

157 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. ER16-561-001

ORDER DENYING REHEARING

(Issued December 21, 2016)

1. On February 29, 2016, the Commission issued an order under section 205 of the Federal Power Act (FPA)¹ accepting revisions to the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (Tariff) to provide a mechanism for funding Consumer Advocates of the PJM States, Inc. (CAPS), a non-profit organization formed to coordinate the participation of state consumer advocate offices in the PJM stakeholder process.² In this order we deny a request for rehearing of the February 29 Order filed by the Talen Companies³ and the Essential Power PJM Companies⁴ (collectively, Talen/Essential Power).

¹ 16 U.S.C. § 824d (2012).

² *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,147 (2016) (February 29 Order).

³ The Talen 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.

⁴ The Essential Power Companies are: Essential Power, LLC; Essential Power OPP, LLC; Essential Power Rock Springs, LLC; and Lakewood Cogeneration, L.P.

I. Background

2. In the February 29 Order, the Commission approved Tariff revisions providing that PJM will collect CAPS's annual budget through a dedicated formula rate included as an amendment to Schedule 9 of the PJM Tariff (CAPS Funding Schedule). 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 for professional staff and operation of the CAPS organization. The Commission found that the proposed funding is a reasonable business expense of PJM which will benefit PJM's ratepayers by increasing its responsiveness to the needs of customers and other stakeholders and by making the stakeholder process more inclusive, transparent, and robust.⁵

3. Talen/Essential Power argue that the Commission made three errors in the February 29 Order. First, they maintain that the Commission exceeded its authority under FPA section 205 when it accepted the CAPS Funding Schedule. Talen/Essential Power contend that CAPS's participation in the PJM stakeholder process is neither a jurisdictional service for purposes of section 205 nor a practice that has a direct effect on jurisdictional rates.⁶

4. Second, Talen/Essential Power argue that the Commission erred in finding that the CAPS Funding Schedule is just and reasonable and not unduly discriminatory. According to Talen/Essential Power, the Commission failed to address the fact that CAPS is not a Regional State Committee – an entity whose stakeholder process participation has been approved for funding through a charge under a jurisdictional tariff – and because the Commission failed to explain adequately its departure from prior cost causation precedent.⁷

5. Third, Talen/Essential Power argue that the Commission erred in finding that the CAPS Funding Schedule does not constitute unconstitutional compelled speech and therefore is consistent with the First Amendment to the United States Constitution.⁸

⁵ February 29 Order, 154 FERC ¶ 61,147 at P 39.

⁶ Rehearing Request at 2-6.

⁷ *Id.* at 2, 7-9.

⁸ *Id.* at 2, 9-13.

II. Procedural Matters

6. On April 14, 2014, Joint Consumer Advocates filed an answer to Talen/Essential Power's rehearing request. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for hearing.⁹ Therefore, we reject Joint Consumer Advocates' answer to the request for rehearing.

III. Discussion

A. Jurisdiction

7. Talen/Essential Power argue that in accepting the CAPS Funding Schedule, the Commission exceeded its jurisdiction under FPA section 205. We disagree. Section 205(a) requires the Commission to ensure that all public utility rates and charges for, or in connection with, the transmission and sale of electric energy subject to Commission jurisdiction and all rules and regulations affecting or pertaining to such rates or charges are just and reasonable.¹⁰ The Supreme Court has held that this jurisdiction extends to rules and practices that directly affect wholesale rates.¹¹ As explained below, the PJM stakeholder process is a practice that directly affects wholesale rates, and thus approval of a proposal that would enhance that process falls within the Commission's jurisdiction under section 205(a).

8. Citing to a single statement found in a single case – *Atlantic City Electric Co. v. FERC* – Talen/Essential Power contend that Commission jurisdiction “extends only to costs incurred for services rendered with a jurisdictional entity's assets.”¹² However, while the court in *Atlantic City* stated that “Section 205 of the [FPA] gives a utility the right to file rates and terms for services rendered with its assets,”¹³ when read in context, it is clear that the court was neither commenting on the question of what costs a public utility may recover nor limiting the scope of recoverable costs to those associated with

⁹ 18 C.F.R. § 385.713(d)(1) (2016). For a list of the members of Joint Consumer Advocates, see February 29 Order, 154 FERC ¶ 61,147 at n.11.

¹⁰ 16 U.S.C. § 824d(a) (2012).

¹¹ *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 774 (2016).

¹² Rehearing Request at 3 (citing *Atl. City Electric Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (*Atlantic City*)).

¹³ *Atlantic City*, 295 F.3d at 9.

certain assets. In short, the statement on which Talen/Essential power rely was not intended to, and does not, define the scope of Commission jurisdiction under FPA section 205.

9. *Atlantic City* dealt, in part, with whether the Commission “exceeded its statutory authority by requiring the owners of transmission assets to cede their statutory right to file rate changes under section 205 of the [FPA]” when those owners turned control of their transmission assets over to an independent system operator (ISO).¹⁴ In answering this question, the court found that “[s]ection 205 of the [FPA] gives a utility the right to file rates and terms for services rendered with its assets,” and the Commission “lacks the authority to require the utility owners to give up their statutory rights under section 205.” The court thus was saying that transferring control over certain assets to an ISO did not cause the owners to lose their section 205 rights in connection with those assets. This conclusion, which speaks to the specific facts presented, i.e., section 205 filing rights related to certain assets, does not speak to the extent of Commission jurisdiction under section 205 with respect to recoverable costs.

10. The Commission has the authority under FPA section 205 to permit the recovery of costs incurred by a public utility in providing utility functions.¹⁵ Here, PJM is seeking to recover just and reasonable costs it will incur as part of its tariff obligation to provide for stakeholder input into the development of rates and charges and terms and conditions of service. The PJM stakeholder process is a practice established by the PJM Members Committee under the PJM Operating Agreement, a jurisdictional agreement filed at the Commission. The stakeholder process is used to identify, review, and make decisions regarding proposed revisions to PJM’s governing documents, processes, market and reliability design and operations.¹⁶

11. The stakeholder process thus provides input that directly affects the content of jurisdictional practices. For example, stakeholder input is an essential element of a just

¹⁴ *Id.* at 3.

¹⁵ *See, e.g., Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945) (Commission can regulate the rates of non-jurisdictional gathering facilities as they affect jurisdictional rates); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004) (permitting recovery of administrative costs of operating a regional transmission organization (RTO) from bundled and grandfathered loads).

¹⁶ *See* PJM Business Practice Manual 34 (PJM Stakeholder Process) at 5.

and reasonable regional transmission planning process,¹⁷ a process that the courts have agreed is one that directly affects jurisdictional rates.¹⁸ As the PJM Market Monitor recognized, “PJM consumers have been systematically underrepresented” in the stakeholder process, and the inclusion of CAPS was “a meaningful first step to obtain needed balance in the PJM stakeholder process.”¹⁹ Talen/Essential Power are thus incorrect in asserting that the PJM stakeholder process does not “have a direct rate effect sufficient to grant the Commission jurisdiction.”²⁰ It is a practice that affects the setting of rates, terms, and conditions of jurisdictional services of the type that the Supreme Court has held falls within the Commission’s jurisdiction.²¹

12. We thus reject Talen/Essential Power’s arguments that “the Commission did not fully address objections raised that CAPS’s costs are not for services rendered with PJM’s assets” and that CAPS funding is not a legitimate business expense of PJM.²² Commission jurisdiction is not limited to the direct costs of services rendered through jurisdictional assets, and CAPS funding is a legitimate business expense of PJM because it facilitates fulfillment of a PJM obligation under the PJM Operating Agreement.

13. Finally, we disagree with Talen/Essential Power that making the stakeholder process more inclusive, transparent, and robust through CAPS’s participation is not a legitimate reason to accept a tariff funding mechanism for CAPS.²³ Talen/Essential

¹⁷ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at PP 11, 49, 68, 79, 148-153 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (*S.C. Pub. Serv. Auth.*).

¹⁸ *S.C. Pub. Serv. Auth.*, 762 F.3d at 55-59.

¹⁹ February 29 Order, 154 FERC ¶ 61,147 at P 16 (quoting Market Monitor Comments at 1-2 (internal citations omitted)).

²⁰ Rehearing Request at 5.

²¹ *See* P 7, n.11 *supra*.

²² Rehearing Request at 3.

²³ *Id.* at 2.

Power argue that the Commission based this conclusion on Order No. 719,²⁴ and the “Commission cannot cite its own order rather than an act of Congress as a basis for its authority.”²⁵ However, the Commission’s authority to accept the CAPS Funding Schedule arises from the fact that the stakeholder process it pertains to is a practice that directly affects jurisdictional rates. Order No. 719 simply provides criteria for evaluating whether that jurisdictional practice is just and reasonable, specifically its effect of “increas[ing] [PJM’s] responsiveness to the needs of customers and other stakeholders.”²⁶

B. FPA Section 205 Requirements

14. We disagree that the CAPS Funding Schedule is unduly discriminatory under section 205 and represents a departure from prior Commission cost causation precedent. Talen/Essential Power complain that it is unduly discriminatory to fund “one stakeholder group to the exclusion of other stakeholder groups.”²⁷ However, Talen/Essential Power acknowledge that the Commission already authorizes funding of a group, Regional State Committees, to the exclusion of other groups. Talen/Essential Power nonetheless contend that “[t]he Commission’s orders approving funding of [Regional State Committees] . . . are inapposite” because “CAPS is meaningfully different than [a Regional State Committee].”²⁸ Talen/Essential Power point to the fact that a Regional State Committee is a regulator with decisional authority over the electricity delivery system, while CAPS’s members are not, as the meaningful difference between the two. They go on to argue that, in light of the difference, “states should fund their consumer advocates’ efforts, not wholesale load-serving transmission customers.”²⁹

²⁴ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (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).

²⁵ Rehearing Request at 5.

²⁶ February 29 Order, 154 FERC ¶ 61,147 at P 39 (quoting Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 502).

²⁷ Rehearing Request at 7.

²⁸ *Id.* at 8.

²⁹ *Id.*

15. In response, we first note that the Commission cited precedent on Regional State Committees to support the point that CAPS, like a Regional State Committee, “is comprised of government-designated entities.”³⁰ This means that CAPS is not an “affinity group,” i.e., a group of private parties promoting their shared private interests, and CAPS shares this important feature with Regional State Committees.³¹ This is a valid criterion for assessing when funding of a group is appropriate, and the cases the Commission cited on this issue are thus entirely apposite to the point that the Commission was making. In addition, Talen/Essential Power’s argument concerning the difference between a Regional State Committee and CAPS is based exclusively on the dissent’s argument in the February 29 Order.³² The dissent, however, argued that acceptance of the CAPS Funding Schedule was imprudent as a matter of policy, not that it was unduly discriminatory as a matter of law. Talen/Essential Power provide no additional reasoning that supports the conclusion that CAPS’s lack of decisional authority overrides what it shares in common with Regional State Committees in a way that requires one to find undue discrimination in this case.

16. With respect to cost causation, Talen/Essential Power argue that rates should reflect costs actually caused by the customer who pays them, and in this instance, PJM transmission customers that serve load within PJM are not the intended beneficiaries of the work of CAPS’s members, who represent utility consumers within their respective states.³³ This, however, misstates the benefits that the Commission determined would be derived from acceptance of the CAPS Funding Schedule.

17. The Commission found in the February 29 Order 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,’ and by making the stakeholder process more inclusive, transparent, and robust.”³⁴ The Commission also found that “CAPS’[s] involvement in the PJM stakeholder process is likely to benefit wholesale customers, as well as retail customers, because the consumer advocates

³⁰ February 29 Order, 154 FERC ¶ 61,147 at P 39.

³¹ *Id.*

³² Rehearing Request at 8 (citing February 29 Order, 154 FERC ¶ 61,147 (Clark, Comm’r, dissenting)).

³³ *Id.* at 7.

³⁴ February 29 Order, 154 FERC ¶ 61,147 at P 39 (quoting Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 502).

represent the perspective of load.”³⁵ The PJM stakeholder process provides benefits that accrue to PJM ratepayers generally, and the Commission’s finding is thus that PJM ratepayers generally, not simply the persons that CAPS members represent, benefit from the CAPS Funding Schedule. Cost causation principles incorporate the proposition that persons who benefit from an expenditure should be viewed as causing it.³⁶ Thus, given the general benefit that CAPS funding provides, requiring that the costs of producing that benefit be borne by PJM ratepayers generally does not violate cost causation principles.

C. First Amendment Issues

18. Talen/Essential Power assert that Commission acceptance of the CAPS Funding Schedule violates the First Amendment, which prohibits “the government from compelling individuals or corporations to express ideological positions not their own” or “to fund or subsidize speech to which they object.”³⁷ This argument fails for two reasons. First, the requirements of the CAPS Funding Schedule do not constitute governmental action, a necessary precondition for any First Amendment claim. Second, even if the requirements of the CAPS Funding Schedule did constitute governmental action, they do not result in compelled speech for First Amendment purposes.

19. The compelled speech doctrine is derived from the freedom of speech and freedom of association clauses of the First Amendment. The doctrine applies in situations where individuals are required to make direct expressions of opinion or faith,³⁸ where persons are required to participate in dissemination of an ideological message,³⁹ and where persons are compelled to subsidize speech by other persons to which they object and thus are compelled to associate with those other persons for purposes of promoting their

³⁵ *Id.* ¶ 41.

³⁶ *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 85 (accepting that the Commission’s adoption of a beneficiary-based cost allocation method is a logical extension of the cost causation principle).

³⁷ Rehearing Request at 9.

³⁸ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that the First and Fourteenth Amendments made it impermissible for the government to compel a student to recite the Pledge of Allegiance).

³⁹ *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (*Wooley*) (forbidding a state from requiring an individual to display “Live Free or Die” on his license plate).

opinions.⁴⁰ Here we find that the requirements of the CAPS Funding Schedule do not result in compelled speech in violation of the First Amendment for two reasons.

20. First of all, the First Amendment applies only to governmental action,⁴¹ and the CAPS Funding Schedule does not constitute governmental action because PJM is a private, non-profit corporation. PJM is, of course, a jurisdictional public utility under the FPA, but the “mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . .”⁴² The CAPS Funding Schedule constitutes a rate that PJM has chosen to establish of its own volition, and the Commission’s only action here has been to accept the CAPS Funding Schedule as just and reasonable.⁴³ “Mere approval of or acquiescence in the initiatives of a private party is not sufficient” to establish governmental action.⁴⁴

⁴⁰ See, e.g., *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) (holding that government could not require public school teachers to pay fees to the school teachers’ union not used for purposes germane to the reason for the union’s existence); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 522 (1991) (holding that “[b]y utilizing petitioners’ funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as ‘an instrument for fostering public adherence to an ideological point of view he finds unacceptable’) (internal quotations omitted)).

⁴¹ *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (stating that the First Amendment applies to governmental action, and it ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech, even where those decisions take place within the framework of a regulatory regime such as broadcasting).

⁴² *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (*Metropolitan Edison*).

⁴³ See *Williston Basin Interstate Pipeline Co.*, 72 FERC ¶ 61,074, at 61,361 (1995) (finding that “[t]he Commission’s establishment of a reasonable rate is not in any way equivalent to . . . government compulsion” that the Supreme Court has found to violate the First Amendment and also finding that “the Commission’s mere act of reviewing a pipeline’s rates and costs does not convert the pipeline’s act of making charitable donations into state action triggering First Amendment rights”); *Williston Basin Interstate Pipeline Co.*, 76 FERC ¶ 61,066, at 61,381 (July 19, 1996) (finding that “allowing these *de minimis* costs as a pipeline business expense does not convert these expenses into the Commission’s ordering this conduct, and does not constitute compelled speech on the ratepayers”).

⁴⁴ *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982) (*Blum*).

21. While the government can be held responsible for a private decision “when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State,”⁴⁵ no such compulsion exists here. Indeed, to the extent we are able to identify a motivating force behind PJM’s proposal, it is PJM stakeholders themselves, approximately 81.18 percent of whom favored the CAPS Funding Schedule, including 100 percent of the end user customer segment that will bear the cost of the funding.⁴⁶

22. None of the other indicia for determining whether action by a private party can be considered governmental action are present here. This is not a case where a “private party exercise[s] powers which are traditionally exclusively reserved to the state.”⁴⁷ The Supreme Court has held that the provision of electric utility services is not a power reserved exclusively to the state.⁴⁸ Nor is there “a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.”⁴⁹ The granting of a governmental approval by itself is not sufficient to create a nexus that establishes governmental action.⁵⁰ Consequently, we find that the facts and circumstances of this case do not evidence any nexus between the Commission and PJM’s action that would permit one to conclude that PJM’s action may be fairly treated as Commission action. On the contrary, the

⁴⁵ *Id.* at 1004; *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (same).

⁴⁶ PJM Transmittal Letter, Docket No. ER16-561-000 (Feb 29, 2016) at 12; <http://www.pjm.com/~media/committees-groups/committees/mc/20151022/20151022-item-1-caps-voting-report.ashx>.

⁴⁷ *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir.1992) (*Wolotsky*).

⁴⁸ *Metropolitan Edison*, 419 U.S. at 353.

⁴⁹ *Wolotsky*, 960 F.2d 1331, 1335; see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (*Burton*) (holding that refusal by a restaurant, which was operated by private owner under lease in a building financed by public funds and owned by an agency of the State of Delaware, to serve a black man solely on account of color was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment).

⁵⁰ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972) (holding that issuance of a state liquor license to a private club that refused to serve a black man on the basis of race did not establish a nexus between the state and the private club “approaching the symbiotic relationship between lessor and lessee that was present in *Burton*”).

Commission's action here is limited to the acceptance of the CAPS Funding Schedule as just and reasonable. PJM developed the CAPS Funding Schedule independently and based on its own assessment of the efficacy of the stakeholder process.⁵¹

23. We thus find that no action by either PJM or the Commission in this matter represents governmental action for purposes of the First Amendment. Nevertheless, assuming *arguendo* that a court could find governmental action here, we consider Talen/Essential Power's contention on rehearing that Commission acceptance of the CAPS Funding Schedule results in unconstitutional compelled speech.

24. Talen/Essential Power argue that this case is similar to cases such as *Abood*, where state action compelled persons to become members of some association, and the association required payment of fees that funded speech that supported the association's aims but that some members found objectionable. In *Abood*, a group of nonunion public school teachers challenged an agreement that required them, as a condition of their employment, to pay a service fee equal in amount to union dues. The teachers alleged that the union's use of their fees to engage in political speech violated their freedom of association.⁵² The Court found that the First Amendment did not prohibit the collection of fees to cover the cost of collective bargaining.⁵³ But the First Amendment did protect the nonunion teachers from having to contribute to the union for the purpose

⁵¹ The court in *Braintree Elec. Light Dept. v. FERC*, 550 F. 3d 6 (D.C. Cir. 2008) expressed the concern that given the decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), state action might apply to a state sanctioned monopoly, at least in the First Amendment context. However, as discussed *infra*, *Abood* and its progeny dealt with explicit state requirements to join or fund a private organization, while, in the regulatory context, the Commission's authority is to determine whether rates are just and reasonable and not unduly discriminatory or preferential. Here, the PJM stakeholders themselves determined that funding CAPS would serve a legitimate corporate and regulatory purpose by enhancing the participation by state-designated organizations representing consumers in their states. As discussed above, the Commission agreed, and we affirm here, that funding CAPS is a reasonable business expense of PJM which will benefit ratepayers by increasing responsiveness to the needs of customers and other stakeholders and by making the stakeholder process more inclusive, transparent, and robust.

⁵² 431 U.S. at 211-13.

⁵³ *Id.* at 232.

of promoting goals they did not share in common with the union.⁵⁴ In essence, the nonunion teachers in *Abood* were being required, through the mandatory fee, to associate with other persons, i.e., the union members, for the purpose of promoting the union's political and ideological goals. The Court held that just as the First Amendment protects a person's right to associate to promote political and ideological goals, the First Amendment also protects a person's right not to associate with others in such activities.⁵⁵

25. The Supreme Court similarly found unconstitutional compelled speech in *Lehnert v. Ferris Faculty Ass'n*.⁵⁶ There the Court held that it violated the First Amendment to assess dissenting members of a state college's exclusive faculty bargaining representative costs of the representative's lobbying, electoral, and other political activities that did not relate to the representative's collective bargaining agreement. The Court found that "[b]y utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'"⁵⁷

26. Nothing similar is occurring here. First of all, the CAPS Funding Schedule represents a charge that PJM members pay to PJM as part of PJM rates. PJM will not use the proceeds to promote its own opinions, whether political, ideological, or commercial. On the contrary, PJM will use the funds to improve the stakeholder process in a way that is likely to benefit wholesale customers, as well as retail customers. As the Supreme Court made clear in *Lehnert*, the compelled speech cases distinguish between fees and charges that support activities that are part of an association's core function and fees and charges that go beyond this and support political, ideological, or other goals that are not

⁵⁴ *Abood*, 431 U.S. at 234-235. See also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 568 (2005) (Thomas, J. concurring) (stating that "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control").

⁵⁵ *Id.*

⁵⁶ 500 U.S. 507 (1991).

⁵⁷ *Id.* at 522 (quoting *Wooley*, 430 U.S. at 715)).

part of this function.⁵⁸ As we have explained above, the CAPS Funding Schedule covers matters that fall within our jurisdiction under FPA section 205, and it does so in a way that meets the requirements of section 205. In other words, it covers matters that are part of PJM's internal operations that directly affect jurisdictional rates and does so in a way that we have found to be just and reasonable.

27. Indeed, in *Braintree Electric Light Department v. FERC*,⁵⁹ the Court of Appeals for the District of Columbia Circuit applied these precedents to find that RTO rates that cover "informational lobbying" did not violate the First Amendment principles articulated by the Supreme Court, as such expenses are "germane" to the RTO's "purpose" because they "are necessarily or reasonably incurred for the purpose" of the RTO.⁶⁰ The PJM expenditures at issue here are similarly germane to PJM's activities as an RTO because they assure that customer views are expressed and considered in the Tariff-required stakeholder meetings leading to the development of rate and tariff proposals essential to PJM's operations.

28. These points are sufficient to show that even assuming the presence of governmental action, the CAPS Funding Schedule does not result in unconstitutional compelled speech in support of positions taken by PJM. In addition, we note that to the extent that Talen/Essential Power are arguing that funding CAPS's participation in the PJM stakeholder process represents unconstitutional compulsion to express political, ideological, or other positions taken by CAPS that they or others disagree with, that argument both misapplies Supreme Court precedent and mischaracterizes the facts. First of all, not all requirements to subsidize speech one disagrees with constitute compelled

⁵⁸ See also *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for purpose of regulating legal profession or improving quality of legal services).

⁵⁹ 550 F.3d 6 (D.C. Cir. 2008).

⁶⁰ *Id.* at 14.

speech in violation of the First Amendment.⁶¹ What the First Amendment prohibits is a funding requirement that causes a dissenter to become “an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”⁶² By contributing to funding CAPS’s participation in the stakeholder process, neither Talen/Essential Power, nor any other stakeholder becomes identified with CAPS’s views in a way that causes them to become an instrument for fostering public adherence to them.⁶³

29. On the contrary, all stakeholders remain free to express their views within the stakeholder process and to support or oppose any position that CAPS advances. Indeed, companies such as Talen Energy Marketing, LLC, one of the Talen Companies, and Essential Power Rock Springs, LLC, one of the Essential Power Companies, which are voting members of PJM,⁶⁴ are free to vote against any proposals that CAPS, which is not a voting member, makes in the stakeholder process. In short, they remain free to disassociate themselves expressly and publicly from CAPS’s beliefs and ideas within the forum in which CAPS expresses them and to encourage others to do so also. One does not foster public adherence to CAPS’s views by enhancing one’s opportunity to find fault with them.

⁶¹ *Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 221, 233 (2000) (holding that that the First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech, including speech that some students may object to, provided that the funding is allocated in a way that is viewpoint neutral).

⁶² *Wooley*, 430 U.S. at 715.

⁶³ *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980) (holding that the First Amendment free speech rights of a shopping center owner were not violated by a state law permitting individuals to exercise free speech and petition rights on shopping center property because the shopping center was not limited to personal use of its owner, and views expressed by members of public thus would not likely be identified with those of owner; no specific message was dictated by state to be displayed on the property, and the owner was free to disassociate himself publicly from views of speakers or handbillers).

⁶⁴ *See* PJM Members List at <http://www.pjm.com/about-pjm/member-services/member-list.aspx>.

The Commission orders:

The rehearing request of Talen/Essential Power is denied as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.