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ENVIRONMENTAL &
ENERGY LAW PROGRAM

PJM Board of Managers
PJM Interconnection
2750 Monroe Boulevard
Audubon, PA 19403

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Dear Chair Conboy and Members of the PJM Board:

Yesterday, the Board received a letter from former FERC Chair Kelliher about Section 205 filing rights. Mr. Kelliher's letter states that Section 205 "reserves [filing] rights to public utilities, and only public utilities." In my opinion, the Federal Power Act (FPA) does not prevent PJM from continuing to provide filing privileges to entities that are not utilities.

Since FERC approved PJM's ISO status in 1997, the Members Committee has enjoyed exclusive privileges over Section 205 filings that amend the Operating Agreement. The Members Committee does not own or operate any facilities subject to FERC's jurisdiction and therefore is not a "public utility" under the FPA. Although the Members Committee has no "right" to file under Section 205, PJM has delegated authority to the Members Committee to dictate the content of Section 205 filings about the Operating Agreement.

PJM may similarly delegate authority to the Organization of PJM States (OPSI). OPSI, like the Members Committee, has no "right" to file under Section 205. Nonetheless, PJM could give OPSI the same kind of privileges the Members Committee now holds or adapt other RTOs' approaches for providing filing privileges to state officials or market participants.

I am enclosing a memo I posted earlier this month about FERC's authority to reform PJM's governance. The memo provides background on FERC's regulation of RTO governance and discusses potential changes to PJM's Section 205 filing procedures and the nominating committee. The memo responds to several of Mr. Kelliher's legal claims that also appear in an affidavit filed at FERC by the Electric Power Supply Association.¹

¹ [Post-Conference Comments of the Electric Power Supply Association](#), FERC Docket AD26-7, Aug. 21, 2026.

Finally, I urge the Board to reject transmission owners' claims that they have special authority over regional transmission planning. In 2024, the Board concluded that "CTOA revisions must be made" to move the Planning Protocol from the Operating Agreement to the Tariff.² It therefore agreed to the transmission owners' amendments to the Consolidated Transmission Owners Agreement (CTOA). FERC rejected those amendments, and the D.C. Circuit affirmed FERC's order in June. As I outlined in a comment I filed at FERC,³ there is no need to again tie governance reforms to utility-proposed CTOA changes.

I appreciate the Board's interest in reforming PJM's governance and am available to provide any additional information that might assist the Board.

Thank you,

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² [Letter from Chair Mark Takahashi](#), May 31, 2024.

³ [Post-Conference Comments of the Harvard Electricity Law Initiative](#), FERC Docket AD26-7, Aug. 21, 2026.

FERC Has Options for Modernizing PJM's Governance

Ari Peskoe, Harvard Electricity Law Initiative

The surge in data-center energy demand and related power price increases has put the spotlight on PJM processes that can culminate in market-rule changes or can reinforce the status quo. In July, FERC hosted a technical conference about PJM's governance. Parties filed comments in August, and FERC is convening confidential settlement discussions about reforms.

In this piece, I discuss FERC's legal authority to approve or order changes to PJM's governance. I focus on three issues: filing rights, the committee that nominates potential board members, and the utilities' claim that they have special control over PJM's transmission planning.

I conclude that FERC's jurisdiction to order governance reforms allows it to modify filing-rights allocations and adjust the nominating committee. In addition, the utilities have no authority to impose conditions on any filing rights transfer over the regional planning protocol.

FERC Has Sweeping Authority over Regional Transmission Governance

FERC's oversight of RTO governance is rooted in its duty to define, detect, and eliminate undue discriminatory conduct. Federal courts have explained that FERC has "[wide discretion to determine what constitutes undue discrimination](#)" and "[broad authority to remedy undue discriminatory behavior](#)."

FERC has connected governance of multi-utility transmission agreements to undue discrimination since at least the 1970s. In a 1987 case, the D.C. Circuit summarized that FERC's prior regulation of regional transmission governance was a "[proper exercise of its power to prevent undue discrimination](#)."

PJM's current governance was designed to address undue discrimination by utilities. In 1996, FERC concluded that utilities had incentives and abilities to stymie the development of competitive wholesale markets through their control over transmission. To foster non-utility investment in power plants, [FERC ordered utilities](#) to file "open access" transmission tariffs that would provide all transmission users with fair service.

FERC recognized, however, that its open-access mandate would be of limited value if utilities continued to operate the system themselves. It therefore encouraged utilities to cede control over their transmission networks to system operators who had no financial stake in the markets. FERC believed that independent control of transmission operations

and planning was essential for opening utility-owned networks to new entrants and allowing power prices to be set through competitive markets.

To receive FERC's approval to operate transmission, FERC required newly created RTOs to show that their governance would prevent "[control, and appearance of control, of decision-making by any class of participants](#)" or individual companies. Based on this Independence Rule, FERC rejected the utilities' initial PJM proposals because they provided the utilities with "[ultimate control](#)" over regional decisions. FERC rejected [other RTO governance proposals](#) for similarly providing utilities with too much power and failing to establish an independent RTO.

The Independence Rule is a remedy for undue discrimination. The D.C. Circuit recently confirmed that [FERC must enforce RTO independence](#). Governance reforms anchored to the RTO Independence Rule should not be legally controversial.

Governance reforms might also be justified if they are tied to evidence about unjust and unreasonable wholesale or transmission rates. For instance, at the FERC technical conference, PJM members and stakeholders blamed slow decisionmaking processes for high prices. FERC might conclude that reforms aiming to break through any bureaucratic morass at PJM could cure unjust and unreasonable rates.

Reforms that can boost the scale and pace of infrastructure development might also remedy unjust and unreasonable rates. PJM has been plagued by [a surge in demand](#), which is driving up prices. PJM cannot itself bring supply online to meet that surge. Any infrastructure buildout requires state support.

A finding here that state engagement in governance can remedy unjust and unreasonable rates would be consistent with recent precedent. In Order No. 1920, [FERC found that state involvement in planning](#) will ultimately lead states to permit projects vetted through the RTO process, which will remedy unjust and unreasonable rates.

State engagement, consultation, and decisionmaking authority do not threaten PJM's independence, [as Constellation claims](#). The seminal orders on RTO independence and the [codified RTO Independence Rule](#) are explicitly about market participants and not state regulators or policymakers. PJM implements the Independence Rule through its Bylaws, Operating Agreement and personnel policies that likewise prohibit connections between its employees and officers with market participants. There is no legal basis for finding state decisionmaking authority contravenes the Independence Rule.

FERC's conclusion in 2002 that CAISO's state-appointed board conflicted with the independence rule is distinguishable and not relevant here. In the midst of the Western Energy Crisis and in response to a utility bankruptcy, the California Department of Water

Resources became the largest electricity buyer in the wholesale market. FERC concluded that “[having a market participant who controls the Board is an untenable situation.](#)” FERC also found that a California-controlled board would “undermine the prospect of broader regional cooperation throughout the West.” Neither threat to independence would apply to the 13-state PJM region today.

[PJM market participants' legal arguments against states' involvement](#) threaten to disrupt productive arrangements in other RTOs. FERC should use this proceeding to reiterate that state engagement, consultation, and decisionmaking authority are consistent with the Federal Power Act's collaborative federalism framework.

FERC May Approve Proposals that Provide States with Filing Opportunities, and FERC Has Said that It Can Add Filing Rights over Utility Objections

Filing rights are at the heart of regional governance. FERC may order changes to existing arrangements, including providing new filing privileges to states or removing privileges enjoyed by non-utility entities.

RTO filing rights are a pre-requisite for RTO independence. In 2000, FERC explained that “for the RTO to provide transmission service independent from market participants, [it must have independent control over its tariff.](#) . . . If the RTO does not have the independent right to seek appropriate changes to its tariff, it is difficult to see how that RTO could be viewed as providing a transmission service that is independent from market participants.”

RTO filing rights reinforce non-discrimination in markets and transmission service. Any tariff change must be approved by FERC. With each proposal to amend market or transmission rules, the tariff filer can implicitly favor particular market participants and prioritize their interests. Even facially neutral rules can benefit particular technologies, companies, or interests. RTO control over rule changes is meant to counteract market participants' incentives to tilt the market or transmission development in their favor.

To approve a proposed tariff amendment, FERC must find only that the proposal is “just and reasonable” and need not conclude that the proposal is the best among possible options. Market participants routinely disagree about market reforms, and it is often plausible that FERC could approve any of their proposals. But only the entity or entities with “filing rights” can impose their preferences on the industry (with FERC approval).

The D.C. Circuit has established one prohibition on FERC's regulation of filing rights. Utilities and other owners or operators of facilities providing jurisdictional services have a Congressionally created right to propose rates, terms, and conditions for their property. In *Atlantic City Electric*, the D.C. Circuit held that while an owner or operator may voluntarily

share its right with other entities or cede it entirely, [FERC may not order an owner or operator to surrender its filing right.](#)

Contracts between the RTO and the region's utilities specify which entity or entities may propose market or transmission rule changes to FERC.

The filing rights arrangement in PJM is unique among RTOs in two respects. First, the PJM utilities have the exclusive right to propose changes to regional transmission cost allocation. In the other regions, state officials or the RTO itself have opportunities to propose transmission cost-sharing arrangements. For instance, [state regulators can compel MISO](#) to file a cost allocation proposal when at least two-thirds of regulators support the proposal and MISO itself is already filing its own proposal.

Second, PJM's Members Committee, which is largely for-profit market participants, has exclusive authority to approve section 205 filings about energy market and regional transmission planning rules. ISO-NE is the only other RTO that gives market participants any such direct control, but through a more limited arrangement. When 60 percent of the members vote to approve a rule change but ISO-NE itself chooses an alternative, ISO-NE must file both options. FERC then picks between them.

The Members Committee's filing privileges are center stage in discussions at FERC. [PJM has proposed to take for itself the members'](#) filing privileges over energy market and transmission planning rules. Utilities unanimously endorse this approach. [OPSI and the region's governors](#) support it too, on the condition that states gain certain filing privileges. [Constellation wants](#) to maintain the Members Committee's authority, while other [market participants](#) say they may be open to changes.

Removing the Members Committee's filing privileges does not trip over the D.C. Circuit's prohibition on filing rights. The Members Committee is not itself a "public utility" under federal law because it does not engage in FERC-jurisdictional transactions. The Committee has no Congressionally created rights.

States similarly have no "rights" to file tariff amendments, but FERC could demand that PJM file state-approved rule changes. When states act through PJM filings, they are not themselves filing under section 205.

Utilities who argue that FERC has no authority to so order PJM are seeking to expand the D.C. Circuit's lone filing-rights prohibition.¹ FERC itself reads *Atlantic City* narrowly. Nothing

¹ The PJM utilities have relentlessly sought to expand the D.C. Circuit's *Atlantic City Electric* decision for their advantage. In ongoing litigation, the utilities are invoking *Atlantic City* to invalidate Order No. 1920 because it: 1) provides states with a one-time opportunity to propose a regional cost allocation method as part of the Order No. 1920 compliance process and 2) requires utilities to consult with states before filing future cost

in the decision, FERC concluded, prevents it from [conferring filing rights on additional parties over utility objections](#). Supplementing the utilities' rights over regional cost allocation or PJM's rights over capacity with new privileges for another party would not force any party to surrender its rights, as *Atlantic City* prohibits.

Because the utilities would surely litigate, FERC would face some legal risk if it ordered PJM or the utilities to provide filing privileges to the states. Since *Atlantic City*, the utilities have sought to enlarge their monopoly power by pushing ahistoric theories about section 205. Section 205 codifies the FPA's core consumer protection safeguards, including requiring that rates be just and reasonable, demanding that utility publish rates and charged only that rate, and empowering FERC to hold rate cases, suspend a new rate's effectiveness, and order refunds. Courts and FERC have repeatedly rejected utilities' attempts to recast section 205 as vehicle for their control over regional transmission.

Alternatively, FERC could approve a proposal filed by PJM to "voluntarily give up, by contract, some of its rate-filing freedom under section 205," as the D.C. Circuit put it in *Atlantic City*. PJM might, for instance, adapt ISO-NE's jump-ball approach to provide states with filing privileges over resource adequacy issues. Such a voluntary decision by PJM to limit its own filing rights over an issue it currently controls would not be inconsistent with section 205.

State privileges in PJM would be enshrined in PJM's tariff and would supplement existing filing rights, leaving PJM's and the utilities' own section 205 rights intact. Those two features answer the objections a [1984 federal appeals court raised to state-compelled filings](#).

In that case, a state commission acting pursuant to state law directed the utility to amend its FERC-regulated tariff. The court worried that such state orders would leave FERC choosing among competing state directives about a single transmission tariff, would let state authority reach a filed federal rate, and would displace the utility's own judgment about its rates. According to the court, section 205 "allows the utility the choice among various reasonable rate practices."

None of those consequences could follow from tariff-based state privileges. A properly structured tariff would specify how states may act and would not allow states to file competing proposals under their own sovereign power. The filed rate doctrine prevents states from regulating transmission tariffs, but it does not prevent FERC from approving tariff-based procedures for state engagement, consultation, or decisionmaking.

allocation proposals. See also [the D.C. Circuit's 2026 decision on RTO independence](#) and a [2026 FERC order rejecting AEP's *Atlantic City* claims](#).

Tariff-based state privileges would allow PJM and the utilities to continue to file under section 205 whatever they choose and whenever they choose. States' privileges could be conditioned on PJM or the utilities making their own concurrent section 205 filing. Concurrent filings are required for MISO state regulators and ISO-NE market participants acting through the jump-ball option to exercise their filing privileges. In these regions, a non-utility proposal reaches FERC alongside a utility's filing rather than instead of it.

Structured that way, neither a voluntary concession by PJM nor a FERC mandate to add filing privileges would deprive anyone of the "choice" the court described.

FERC May Order Changes to PJM's Board Nominating Process

PJM's Operating Agreement empowers a committee consisting of one representative from each of the Members Committee's sectors and three PJM Board members to nominate potential Board members. [FERC reviewed and approved a prior iteration of this structure in 1997](#) and [reviewed and approved the current structure in 2002](#).

Unlike private utility companies whose governance is beyond FERC's reach, RTOs were created and are maintained through FERC-jurisdictional contracts. To ensure those contracts are just and reasonable and not unduly discriminatory, FERC reviews each and every provision, including those about [RTO procedures for choosing board members](#). To comply with its own governance practices, [PJM has requested waivers from FERC to deviate from its own nominating process](#).

Threats made in this proceeding to FERC's jurisdiction over RTO nominating committees overread a D.C. Circuit decision. For instance, utility PPL claims that a 2004 D.C. Circuit decision about the California ISO bars FERC from "[reaching into the internal governance of RTOs](#)". Such a sweeping interpretation of the case would undermine thirty years of RTO oversight and at least five decades of FERC orders reviewing regional transmission governance.

CAISO is a narrow decision. In that 2004 case, the D.C. Circuit overturned a FERC order that directed the California ISO to replace its state-appointed board with new directors. [The panel concluded](#) that FERC's order amounted to an "unprecedented invasion of internal corporate governance" that could not be sustained by FERC's limited jurisdiction over utility practices that "directly affect the rate."

FERC has not broadened that holding. As recently as 2019, FERC reiterated that [membership rules for RTO stakeholder groups](#) "directly affect" FERC filings and therefore directly affect rates and fall under FERC's jurisdiction. For the same reason, RTO procedures for selecting board members are also within FERC's control. FERC's oversight

of these aspects of RTO governance prevents undue discrimination and supports compliance with the RTO Independence Rule.

The Utilities Do Not Enjoy Special Control over PJM's Transmission Planning

The utilities unanimously support replacing the Members Committee's filing privileges over the regional planning protocol with exclusive control by the PJM Board. The utilities claim that this change requires their approval and may demand governance concessions in their favor. [Exelon, for instance, says](#) that "any enhancement of section 205 rights over the [regional planning] process would be subject to negotiation of appropriate corresponding amendments to the [Consolidated Transmission Owners Agreement] CTOA satisfactory to both PJM and the PJM Transmission Owners."

[I filed a comment urging the Commission to reject these claims.](#) Thirty years ago, the transmission owners voluntarily provided the Members Committee with filing privileges over the planning protocol. Whether the PJM Board may have exclusive authority over the planning protocol is up to PJM, the Members Committee, and FERC. The Members Committee could agree to disempower itself through a section 205 filing or be disempowered under section 206. The transmission owners' consent is legally irrelevant.