

May 9, 2024

Via email

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

Re: Response to Ari Peskoe Remarks with respect to CTOA Amendments

Dear PJM Board of Managers:

We are counsel to the PJM Transmission Owners (“TOs”) who have negotiated the proposed Consolidated Transmission Owners Agreement (“CTOA”) Amendments with PJM staff. We write to respond to certain false and misleading remarks provided by the Director of the Electricity Law Initiative at the Harvard Law School Environmental and Energy Law Program, Ari Peskoe, during the May 8, 2024 Public Interest & Environmental Organizations User Group meeting regarding the CTOA Amendments. In the interests of time and efficiency, we are attaching a brief list that explains the major inaccuracies and hopefully clarifies the correct legal and factual aspects associated with the contractual provisions.

The TOs supporting the CTOA Amendments grow increasingly concerned about both the resource adequacy and transmission planning challenges that our region faces as well as the ability to collectively meet our responsibility to ensure the safe and reliable operation of the bulk power system. The CTOA Amendments are long overdue and the TOs urge the Board to accept them. Should the Board do so, the TOs anticipate overwhelming support for the CTOA Amendments at the Transmission Owners Agreement-Administrative Committee meeting next week.

Respectfully submitted,

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Rebuttal to the Ari Peskoe Remarks to the PIEOUG

Ari Peskoe delivered remarks to the PJM Public Interest & Environmental Organizations User Group (“PIEOUG”) and the PJM Board at the PJM Annual Meeting on May 8, 2024, arguing that the PJM Board should negotiate a “better deal” than the proposed amendments to the PJM Consolidated Transmission Owners Agreement (“CTOA Amendments”) pending before the Transmission Owners Agreement-Administrative Committee.¹ The claims are false, misleading and have no support in the text of the proposed amendments, the Federal Power Act or established law. Following is a response grounded in the actual text of the CTOA Amendments and the law. One point in the Peskoe Remarks is correct, “PJM is not a mere agent of the transmission owners.” This is true. PJM is *not* a mere agent of the Transmission Owners and, in fact, actively negotiated the *Atlantic City* Settlement, the 2006 Consolidated Transmission Owners Agreement (“CTOA”) and the CTOA Amendments.

- The Peskoe Remarks state that “[u]ltimately, FERC denied at-will withdrawal and held that utilities need FERC’s permission to withdraw from PJM.”² This ignores that the D.C. Circuit struck down FERC’s ruling as unlawful.³ The law remains that RTO membership is voluntary.
- The Peskoe Remarks also state that “two identical provisions ... allow any single utility to replace a PJM-planned transmission project with its own project.” There is no text in the CTOA Amendments that support this statement. None of the proposed amendments permit a Transmission Owner to “unilaterally remove a project from an RTEP.” A Transmission Owner can elect to move forward with its own project. However, it must justify its decision to do so and risks a FERC finding of imprudence. Nothing prevents PJM from continuing with the RTEP project.
- The Peskoe Remarks go on to assert that “PJM’s tariff prevents staff from planning a duplicative project. Once a utility announces its intent to build a project that overlaps with the RTEP, staff will likely adjust the regional plan by removing the more cost-effective project from PJM’s plan.”⁴ This is also untrue. PJM is obligated to go ahead with the regional project. If any change occurs, it would be PJM revising its project to address the Transmission Owner project need, in which case the risk would be on the Transmission Owner to move forward with its project, as outlined above.
- The Peskoe Remarks contend that “FERC does not conduct prudence reviews[.]”⁵ Again, this is incorrect. The Transmission Owners’ formula rate proceedings afford customers discovery regarding the prudence of costs included in a formula rate update.⁶ There are “no

¹ Peskoe’s remark (“Peskoe Remarks”) were also submitted as a letter to the PJM Board.

² Peskoe Remarks at 2.

³ 295 F.3d 1 (D.C. Cir. 2002) (“*Atlantic City*”), *petition to enforce mandate granted, Atl. City Elec. Co. v. FERC* (“*Atlantic City II*”), 329 F.3d 856 (D.C. Cir. 2003).

⁴ *Id.*

⁵ Peskoe Remarks at 2.

⁶ PJM Tariff, Attachment H. *See also Transmission Planning and Cost Management and Joint Federal-State Task Force on Electric Transmission, Post-Technical Conference Comments of the Indicated PJM Transmission Owners*, Docket Nos. AD22-8-000, AD21-15-000, at 46-51 (filed Mar. 23, 2023).

formal rate cases at FERC” because prudence is typically filed (and usually settled) in formula rate formal challenges and there are several pending before the Commission at any given time.

- The Peskoe Remarks allege that “[t]he new CTOA includes subtle restraints on PJM’s planning authority that would allow utilities to manufacture conflicts with PJM in order to trigger secret negotiations that would set the scope of PJM’s planning authority.”⁷ Again, this is incorrect. The CTOA Amendments include a new right to seek arbitration if either PJM or a Transmission Owner believes the other is proposing a filing that contravenes the CTOA. But that provision, Section 7.9, is completely neutral and does not bar either party, or even non-parties to the CTOA, from going to FERC to complain about the result. This provision is virtually identical to a process FERC approved in 2003 and already is embodied in Section 9.3 of the PJM Tariff.
- The Peskoe Remarks go on to complain about the “new definition of the term, Transmission System”, because it is “limited only to those facilities owned by the CTOA signatories.”⁸ However, that has always been the case because an entity cannot own transmission facilities integrated into the PJM Transmission System without being a “CTOA Signatory.”⁹
- The Peskoe Remarks challenge the confidentiality provisions of the proposed dispute resolution procedures in Attachment B. But confidential dispute resolution processes are standard, including in the PJM Operating Agreement.¹⁰ And, of course, any aggrieved party can take its complaint to FERC.
- The Peskoe Remarks assert that “it may seem appealing to negotiate behind closed doors, free from scrutiny or FERC oversight,”¹¹ but neglect to mention that the CTOA cannot be amended without FERC acceptance of the filing under section 205 or a complaint to FERC under section 206. If anyone wants to make such claims to FERC they will be tested based on the record that is filed.
- The Peskoe Remarks raise concerns about transparency, citing several provisions (some of which are not being amended or not amended in a way that affect confidentiality).¹² The Transmission Owners have already addressed this issue in prior letters. In short, PJM is the tariff administrator and therefore must be able engage in conversation with the Transmission Owners on changes to the cost allocation provisions. Certainly, the PJM Board would not authorize the filing of Tariff Terms and Conditions without input from its expert staff.
- Regarding the annual “State of the Agreement Meeting,” in Section 2.3, again the Transmission Owners have already addressed this in prior letters and publications. The meeting is solely a discussion and education session and only with the Board’s reliability

⁷ Peskoe Remarks at 3.

⁸ *Id.*

⁹ CTOA, § 3.1.

¹⁰ Operating Agreement, Sch. 5.

¹¹ Peskoe Remarks at 4.

¹² *Id.*

committee, not the full Board. FERC has already rejected efforts to open similar meetings.¹³ Moreover, since the meetings will include discussion of CEII and transmission function information, they cannot be open. Notwithstanding, in response to feedback from stakeholders, the provision has been modified to incorporate a commitment to include an agenda and minutes of the meeting that may be publicly posted.

- The Peskoe Remarks completely misread Section 6.3.5.¹⁴ The provision requires PJM to provide services to the Transmission Owners, namely to provide open access transmission, interconnection of new customers and generation, maintaining reliability and all the other functions PJM must perform to “keep the light on.” The provision was amended because without it a change in regulations that prevents PJM from qualifying as an RTO could undermine PJM’s authority to do those things.
- The Peskoe Remarks attack Section 9.16.3.¹⁵ The Transmission Owners have detailed the existence of *Mobile-Sierra* protection within the CTOA today as well as the need for this provision to capture the proposed amendments in their April 12, 2024 letter.¹⁶ As previously stated, no corporation responsible to its shareholders and to its customers to ensure safe, adequate and proper service would turn over a major portion of its assets to an independent entity to operate or commit to spend billions of dollars to own, operate and maintain if so directed by that entity without strong contractual protections. And no organization charged with the weighty responsibilities of operating and maintaining the reliability of society’s most critical infrastructure as PJM is would commit itself to do so without the same strong contractual protections from the entities providing that infrastructure. Section 9.16.3 not only protects the Transmission Owners, it protects PJM and all of its customers.
- The Peskoe Remarks’ conjecture that placing PJM’s responsibilities exclusively in the PJM Board (Sections 2.1 and 2.3) will undermine FERC’s upcoming transmission rulemaking.¹⁷ There is simply no merit to this claim. And the remarks provide no explanation for why the Board should not have that responsibility.

Finally, the Peskoe Remarks completely ignore the central point of the CTOA Amendments – providing PJM with section 205 rights over the Regional Transmission Expansion Planning Protocol (“Planning Protocol”), and the close connection of the amendments to the need to improve PJM’s planning authority. Moving the Planning Protocol to the Tariff is critical given the challenges PJM faces and the consistent failure of the current stakeholder process to address those challenges. However, without the CTOA Amendments, the Planning Protocol will remain in the Operating Agreement.

¹³ *Pub. Serv. of W. VA v. PJM Interconnection, L.L.C.*, 186 FERC ¶ 61,163 at P 79, 85 (2024).

¹⁴ Peskoe Remarks at 4.

¹⁵ *Id.* at 5.

¹⁶ *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 531-535 (2008); *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm’n*, 558 U.S. 165, 174-175 (2010).

¹⁷ Peskoe Remarks at 5.