

154 FERC ¶ 61,147
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

PJM Interconnection, L.L.C.

Docket No. ER16-561-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued February 29, 2016)

1. On December 18, 2015, pursuant to section 205 of the Federal Power Act (FPA),¹ PJM Interconnection, L.L.C. (PJM) submitted revisions to the PJM Open Access Transmission Tariff (Tariff) to provide a mechanism for funding the organization Consumer Advocates of the PJM States, Inc. (CAPS).² As discussed below, we accept the proposed Tariff revisions, effective March 1, 2016, as requested.

I. PJM's Filing

2. PJM states that CAPS is a non-profit organization formed to coordinate the participation of state consumer advocate offices in the PJM stakeholder process. CAPS was originally funded through a settlement with Constellation Energy Commodities Group in a 2012 proceeding before the Commission.³ PJM states that it worked with CAPS to develop this funding proposal, and that the one-time funding through the 2012

¹ 16 U.S.C. § 824d (2012).

² PJM Interconnection, L.L.C., Intra-PJM Tariffs, [OATT Table of Contents, PJM OATT Table of Contents, 16.0.0](#); and [SCHEDULE 9-CAPS, OATT SCHEDULE 9-CAPS, 0.0.0](#).

³ *Constellation Energy Commodities Group, Inc.*, Order Confirming Rulings from October 4, 2012 Oral Argument, Docket No. IN12-7-000 (October 10, 2012) (unpublished order); *Constellation Energy Commodities Group, Inc.*, Order Approving PJM State Agencies Request for Adjustment to Authorized Allocation and Distribution Proposal, Docket No. IN12-7-000 (November 5, 2012) (unpublished order).

settlement has enabled CAPS to participate in the PJM stakeholder process, but that the funding is running out.

3. According to PJM, membership in CAPS is limited to “state advocate offices designated by the laws of their respective jurisdictions to represent the interests of utility consumers within the service territory of PJM . . . in the PJM stakeholder process and before the state and federal regulators and in the courts”⁴ PJM states that the recognition of these organizations in state law as the designated representative of consumers in their states is critical to the reasonableness of this proposal.

4. Under the proposed Tariff revisions, PJM will collect CAPS’ annual budget through a dedicated formula rate included as an amendment to Schedule 9 of the PJM Tariff (CAPS Funding Schedule). The initial budget is set as \$450,000 per year. The CAPS Funding Schedule provides that CAPS will develop its annual budget for the next calendar year and submit it to the PJM Finance Committee. PJM states that stakeholders will have an opportunity to express their concerns about the budget, including whether it is excessive, when PJM makes its annual informational filings.⁵ The CAPS Funding Schedule provides that any budget that includes an increase in excess of 7.5 percent will require the Commission’s approval by means of a subsequent section 205 filing. Funding will be pegged to an estimate of energy deliveries expected in the following calendar year and then trued-up to account for under- or over-recovery.⁶

5. PJM states that it will separately state the CAPS charge on customers’ bills, which will reflect the application of the CAPS funding rate to every megawatt-hour of energy delivered to the load. PJM states that allocating these costs based on the quantity of megawatts delivered to the load is just and reasonable because the benefits of funding to

⁴ Transmittal at 6 (quoting Consumer Advocates of the PJM States, *Membership*, <http://www.pjm-advocates.org/Membership.html>).

⁵ The filing will be for informational purposes only and will not be noticed for comment or subject to Commission order.

⁶ *Id.* at 7-8. For calendar year 2016, the CAPS revenue requirement will be \$0 due to funds CAPS currently holds from the Constellation Settlement that it projects will fulfill its 2016 budget requirements. PJM states that the CAPS Funding Rate for 2017 will take into account any funds remaining from the Constellation Settlement and any funds received by CAPS as a result of settlement agreements resulting from the merger of Exelon Corporation and Pepco Holdings, Inc., or other receipts.

include CAPS' perspectives in the PJM stakeholder process apply to electricity consumers in PJM proportionately to their electricity usage levels.⁷

6. PJM states that funds received under the CAPS Funding Schedule will pay for staffing and travel costs for state consumer advocates to participate in in-person meetings and other proceedings at PJM as well as pay professional staff and operation of the CAPS organization. PJM states that CAPS represented to PJM stakeholders that the funding will not be used for: (1) activities related to proceedings of state agencies; (2) proceedings at federal agencies other than the Commission; (3) litigation of matters at the Commission arising from the filing of Tariff or Operating Agreement changes by PJM including the filing of interventions or protests or participation in hearings or settlements; or (4) the hiring of counsel or expert witnesses to support the filings of other parties. PJM notes that CAPS could still participate in other Commission activities, such as responding to Notices of Proposed Rulemakings and participating in Technical Conferences.⁸

7. In support of its proposal to provide funding for CAPS, PJM states that the state consumer advocates are the only entities charged by state statutes with officially representing the interests of consumers. PJM also asserts that the stakeholder process benefits from state consumer advocates being able to inform stakeholders on matters affecting the interests of consumers and advocate on behalf of consumers consistent with their state mandates. PJM states that the CAPS Funding Schedule enhances the participation by these state-designated organizations especially given resource constraints that individual state consumer advocates may otherwise face in travelling to stakeholder meetings on matters relevant to their statutory mission.⁹

8. PJM states that the PJM Members Committee endorsed the CAPS Funding Schedule with a sector-weighted vote of 4.049/5.0, which amounts to approximately 81.18 percent of the voting membership. PJM requests that the Commission accept the proposal for filing by no later than February 28, 2016 with an effective date of March 1, 2016. PJM notes that, since the CAPS Funding Rate will be \$0 for 2016 given the funds from the Constellation Settlement, the collection of funds under this rate schedule will not begin until January 1, 2017.¹⁰

⁷ *Id.* at 9.

⁸ *Id.* at 11-12.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 12-13.

II. Notice and Responsive Pleadings

9. Notice of PJM's December 18, 2015 filing was published in the *Federal Register*, 80 Fed. Reg. 80,352 (2015), with interventions and protests due on or before January 8, 2016. A notice of intervention was filed by the Indiana Utility Regulatory Commission (Indiana Commission) and the Maryland Public Service Commission. Timely motions to intervene were filed by the Joint Consumer Advocates;¹¹ the Delaware Division of the Public Advocate; Organization of PJM States, Inc.; the Office of the People's Counsel for the District of Columbia; Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (Market Monitor); PJM Power Providers Group; the Talen PJM Companies;¹² NRG Power Marketing LLC and GenOn Energy Management, LLC; Pennsylvania Office of Consumer Advocate; the Essential Power PJM Companies;¹³ the PJM Industrial Customer Coalition (PJM ICC); the PSEG Companies;¹⁴ the Sustainable FERC Project; the Electric Power Supply Association; the

¹¹ The Joint Consumer Advocates are: the Delaware Division of the Public Advocate, the Office of People's Counsel for the District of Columbia, the Illinois Citizens Utility Board, Indiana Office of Utility Consumer Counselor, Kentucky Office of Rate Intervention, Office of Attorney General, the Maryland Office of Peoples' Counsel, Michigan Department of Attorney General, the New Jersey Division of Rate Counsel, the Public Staff-North Carolina Utilities Commission, the Office of the Ohio Consumers' Counsel, the Pennsylvania Office of Consumer Advocate, the Consumer Protection and Advocate Division of the Tennessee Attorney General's Office, the Division of Consumer Counsel of the Virginia Office of the Attorney General, and the Consumer Advocate Division of the Public Service Commission of West Virginia.

¹² The Talen PJM Companies are: Talen Energy Marketing, LLC; Brunner Island, LLC; Holtwood, LLC; Talen Ironwood, LLC; Martins Creek, LLC; Montour, LLC; Susquehanna Nuclear, LLC; Lower Mount Bethel Energy, LLC; Raven Power Marketing LLC; Brandon Shores LLC; Sapphire Power Marketing LLC; Bayonne Plant Holding, L.L.C.; York Generation Company, LLC; Newark Bay Cogeneration Partnership, L.P.; Camden Plant Holding, L.L.C.; Pedricktown Cogeneration Company LP; H.A. Wagner LLC; C.P. Crane LLC; and Elmwood Park Power, LLC.

¹³ The Essential Power PJM Companies are: Essential Power, LLC; Essential Power OPP, LLC; Essential Power Rock Springs, LLC; and Lakewood Cogeneration, L.P.

¹⁴ The PSEG Companies are: Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC.

New Jersey Board of Public Utilities; Public Citizen, Inc. (Public Citizen); and the Retail Energy Supply Association.

10. Comments were filed by the Joint Consumer Advocates; the Indiana Commission; the Market Monitor; PJM ICC; Sustainable FERC Project; and Public Citizen. A protest was filed by the PJM Power Providers Group, the Talen PJM Companies, and the Essential Power PJM Companies (collectively, Protestors). An out-of-time motion to intervene and comments were filed by Exelon Corporation (Exelon) on January 22, 2016. Answers were filed by the Joint Consumer Advocates, Market Monitor, and Protestors.

A. Supporting Comments

11. The Joint Consumer Advocates support the CAPS Funding Schedule, offering that the Commission directed regional transmission organizations (RTO) to develop and utilize active and meaningful stakeholder participation processes to carry out their functions and encouraged in Order No. 719 that each RTO include in its mission statement a commitment to being responsive “ultimately to the consumers who benefit from and pay for electricity services.”¹⁵ The Joint Consumer Advocates state that representation of consumers in the stakeholder process improves the chances of consensus among stakeholders and produces a narrower, better informed set of arguments when matters come before the Commission.¹⁶

12. The Joint Consumer Advocates state that state consumer advocate offices: (1) are often small with limited budgets; (2) have full dockets of cases before their local regulatory bodies; (3) have travel restrictions; and (4) lack access to information about and guidance on the many complicated issues addressed in the PJM stakeholder process. The Joint Consumer Advocates state that CAPS has expanded consumer agency participation in stakeholder meetings and in meetings with the PJM Board of Directors, and that CAPS’ active engagement has made a significant difference in the ability of the state-designated consumer agencies to represent their constituents in the PJM stakeholder process.¹⁷

¹⁵ Joint Consumer Advocates Comments at 15-17 (citing *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 478 (2008)).

¹⁶ *Id.* at 17-18.

¹⁷ *Id.* at 18-21.

13. The Joint Consumer Advocates state that the state consumer agencies have consistently recognized stakeholders' desire not to fund their opponents in litigated proceedings, and states that CAPS has promised to not use the funds collected under the CAPS Funding Schedule to litigate in state proceedings or to litigate PJM issues at the Commission. The Joint Consumer Advocates note that this will not prevent CAPS from commenting on Commission policy statements or notices of proposed rulemaking, and will not preclude it from attending and participating in technical conferences at the Commission.¹⁸

14. Finally, the Joint Consumer Advocates state that the CAPS funding schedule is similar to the funding tariff approved for the Organization of PJM States, Inc. (OPSI) since both organizations are governmental regulatory bodies, and their joint participation in the RTO is essential to carrying out their respective legal purposes. The Joint Consumer Advocates state that, similar to OPSI, funding CAPS is crucial to fulfilling the statutory mandate to adequately represent utility consumers.¹⁹

15. The Indiana Commission also supports the CAPS Funding Schedule for similar reasons, citing to the value of the Indiana Office of Utility Consumer Counselor in the rate-making process and in advocating on behalf of Indiana ratepayers, consumers, and the public. The Indiana Commission states that the CAPS Funding Schedule is necessary, transparent, sufficiently limited, and widely supported.²⁰

16. The Market Monitor offers that CAPS Funding Schedule is “a meaningful first step to obtain needed balance in the PJM stakeholder process;” and that “PJM consumers have been systematically underrepresented.” The Market Monitor states that meaningful participation in the PJM stakeholder process requires regular participation in a heavy schedule of meetings, and that effective representation of consumer interests is needed at all stages of the stakeholder process. The Market Monitor states that the requirement in Order No. 2000 that RTOs “have a decision-making process that is independent of

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 26 (citing *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292 (2005) (OPSI Funding Order)).

²⁰ Indiana Commission Comments at 2-3.

control by any market participant or class of participants” will be enhanced by adequate funding for consumer groups.²¹

17. The PJM ICC also supports the CAPS Funding Schedule, stating that the CAPS Funding Schedule will facilitate the continued meaningful participation of CAPS and state consumer advocate agencies in the PJM stakeholder process. The PJM ICC states that consumers located within the PJM footprint cannot be adequately represented without active engagement in the PJM stakeholder process.²²

18. The Sustainable FERC Project also comments in support of the CAPS Funding Schedule. The Sustainable FERC Project states that the funding proposal will help ensure an open and transparent stakeholder process that is well informed by different stakeholder perspectives, help ensure just and reasonable rates, and is in the public interest. The Sustainable FERC Project states that CAPS has enriched the stakeholder process with a reasonable voice and consumer perspective that is not adequately represented by any other stakeholder group.²³

19. Public Citizen also supports the CAPS Funding Schedule. Public Citizen states that the Commission should initiate a proceeding or convene a technical conference to implement similar support for consumer advocates in other regions, and proposes that stakeholder meetings be transcribed. Public Citizen states that the Commission should also provide funding for an Office of Public Participation to ensure that all stakeholders are represented before the Commission.²⁴

20. Exelon also supports the CAPS Funding Schedule. Exelon states that robust stakeholder participation is important to ensure that effective market rules which support reliable wholesale electric service at just and reasonable rates. Exelon states that the

²¹ Market Monitor Comments at 1-2 (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

²² PJM ICC Comments at 2-3.

²³ Sustainable FERC Project at 1-2.

²⁴ Public Citizen Comments at 1-2.

proposal will ensure that state consumer advocates are able to participate in the PJM stakeholder processes.²⁵

B. Protest and Answers

21. Protestors argue that the proposal would unlawfully compel PJM transmission customers that serve load to pay charges for the work of public advocates representing state consumer interests, and that the U.S. Congress has not granted the Commission authority to impose rates designed to recover costs incurred by state consumer advocate groups. Protestors state that the advocacy work of CAPS will not be performed with PJM assets and that, therefore, the Commission does not have jurisdiction to accept the CAPS Funding Schedule.²⁶

22. Protestors also argue that, if the Commission were to approve the CAPS Funding Schedule and require PJM transmission customers that serve load to fund private speech with which they may disagree, the order would violate the First Amendment to the U.S. Constitution under *U.S. Department of Agriculture v. United Foods* and *Wooley v. Maynard*.²⁷ Protestors further argue that CAPS' speech cannot be considered government speech under *Johanns v. Livestock Marketing Assn.*, because CAPS' message is not controlled by any sovereign government and because not all CAPS' members are government representatives.²⁸ Protestors state that CAPS' advocacy efforts cannot be viewed as part of a general and comprehensive, cooperative regulatory scheme. Protestors dispute the Joint Consumer Advocates' position that CAPS is similar to OPSI, stating that, unlike OPSI, CAPS: (1) is not the regional state committee in PJM; (2) is not comprised of regulatory commissions; and (3) members may vote in the PJM stakeholder process.

23. Protestors argue that proposed funding proposal has not been shown to be just and reasonable and not unduly discriminatory. Specifically, Protestors argue that the proposal will result in disparate treatment between CAPS and other PJM stakeholders, particularly given the existence of OPSI. Protestors state that, although state consumer

²⁵ Exelon Comments at 1.

²⁶ Protestors Protest at 8-13.

²⁷ *Id.* at 14 (citing *U.S. Department of Agriculture v. United Foods, Inc.*, 533 U.S. 405 (2001) (*United Foods*); *Wooley v. Maynard*, 430 U.S. 705 (1977) (*Wooley*)).

²⁸ *Id.* at 14-23 (citing *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, at 560-61 (2005) (*Johanns*); *Keller v. State Bar of California*, 496 U.S. 1, 11 (1990)).

advocates are unique entities that represent retail consumers, there are many associations that represent diverse sets of stakeholders impacted by issues addressed in the PJM stakeholder process. Protestors state that the funding proposal should be rejected because it may open the door to more requested funding proposals from other PJM stakeholders.²⁹

24. Protestors argue that previously established funding for CAPS does not warrant continued funding of CAPS through the PJM Tariff. Protestors also argue that the proposed Tariff revision does not contain sufficient cost controls. Protestors state that, if rate increases up to the limit of 7.5 percent occur each year, the CAPS budget would double in just over 10 years. Protestors also note that CAPS may receive funding from other sources without deducting such revenue from its Tariff funding.³⁰

25. Protestors further argue that the funding proposal is inconsistent with the Commission's cost causation principles. Protestors assert that, while state consumer advocates have been created to represent the interest of utility customers within their respective states, PJM transmission customers that serve load within the PJM region are not represented by state consumer advocates and are not the intended beneficiaries of those groups. Protestors argue, therefore, that PJM transmission customers, including load-serving entities and competitive retail suppliers, cannot be required to pay for the work of state consumer advocates. Protestors state that some transmission customers may be unable to pass the costs of funding CAPS on to retail customers. Protestors also argue that PJM transmission customers located in one state would, under the funding proposal, potentially be funding the expenses of a consumer advocate of another state.³¹

26. In their answer, the Joint Consumer Advocates assert, contrary to Protestors' argument that the Commission has jurisdiction to accept PJM's proposal because the proposed Tariff revision "is a rate or charge by a public utility that is connected with wholesale transmission and the sale of energy at wholesale in interstate commerce," and that PJM has made a rate filing under section 205 of the FPA.³² The Joint Consumer Advocates argue, moreover, that funding CAPS is a reasonable business expense incurred by PJM to transact business that will benefit PJM, PJM's transmission customers, and consumers in the PJM region. The Joint Consumer Advocates note that the regulatory state commissions of the Midcontinent Independent System Operator, Inc. (MISO) have

²⁹ *Id.* at 23-25.

³⁰ *Id.* at 26-27.

³¹ *Id.* at 28-30.

³² Joint Consumer Advocates Answer at 4.

voting rights in MISO and their organization, the Organization of MISO States, is funded through the MISO tariff.³³

27. The Joint Consumer Advocates argue that Protestors' erroneously contend that the funding proposal compels Protestors' speech or compels them to subsidize speech with which they disagree in violation of the First Amendment. The Joint Consumer Advocates state that these arguments are misplaced because Protestors have not demonstrated that CAPS funding would compel speech or violate their First Amendment rights. Moreover, the Joint Consumer Advocates argue that, even if the funding proposal could be classified as a compelled subsidy, it is permissible under the First Amendment as government speech. In support of this argument, the Joint Consumer Advocates state that, because CAPS is not a member of PJM and has no individual standing in the PJM stakeholder process except to the extent it represents the views of CAPS' members, there is no independent generic message of the type at issue in *United Foods*. The Joint Consumer Advocates represent that none of CAPS' statements or positions would be attributed to the Protestors by virtue of the CAPS funding tariff, so the concern articulated in *Johanns* is not present here. The Joint Consumer Advocates state that, even if the CAPS Funding Schedule were considered a compelled subsidy, the tariff would be permissible under the First Amendment under the "government speech" exception since the members of CAPS are government entities who have been designated by statute to represent utility consumers.³⁴

28. The Joint Consumer Advocates argue that funding CAPS is not unduly discriminatory since CAPS is unique in that it represents entities created by state governments for the sole purpose of representing consumer interests on state and federal energy matters. The Joint Consumer Advocates also note that all load-serving entities in PJM will pay the same rate under the proposed Tariff revision. The Joint Consumer Advocates argue that the funding CAPS in this manner is just and reasonable because PJM issues take place in the federal arena and wholesale transmission charges are passed through to retail customers on their monthly bills.³⁵

29. The Joint Consumer Advocates also argue that the funding proposal contains adequate cost controls because CAPS must submit a budget to the PJM Finance Committee each year, and stakeholders will have an opportunity to complain about any charges they perceive as excessive in PJM's annual informational filings. Finally, the

³³ *Id.* at 4-8.

³⁴ *Id.* at 10-15.

³⁵ *Id.* at 15-18.

Joint Consumer Advocates argue that Protestors' cost causation argument is without merit because transmission costs in PJM are ultimately flowed through to consumers (through megawatts of energy delivered to load), and that the costs of participation by the state-designated consumer advocates on PJM issues will be paid by the consumers they represent.³⁶

30. In its answer, the Market Monitor disputes Protestors' argument that the Commission lacks jurisdiction or authorization under the FPA to approve the CAPS Funding Schedule, stating that the Commission has jurisdiction over proposals from RTOs intended to bolster and protect the RTO's status. The Market Monitor argues that because RTOs are creatures of the Commission, the Commission has the jurisdiction to determine the rates charged by RTOs so that RTOs can achieve the requirements and goals assigned to RTOs.³⁷

31. The Market Monitor also states that funding CAPS is a reasonable attempt to establish appropriately balanced representation within the PJM stakeholder process. The Market Monitor states that CAPS would not be the only members whose participation in the PJM process is funded by ratepayers. The Market Monitor states that many other members have regulated tariffs and use revenues obtained under those tariffs to finance their activities as members of PJM. The Market Monitor further argues that those members may use revenues obtained under those rates to advocate views in the stakeholder process with which their customers may not agree.³⁸

32. The Market Monitor argues that CAPS' members are the only entities with an exclusive obligation to represent the general interests of end use customers, and that end use customers constitute an important stakeholder constituency in the organized wholesale markets. The Market Monitor states that end use customers are the only entities in a position to bargain with suppliers over costs, and that they are the only representatives exclusively adopting the market perspective of demand. The Market Monitor concludes that because CAPS members already represent end use customers in state matters, it makes sense to take advantage of existing institutions to represent load in PJM.³⁹

³⁶ *Id.* at 18-21.

³⁷ Market Monitor Answer at 2-3.

³⁸ *Id.* at 3-4.

³⁹ *Id.* at 4-5.

33. In their answer, Protestors argue that the Commission lacks jurisdiction to accept the proposal because the costs of CAPS' participation in the PJM stakeholder process is not one that PJM incurs in association with operating the electric grid or for its own internal operations.⁴⁰ Protestors dispute the Joint Consumer Advocates' argument that there is no distinction between CAPS and OPSI, noting that OPSI is a regional state committee and CAPS is not. Protestors note that the Commission's decision to fund OPSI was based on its status as a regional state committee. Protestors argue that competitive retail suppliers of electricity "do not have any automatic cost pass through capabilities," and therefore the proposal is inconsistent with the principles of cost causation.⁴¹

34. In addition, Protestors reiterate their argument that the funding proposal violates the First Amendment. Protestors state that the government speech test turns in large part on who is controlling the speech, and that since, in this case, there is no one government controlling the speech, CAPS' speech cannot be said to be the speech of any particular government. Protestors also argue that, if the speech at issue is that of CAPS, CAPS is not a sovereign and the speech is not protected by the government speech doctrine. Protestors further argue that, if the speech at issue is that of the members of CAPS as sovereigns, the proposal potentially would require load-serving entities in one state to fund the speech of a consumer advocate representing another state, a situation for which there is no constitutional basis.⁴²

III. Discussion

A. Procedural Matters

35. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴³ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁴⁴ the Commission will grant Exelon's

⁴⁰ Protestors Answer at 2-3 (citing *Federal Energy Regulatory Commission v. Electric Power Supply Association*, Nos. 14-840, 14-841, 2016 WL 280888, at *15 (U.S. Jan. 25, 2016)).

⁴¹ *Id.* at 4.

⁴² *Id.* at 5-6.

⁴³ 18 C.F.R. § 385.214 (2015).

⁴⁴ 18 C.F.R. § 385.214(d) (2015).

late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

36. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority.⁴⁵ We will accept the Joint Consumer Advocates, the Market Monitor's, and Protestors' answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

37. We accept PJM's proposed tariff revisions, to become effective March 1, 2016, as requested.

38. As an initial matter, the Commission has jurisdiction to determine whether the proposed tariff revisions are just and reasonable under section 205 of the FPA. PJM administers an organized wholesale energy market, and the Commission may determine which costs are appropriately reflected in PJM's tariff.

39. We find that PJM has sufficiently demonstrated that its proposal is just and reasonable and not unduly discriminatory. We find that funding CAPS is a reasonable business expense of PJM which will benefit PJM's ratepayers by "increas[ing] its responsiveness to the needs of customers and other stakeholders,"⁴⁶ and by making the stakeholder process more inclusive, transparent, and robust.⁴⁷ We note that the CAPS proposal was widely supported in the PJM Members Committee, with approximately 81 percent of the voting membership in favor of the proposal.⁴⁸ Furthermore, as the Joint Consumer Advocates note, CAPS is not an "affinity group," but is rather an organization of state-designated consumer advocates meant to carry out the duties with which they have been statutorily charged, and we find that accepting PJM's proposal here is

⁴⁵ 18 C.F.R. § 385.213(a)(2) (2015).

⁴⁶ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, at P 502 (2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

⁴⁷ *See id.* PP 478, 481-482, 503-05, and 509.

⁴⁸ Transmittal at 12.

consistent with Commission precedent.⁴⁹ To Protestors' argument that accepting PJM's proposal may open the door to funding proposals from other stakeholders, we note that any such proposal would be subject to the same stakeholder vetting process as the CAPS Funding Schedule, and that any resulting proposal from PJM would be subject to the same FPA section 205 burden. We also emphasize that CAPS, like OPSI, is comprised of government-designated entities.

40. Although Protestors argue that the proposed Tariff revisions do not contain sufficient cost controls, we disagree. The PJM Tariff amendment provides a narrow and targeted funding mechanism for CAPS to carry out its mission to "actively engage in the PJM stakeholder process and at the Federal Energy Regulatory Commission to ensure that the prices . . . for reliable, wholesale electric service are reasonable."⁵⁰ The CAPS Funding Schedule contains safeguards against the recovery of excessive costs, including a provision for stakeholder review of the annual budget. The CAPS Funding Schedule also requires Commission approval for annual budget increases beyond 7.5 percent, half of the level approved in the OPSI Funding Order. The CAPS Funding Schedule also has a true-up provision to account for actual under- or over-recovery of CAPS' budget during the prior calendar year. Moreover, affected parties can express their concerns about CAPS' annual budget, including whether it is excessive or does not adequately account for other revenues, when PJM makes its annual informational filing pursuant to the CAPS Funding Schedule. Additionally, PJM states that CAPS represented to PJM stakeholders that the funding will not be used for: (1) activities related to proceedings of state agencies; (2) proceedings at federal agencies other than the Commission; (3) litigation of matters at the Commission arising from the filing of Tariff or Operating Agreement changes by PJM including the filing of interventions or protests or participation in hearings or settlements; or (4) the hiring of counsel or expert witnesses to support the filings of other parties.⁵¹ We also note that the CAPS Funding Schedule allows the CAPS budget to "include only expenses that are appropriate to and directly related to the purposes for which CAPS was formed." We find that, in light of these safeguards, the proposed Tariff revisions have sufficient cost controls and affected parties are adequately protected from excessive costs.

⁴⁹ *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007) (allowing funding through ISO New England Inc.'s (ISO-NE) tariff for the New England States Committee on Electricity).

⁵⁰ Transmittal at 5.

⁵¹ Transmittal at 11-12; *see also* Joint Consumer Advocates Comments at 24.

41. We further find that CAPS' involvement in the PJM stakeholder process is likely to benefit wholesale customers, as well as retail consumers, because the consumer advocates represent the perspective of load. PJM's proposal would allow for improved coordination between PJM and the consumer advocates, representatives who have a unique relationship with and responsibility to customers. The consumer advocates represent the parties who eventually pay for the wholesale costs that originate in PJM, and the work of CAPS in ensuring that the PJM markets result in reliable service at reasonable rates is likely to result in significant benefits for wholesale customers. Indeed, as noted above, the CAPS proposal was broadly supported in the PJM stakeholder process.⁵² Given the overall benefits of the proposal, we are not persuaded by arguments that the Commission should reject the proposal because PJM transmission customers of one state may indirectly fund the expenses of a consumer advocate of another state through the CAPS Funding Schedule.

42. Although Protestors argue that the CAPS proposal violates the First Amendment, we find, as the Commission did in the OPSI Funding Order, that the proposal is a legitimate business expense of PJM which is not equivalent to the government compulsion of speech.⁵³ Further, the cases upon which Protestors rely in support of their position are distinguishable from the circumstances here. In *United Foods*,⁵⁴ cited by Protestors, the U.S. Supreme Court found that a government requirement that businesses fund an advertising campaign violated the First Amendment by compelling a party to subsidize speech with which it did not agree. *United Foods* involved dues paid specifically to fund advertising; the funding in this case, however, is not intended to fund specific speech. Instead, this case involves a funding proposal put forward by PJM to enable it to work with state consumer advocates more easily and efficiently, and to ensure proposals originating in the PJM stakeholder process promote the provision of reliable service at reasonable rates. Moreover, like OPSI, CAPS is not a member of PJM, and will have no official standing and will not be able to vote in the PJM stakeholder process.

43. Protestors also cite *Wooley* to support the argument that the government is precluded from requiring citizens or corporations to express positions not their own through what is known as the compelled speech doctrine.⁵⁵ In *Wooley*, however, the plaintiff had been compelled to display specific speech. The CAPS Funding Schedule

⁵² Transmittal at 12.

⁵³ OPSI Funding Order, 113 FERC ¶ 61,292 at P 40.

⁵⁴ 533 U.S. 405.

⁵⁵ 430 U.S. 705.

does not compel speech or a specific message. Further, the CAPS Funding Schedule does not prevent PJM stakeholders from expressing different views than CAPS.

44. Protestors also state that, because CAPS is not a governmental entity, its speech does not qualify as government speech under *Johanns*.⁵⁶ We need not address this issue, because, even if CAPS is not a government entity and does not qualify for the exemption, we find that funding the CAPS expenses at issue here through the PJM Tariff does not constitute a violation of the First Amendment, for the reasons stated above.

45. Finally, because this proceeding deals with the narrow issue of PJM's section 205 filing, we find that Public Citizen's proposals are beyond the scope of this proceeding.

The Commission orders:

PJM's proposed tariff revisions are hereby accepted, effective March 1, 2016, as discussed in the body of this order.

By the Commission. Commissioner Clark is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁶ *Johanns*, 544 U.S. at 559. *Johanns* builds upon the principle that “compelled support of government,” even government programs with which one disagrees, is “perfectly constitutional.” *Id.* Thus, while citizens may challenge government-compelled support of private speech, they have no First Amendment right not to fund government speech. *Id.*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket No. ER16-561-000

(Issued February 29, 2016)

CLARK, Commissioner *dissenting*:

This Commission has not before endorsed the policy that the activities of non-decisional intervenor groups be funded through a dedicated utility tariff under the auspices of the FPA. Yet here we are doing exactly that. Today's order is couched in the language of good intentions, but I find it troubling precedent as both a matter of policy and prudence.

Today's action comes not as a result of any argument that the members of the Consumer Advocates of PJM States (CAPS) are not allowed to participate in the PJM stakeholder process; rather, CAPS members are concerned that they will no longer have the financial resources to staff and travel to various stakeholder meetings.

Since 2012, CAPS members have had access to \$1.2 million in funding¹ provided as the result of a Stipulation and Consent Agreement entered into by FERC's Office of Enforcement (OE) and Constellation Energy Commodities Group, which resolved an investigation under Part 1b of the Commission's regulations.² The fact that the well is now dry should impose no obligation on this Commission to conscript electricity consumers in a plan to create a permanent revenue stream to replenish those funds allocated from the disgorgement of monies OE alleged were improperly earned through market manipulation of the wholesale markets. No other region of the country has a similarly situated regional committee of consumer advocates so funded, but today's order makes it exceedingly likely such publicly funded groups will now proliferate.

While it is commendable that these groups wish to participate in regional stakeholder events, their participation should not be funded through a FERC-approved "utility tax," but through the regular appropriations process that takes place in every state legislature in

¹ *Constellation Energy Commodities Group, Inc.*, Order Confirming Rulings from October 4, 2012 Oral Argument, Docket No. IN12-7-000 (October 10, 2012) (unpublished order); *Constellation Energy Commodities Group, Inc.*, Order Approving PJM State Agencies Request for Adjustment to Authorized Allocation and Distribution Proposal, Docket No. IN12-7-000 (November 5, 2012) (unpublished order).

² *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 (2012).

America.³

My public policy concern is that there is little that meaningfully differentiates these organizations from a myriad of other state agencies and not-for-profit governmental organizations or other interest groups that will now say, “what about my piece of the pie?” CAPS entities argue they are uniquely situated. But aren’t state energy offices, in their own way, also uniquely situated? What about state departments of environmental quality? Do they, too, deserve a Regional Transmission Organization (RTO) funded organization to finance their participation in stakeholder meetings? Furthermore, given that CAPS includes at least one non-governmental non-profit, we now have cracked-open the lid of Pandora’s Box just a little wider yet. What is to stop any of the countless groups that intersect with the regulatory world from arguing that they are also uniquely situated to speak for any number of communities of interest?

Furthermore, as this RTO funded model spreads to other regions, as it is sure to do, FERC will be left to resolve other thorny issues. For example, unlike state regulatory commissions, which are a state governance model adopted universally, not all states have separate offices of consumer advocates or Attorneys General that practice before state utility commissions. Some states organize their regulatory regime as does FERC; they have advocacy staff embedded within the Commission itself. Like FERC’s Office of Administrative Litigation, their job is to advocate for the “public interest.”⁴ By going down the path we have chosen today, FERC will eventually need to answer how it will require consumers in one set of states that do not have consumer advocate offices, to fund the regional participation of other states that do have them.

The backers of this proposal would argue FERC has already permitted a similar funding stream for OPSI. It has indeed, but the differences between RSCs, like OPSI, and all

³ While the majority of CAPS entities are either affiliated with a state Attorney General or a state office of consumer counsel, I note the Illinois Citizens Utility Board is not an agency of state government, but rather, an independent non-profit entity created by the Illinois legislature to advocate for consumer interests in various venues. Using monies generated through a dedicated RTO tariff provision to pay the participation expenses of an independent non-profit entity should raise even more red flags for this Commission. Acknowledging this outlier would lay bare the inappropriate suggestion that CAPS funding is the equivalent to funding received by the Organization of PJM States, Inc. (OPSI), a FERC-recognized regional state committee (RSC).

⁴ I view protecting the “public interest” as a somewhat broader mission than “consumer advocacy.” The former suggests balancing the legitimate needs of all stakeholders, including consumers and the utilities that serve them. The latter typically focuses on the more discrete concerns of consumers specifically.

other groups are vast. As the Commission explains in *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292 (2005), OPSI was eligible for funding due to its status as an RSC. This is not a minor discrepancy. The rationale for an RSC is deeply embedded within Order No. 2000.⁵ State commission engagement with RTO's is not just desirable, it is a near necessity. It only makes sense FERC would have recognized this. The formation of RTOs would have been incalculably more difficult without the formal and informal participation, approval and acquiescence of state commissions. State commissions exert express regulatory authority over utilities in ways that can enhance or degrade wholesale markets. It should go without saying, but the reason state commissions are different than any other group is because state commissions hold decisional authority over various portions of the electricity delivery system. Institutionalizing a regional state consumer advocacy/Attorneys General group as the equal of RSCs, devalues the special relationship that FERC created when it recognized RSCs.

This filing also fails as a matter of prudence. There is, of course, no such thing as a free ride. These dollars are ultimately paid by consumers, just like all other RTO fees and recovery charges. This filing calls for an initial \$450,000 annual appropriation, subject to annual adjustments. So long as CAPS' budget does not increase more than 7.5 percent in any given year no section 205 filing would be required. As protesters have noted, if CAPS seeks an annual budget increase of up to 7.5 percent per year, this provision could, within the span of just 10 years, more than double CAPS' budget to nearly \$1 million a year.⁶ This authorized 7.5 percent annual increase is described in the filing as a way to "promote fiscal restraint."⁷ Only in government could a budget that allows for a near doubling every decade be considered parsimonious.

I realize it can be tough to say no. Consumer advocates and Attorneys General often make the case that other parties do not. I want them to be as involved in RTO stakeholder processes as they can be. But in this case, the Commission would do well to

⁵ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999).

⁶ PJM Power Providers Group, the Talen Companies, and the Essential Power PJM Companies' Protest at 26-27.

⁷ PJM Transmittal at 8. "In order to promote fiscal restraint and rate certainty, schedule 9- CAPS provides that any budget submitted for a calendar year that includes an increase in excess of seven and one-half percent of the budget on file for the current calendar year will require the Commission's approval by means of a subsequent Section 205 filing by PJM. CAPS elected to include this limitation in the instant rate schedule in order to provide to PJM and its Members additional comfort that its costs would be kept in check."

hold the line. The proper source of funding for these activities is through the states themselves. To the degree they are unable to convince their legislatures to support such appropriations, it should not fall to this Commission to find alternative sources of revenue through the FPA.

For these reasons, I respectfully dissent.

Tony Clark