HARVARD LAW SCHOOL | ENVIRONMENTAL & ENERGY LAW PROGRAM

May 9, 2024

Mr. Mark Takahashi
Chair, PJM Board of Managers
PJM Interconnection, LLC
2750 Monroe Boulevard
Audubon, Pennsylvania 19403

Dear Mr. Takahashi:

I appreciate the opportunity to comment on the transmission-owning utilities' proposed revisions to the Consolidated Transmission Owners Agreement. In response to requests by individual members of the Board, I am attaching the remarks I provided at the Annual Meeting of Members. Please note that while the attachment is not a transcript, I have attempted to accurately represent what I actually said during the PIEOUG presentation.

I am available to respond to any inquiries. Please let me know if I can assist in the Board's deliberations.

Sincerely,

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Ari Peskoe
Remarks at the Annual Meeting of Members
May 8, 2024

I appreciate this opportunity to speak with the Board and PJM's Members about regional governance. I thank the Board for opening this issue up to discussion, and I thank PIEOUG for inviting me to participate.

My research focuses on transmission development and regional governance, and I have been carefully following developments about the CTOA since February.

Even though the Members voted not to transfer filing authority over the RTEP rules, the Board may still wish to pursue RTEP filing authority. One option is to ask FERC to endorse the transfer without the Members' consent. Another option is to begin a new process with the Members.

Monday's vote was linked to the utilities' new CTOA. The Board can offer the Members a better deal. Filing rights about planning and market rules as well as the processes stakeholders and staff use to develop rules and transmission plans are not set in stone. Other regions share filing rights differently and have their own internal decisionmaking processes that can provide models for a new deal between Members and the Board. As PJM nears completion of its third decade of independent operations — we now have new business models, new technologies, and new solutions for ensuring reliability that did not exist in the 1990s — reviewing these processes and structures is warranted.

Next week, FERC will issue a new transmission rule that may envision roles for state regulators in planning and cost allocation. The rule will be an opportunity for a new conversation about filing authority that considers the Members and states' interests while protecting PJM's independence.

That conversation should begin on a clean slate, after the Board discards the utilities' new CTOA, which is wholly unnecessary for transferring filing authority. In a letter to the Board, OPSI observed that many of the CTOA amendments are "superfluous and harmful." I'm going to build on that observation. To set the stage, I want to start at the beginning.

Ari Peskoe
Remarks at the Annual Meeting of Members
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During its first year of independent operations, PJM told FERC that "PJM is not a mere agent of the transmission owners."

PJM understood, in that same FERC filing, that maintaining its independence is essential for achieving its mission. PJM then warned that at-will withdrawal from PJM by transmission owners would "undermine the independence of PJM because there would be a constant threat overhanging PJM."

Ultimately, FERC denied at-will withdrawal and held that utilities need FERC's permission to withdraw from PJM. But their leverage nonetheless remains. Today, utilities could try to dissolve PJM, while PJM has no similar ability to eliminate transmission owners. That threat hangs over this discussion today.

The utilities' CTOA is harmful because it includes new levers for interfering with PJM's decisionmaking, particularly about regional transmission planning.

The most blatant obstructions are two identical provisions that would allow any single utility to replace a PJM-planned transmission project with its own project. These sections — 6.3.4 and 4.1.4 — grant utilities an option that is broader in scope than a right-of-first refusal. By merely *declaring its intent* to build a project *similar to* a project identified in a regional plan, a utility displaces PJM's planned project with its own investment. In effect, each utility can unilaterally remove a project from an RTEP, and multiple utilities can team up to achieve the same result for larger projects.

Displacement of PJM's project is not explicitly mandated by the CTOA because it doesn't have to be. 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.

This manifestly unjust and unreasonable result has been reflected in PJM's business practice manual since 2019. But when PJM staff then addressed the overlap issue, it proposed the opposite approach. Staff's initial language favored PJM's more efficient planning over a utility's individual project.

I have to disagree with something said earlier — FERC does not conduct prudence reviews, which is why these default rules are so critical. Because the PJM

utilities recover their transmission revenue through formula rates, there are no formal rate cases at FERC. In annual rate update processes, utilities typically protest any customer's request that FERC even consider prudence.

Inserting the utilities' upside-down hierarchy in the CTOA would needlessly enshrine PJM's secondary status in transmission development in a FERC-approved document that carries the force of federal law.

The utilities propose to enhance this control over specific regional projects with new authority to protest new planning rules and future PJM transmission plans.

The 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. PJM would be at a disadvantage in these negotiations because, as I described, the new CTOA codifies utility supremacy in transmission planning.

These subtle restraints include a new definition of the term Transmission System that is limited only to those facilities owned by CTOA signatories and then incorporated into a new definition of the RTEP. Section 4.1.4 similarly specifies that the RTEP is limited to the signatories' facilities and says that every word of the CTOA can be a basis for protesting PJM's regional plan.

These improper additions to the CTOA would create vague constraints on PJM's RTEP to be defined at some later date. Members, state regulators, consumers, and FERC would not participate in these negotiations and may not even be aware of them. Instead, amended section 9.19 and new Attachment B funnel disputes to secret processes where utilities can protest regional plans or other PJM actions that are not a section 205 filing. New Section 7.9 allows utilities to protest PJM's section 205 filings based on alleged CTOA conflicts before the filing gets to FERC.

About four years ago, PJM protested a utility's request that FERC recognize utilities' authority to block PJM's FERC filings. PJM then told FERC that this proposed power would create "sweeping limits on PJM's exercise of section 205 authority that are overbroad, unworkable, and unjust and unreasonable on the merits." Enshrining this new power in section 7.9 would be inconsistent with PJM's independence and violate commitments PJM made to FERC and its members about stakeholder processes.

This new shadow governance — where utilities have the upper hand because of their veto power over regional projects — may not pass muster with FERC and will inevitably raise concerns from PJM Members and states about PJM's independent decisionmaking. While it may seem appealing to negotiate behind closed doors, free from scrutiny and FERC oversight, I contend that because it would not be entering the negotiations on equal footing, PJM would be in jeopardy of becoming a mere agent of the transmission owners, who might chip away at PJM's independence and planning authority over time.

Transparency is further harmed by other new or enhanced confidentiality provisions in sections 6.3.10, 7.3.1, and 9.15.2, as well provisions 2.3 and 6.3.8 that create new or enhanced formal and closed-door meetings with some or all of the Board and PJM staff.

The new CTOA also puts PJM's status as an RTO at stake. The current CTOA demands that PJM maintain its RTO status, without qualification. Under FERC's rules, PJM's RTO status depends on its independent decisionmaking, as well as three characteristics, and eight functions, including regional planning. Section 6.3.5 adds vague language that ties PJM's RTO status to the CTOA itself and suggests that PJM's RTO status must yield to the CTOA's provisions.

Revised Section 3.5 plays out this no-RTO scenario. If FERC decertifies PJM, PJM must continue to provide services to the utilities. This commitment benefits the region — it allows for PJM's continued operations in the event of an adverse FERC order decertifying PJM. But new section 5.5.2 endows utilities with exclusive power to demand PJM's performance under the Agreement. If there were to be a dispute about whether PJM performs a particular function, or whether utilities can take back control of that function, the Members, states, and other stakeholders would be barred from filing certain legal claims.

The utilities are seeking enhanced legal protection for nearly every change I've discussed. The so-called Mobile-Sierra presumption is encoded in a new preamble provision that claims, as a factual matter, PJM is voluntarily entering into the utilities' new agreement. New section 9.16.3 lays further groundwork for Mobile-Sierra protection, which, if granted by FERC and federal courts, would all but

guarantee that any modification imposed by FERC will be litigated in federal court, creating legal risk and limiting PJM's options as it navigates the energy transition.

For instance, new provisions may already interfere with next week's transmission rule. FERC's proposed rule envisions roles for state regulators in project selection, but the new CTOA might prevent that. Sections 2.1, 2.2, 4.1.4, and 6.3.11 transfer RTEP responsibilities *exclusively* to the Board and PJM staff. That exclusivity might create a roadblock to compliance that triggers lengthy and unnecessary legal disputes about states' roles.

In a February letter to the Board, the utilities emphasized that they have invested $70 billion in transmission and that the new CTOA reflects "the truism that responsible companies do not enter into contracts affecting billions of dollars of their assets and leave their counterparty free to make a regulatory filing to change the deal." Most responsible companies do not benefit from the Federal Power Act. Utilities' past investments are not at issue here. The FPA and FERC's rate regulation eliminate nearly all downside risk to which most "responsible companies" are typically exposed. The existing CTOA does not jeopardize utilities' past investments, and the new CTOA is not about existing utility assets. The new CTOA is primarily aimed at future profits and control over regional decisions.

PJM should not be a shield that protects utilities' future upside. To the contrary, PJM's purpose is to protect Members and consumers from monopolist transmission owners. If PJM believes it should control the RTEP rules, then PJM should control the RTEP free and clear without the obstructions created by the new CTOA.

In their public communications about their new CTOA, utilities have provided alternative interpretations about some provisions I've described and left others entirely unexplained. The utilities may resist my interpretations and claim that my descriptions don't match their intent.

My reading is informed by FERC proceedings about the CTOA. The CTOA has been at the center of disputes about whether non-incumbent transmission developers may recover costs through the PJM tariff, whether utilities can profit from network upgrades paid for by interconnecting generators, and whether end-of-life projects can be part of the regional planning process. For the utilities, as well as Members and consumers, these issues have billion-dollar implications.

In each proceeding, utilities advanced interpretations of the CTOA that served their financial interests. Utilities' statements today about the intended meaning of the new CTOA cannot predict how they might try to read the CTOA in the future. When their interests are on the line, they will argue for a reading that serves them.

As I've outlined, the CTOA creates new veto powers and broad rights of first refusal, as well as new opportunities for each utility to interfere with regional planning, PJM's FERC filings, and other PJM actions. The new CTOA also subjugates PJM's RTO status to the CTOA, reduces transparency for PJM Members and states, and limits PJM's options as it navigates the energy transition. It would create a new shadow governance system where utilities will have the advantages.

If the utilities did not intend these results, they should propose a new version that reflects their limited intent.

As it reviews the new CTOA, I urge the Board to ensure that any new CTOA amendment benefits PJM, furthers PJM's mission, and is consistent with PJM's structure and purpose.

Thank you.