new or amended transmission cost allocation methodology, provided at least 66% of the OMS Board supports the OMS alternative.")
[128] *Id.* at 7-6 ("SPP is required to make Section 205 filings to FERC on behalf of the RSC for proposals regarding transmission planning and cost allocation and resource adequacy. While SPP files proposals on behalf of the RSOC, nothing prohibits SPP from filing its own related proposal(s) pursuant to Section 205 of the Federal Power Act.").

sway over transmission planning and cost allocation. In short, the proposed CTOA amendments would not align PJM with any other RTO's practices regarding critical transmission planning issues.

By leaving PJM an outlier with regard to cost allocation, the CTOA Filings would also make it more difficult for the PJM region to fulfill the objectives of Order No. 1920—contrary to PJM and the TOs' purported interest in facilitating the achievement of that Order. In Order No. 1920, the Commission provides states with a six-month period during which states may negotiate a cost allocation approach that differs from a region's *ex ante* cost allocation method.[129] However, Order No. 1920 does not require utilities to actually include a cost allocation approach that states agree on in any section 205 filing.[130] Nevertheless, as discussed above, states in every other multi-state RTO have the ability to require that an agreed-upon approach to cost allocation be reflected in a section 205 filing before the Commission. By failing to include any such mechanism in the CTOA Filings, PJM and the TOs would ensure that states in the PJM region face more difficulty than states in any other wholesale market when it comes to actually allocating costs of transmission projects based on any agreed-upon approach that the states may negotiate. Hence, the CTOA Filings will fail to promote Order No. 1920's purpose of promoting state collective agreement on cost allocation and fail to put the PJM region on a similar footing as other regions regarding this critical issue.

The fact that the CTOA Filings would not align PJM with any other RTO's filing practices regarding cost allocation is ironic, because transmission cost allocation is an issue over

[129] Order No. 1920, 187 FERC ¶ 61,068, at PP 1354–1368.
[130] *Id.* at P 1412 (noting that the Order does not "create any obligation that transmission providers file a cost allocation method resulting from a State Agreement Process, unless the transmission providers had clearly indicated assent to do so in their [Tariffs]"); *see also id.* at P 1429 (noting that "transmission providers . . . could elect to . . . not file a State Agreement Process or other *ex ante* cost allocation method to which Relevant State Entities agreed").

which TOs actually have exclusive section 205 filing rights—unlike the filing rights over transmission planning that the CTOA Filings seek to change, which TOs do not possess or control. Yet, TOs make no effort to alter the filing rights that they genuinely control to enhance consistency with other RTOs or to facilitate the achievement of Order No. 1920's goals. Instead, the CTOA Filings attempt to deprive other stakeholders of influence over transmission planning by rendering Members' votes merely advisory while aggrandizing TOs' own influence by allowing their own local transmission projects to proceed and by providing themselves with unique, privileged access to the PJM Board. Hence, the CTOA Filings would not bring PJM into alignment with other RTOs, nor prevent undue influence, nor promote effective transmission cost allocation in the region.

IV. The CTOA Filings Suffer from Fatal Procedural Defects.

In addition to the numerous, significant problems described above, the CTOA Filings are also procedurally improper. These Filings attempt to use a bilateral agreement to significantly constrain the rights of third parties, including the rights of PJM Members to a binding, sector-weighted vote under the terms of the PJM OA, the rights of consumers to challenge unjust and unreasonable rates resulting from inefficient local transmission projects, and the Commission's statutory role in determining a replacement rate for any rate it determines is unjust and unreasonable. Any of these procedural defects should be sufficient for the Commission to reject the CTOA Filings.

A. PJM and the TOs' effort to constrain the Commission's discretion to fix the replacement for an unjust and unreasonable rate defies the FPA's plain text.

The CTOA Filings cannot succeed unless the Commission agrees with PJM's complaint under section 206 of the FPA, which contends that it is unjust and unreasonable to require a sector-weighted vote in favor of a transmission planning proposal before PJM may file that

proposal under section 205 of the FPA. Nevertheless, in the CTOA Filings, PJM and the TOs assert that the Commission has only one procedural recourse—the approval of the CTOA Filings as a whole.[131] Notably, neither PJM nor the TOs cite any support for the proposition that the Commission lacks discretion to determine the replacement for a rate that it finds unjust and unreasonable. Instead, the FPA plainly states otherwise.

Section 206 of the FPA makes quite clear that when the Commission finds a rate unjust and unreasonable, it is the Commission—and not any market participant—that must determine the replacement rate. The statute specifies:

> *Whenever* the Commission, after a hearing held upon its own motion or *upon complaint*, *shall find that any rate*, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification *is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate*, charge, classification, rule, regulation, practice, or contract *to be thereafter observed and in force, and shall fix the same by order*.[132]

This text does not admit exceptions. It contains no provision allowing a bilateral agreement among market participants to constrain the Commission's discretion in determining a just and reasonable replacement for an unjust and unreasonable rate. Instead, the mandate is clear: "whenever" the Commission finds a rate unjust and unreasonable, "the Commission shall determine the just and reasonable rate."

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[131] *See* PJM 206 Complaint, *supra* note 2, at 5 ("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."); *see also PJM Interconnection, LLC*, Comments of the Indicated PJM Transmission Owners in Support of PJM Interconnection, LLC, at 7, Docket No. EL24-119 (June 28, 2024), Accession No. 20240628-5348 (suggesting that "the Commission's acceptance of all parts of that package—the CTOA Amendments and both PJM Filings—is necessary for PJM to have exclusive and unilateral section 205 rights to file for changes to the Planning Protocol").

[132] 16 U.S.C. § 824e(a) (emphases added).

In light of this plain statutory text, PJM and the TOs cannot require the Commission to approve the entirety of the CTOA Filings as a replacement for the voting structure that they argue has become unjust and unreasonable. As described above, PJM fails to provide any persuasive basis for the Commission to find PJM's existing sector-weighted voting process unjust and unreasonable. However, even if it were to do so, the FPA dictates that the Commission itself—not PJM and the TOs—must determine what just and reasonable practices should replace this ostensibly unjust and unreasonable governance structure.

No aspect of the saga of *Atlantic City Electric Company v. FERC* supports the wrongful effort of PJM and the TOs to infringe on the Commission's statutory role under section 206 of the FPA.[133] The holding of those cases is plain and plainly limited, as the Court of Appeals for the D.C. Circuit clarified "[l]est there be any doubt."[134] That holding is as follows: "When FERC attempts to deprive the utilities of their rights to initiate rate design changes with respect to services provided by their own assets, FERC has exceeded its jurisdiction."[135] That holding has zero bearing on modifying the stakeholder voting process required for PJM to make a section 205 filing regarding transmission planning. Neither PJM nor the TOs argue that the existing voting requirement—the voluntary result of a settlement—somehow deprives any utility of its section 205 filing rights. Nor would a modification of that voting requirement deprive TOs or PJM of any existing filing rights. Indeed, nothing in the *Atlantic City* cases suggests that PJM and TOs can rewrite the FPA by claiming for themselves the statutory duty to determine the replacement for an unjust and unreasonable rate, which Congress clearly assigned to the Commission.

[133] *See Atl. City Elec. Co. v. FERC* ("*Atlantic City I*"), 295 F.3d 1 (D.C. Cir. 2002); *Atl. City Elec. Co. v. FERC* ("*Atlantic City II*"), 329 F.3d 856 (D.C. Cir. 2003).
[134] *Atlantic City II*, 329 F.3d at 859.
[135] *Id.*

B. The CTOA Filings would unjustly and unreasonably use a bilateral agreement to constrain numerous third parties' rights.

The CTOA Filings are also procedurally improper—and unjust and unreasonable—because they attempt to use a bilateral agreement between PJM and the TOs to significantly alter the rights of numerous third parties, including: (1) the Commission's own rights to determine just and reasonable rates; (2) consumers' rights to seek protection from the Commission regarding unjust and unreasonable rates stemming from inefficient local transmission planning processes; and (3) all PJM Members' rights to participate in meaningful, sector-weighted voting under the PJM OA.

First, it is not just or reasonable, or consistent with the plain terms of the FPA, for PJM and the TOs to use a bilateral agreement to try and tie the Commission's hands. As described above, in arguing that the Commission must approve the CTOA Filings as a whole, PJM and the TOs wrongly ignore the plain text of section 206 of the FPA. Second, because the CTOA Filings' proposed extension of *Mobile-Sierra* protection for local transmission planning would impose a more stringent standard of review in multiple matters presently before the Commission, this agreement between PJM and the TOs would also wrongly and profoundly constrain consumers' ability to seek redress from the Commission, as well as the Commission's ability to ensure just and reasonable rates. No bilateral agreement should have such a sweeping effect on the Commission or the consumers that the FPA tasks it to protect.

Third, it is not just and reasonable for PJM and the TOs to use a bilateral agreement to make changes to the rights of all PJM Members, especially since the Members themselves overwhelmingly oppose those changes. Though PJM and the TOs brazenly claim that the CTOA Filings "*will not in any way* diminish, reduce, or otherwise change the current PJM stakeholder

process,"[136] this claim is plainly false. The CTOA Filings would fundamentally change sector-weighted voting in the PJM Members Committee. Rather than facing a mandatory requirement to obtain support from its Members in a sector-weighted vote, under the CTOA Filings, PJM would be able to treat its Members' votes as merely advisory. Using a bilateral agreement to make a fundamental change to the voting rights of all stakeholders is not just and reasonable.

C. The history of these filings suggests that PJM is vulnerable to undue influence from TOs, and the CTOA Filings would worsen that vulnerability.

PJM's OA is explicit in requiring that amendments must be approved by PJM's Members Committee. Section 18.6 of the OA specifies that it "may be amended" through the following process:

> (i) submission of the proposed amendment to the PJM Board for its review and comments; (ii) approval of the amendment or new Schedule by the Members Committee, after consideration of the comments of the PJM Board; and (iii) approval and/or acceptance for filing of the amendment by FERC and any other regulatory body with jurisdiction thereof as may be required by law.[137]

The OA is also clear that the mechanism for the Members Committee to express its approval of a proposed amendment is sector-weighted voting.[138]

Because the CTOA Filings require a change to the OA, PJM should have engaged in meaningful negotiations with its Members to build support for its proposal. Indeed, both the Organization of PJM States and the Consumer Advocates of PJM States urged PJM to engage in a more meaningful process. But PJM never did so. Instead, after negotiating *solely* with the TOs, PJM provided Members with less than three weeks to consider whether to approve changes to the OA. Moreover, during that limited period—and even immediately before the Members voted—PJM never provided a plain answer about whether it would use a vote on section 205

[136] PJM 206 Complaint, *supra* note 2, at 21.
[137] PJM Operating Agreement § 18.6(a), available at https://agreements.pjm.com/oa/4639.
[138] *Id.* § 8.4.

filing rights to effectuate the proposed CTOA changes. Members had no way to know whether the proposal before them would be used in concert with the proposed CTOA changes in their entirety, or whether the proposal was for a more limited set of changes solely to provide PJM with unilateral section 205 filing rights over transmission planning. Members thus lacked clarity about whether PJM would treat a "yes" vote as a tool to move forward with the entire suite of proposed CTOA changes. Facing that uncertainty—and with the CTOA changes as a whole looming over the voting process—Members voted overwhelmingly in opposition.

This rushed process stands in sharp contrast to the normal stakeholder process in PJM. In a typical stakeholder proceeding, there is no ambiguity about what proposals are put before Members; instead, the proposals are generally well described in various presentations as well as a large spreadsheet that allows comparison of the substantive provisions of various proposals. Stakeholders generally have the opportunity to ask clarifying questions and to propose alternative solutions of their own. By the time a proposal reaches the Members Committee, it has typically undergone extensive scrutiny by PJM Members, and there is no significant ambiguity about the nature of the proposals that Members must vote on. PJM's rushed process for the CTOA Filings had none of these procedural safeguards. Instead, the CTOA Filings failed to use any just or reasonable process for educating or consulting PJM Members.

Instead of any transparent or equitable process for negotiating with all of the Members that the CTOA Filings would impact, PJM engaged in negotiations only with TOs.[139] Because the process leading to these CTOA Filings was not transparent and involved no ability for Members to explore alternative solutions to those designed by TOs, Advocates are concerned that this process is an example of TOs exerting an undue degree of influence over PJM. This

[139] TOs' 205 Filing, *supra* note 3, at 45 (noting that the CTOA Filings "are bilaterally negotiated individualized terms between PJM and the Transmission Owners alone").

concern is reinforced by the fact that PJM is engaging in a bilateral agreement with TOs to strip away the binding force of Members' votes. Moreover, various other terms in the CTOA Filings will serve to further insulate TOs' communications with PJM from any scrutiny by PJM Members, state or federal regulators, or the public. For example, the CTOA Filings would provide TOs with another private, confidential meeting with members of the PJM Board,[140] would attempt to use the attorney-client or common-interest privileges to shield communications between TOs and PJM from scrutiny,[141] and would allow TOs a special procedural right to try and block any section 205 filings from PJM that TOs feel are inconsistent with the CTOA.[142] Accordingly, Advocates are concerned that—far from protecting PJM from undue influence—allowing the CTOA Filings to go into effect would actually further skew the balance of power in the PJM region in favor of TOs and render PJM more vulnerable to undue influence from that market sector.

CONCLUSION

Advocates remain willing to work with PJM on sensible solutions to promote effective regional transmission planning, including exploring whether governance changes are necessary or appropriate to facilitate regional transmission development and the efficient, cost-effective accomplishment of state public policies. However, as described above, the CTOA Filings are defective procedurally, would significantly harm consumers, and would constrain the Commission's ability to ensure just and reasonable rates. For all these reasons, Advocates respectfully request that the Commission reject the CTOA Filings.

DATED: July 22, 2024

[140] *Id.* at Exhibit B p. 9, § 2.3.
[141] *Id.* at Exhibit B p. 28, § 7.3.1.
[142] *Id.* at Exhibit B p. 34, § 7.9.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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