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September 28, 2026

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

Dear Chair Conboy and Members of the PJM Board:

I am writing to respond to some of the arguments in support of granting the Organization of PJM States Section 205 rights over the PJM tariff. In my opinion, these arguments strain to avoid the plain statutory language, misstate relevant court precedent, and ignore the history of the Federal Energy Regulatory Commission's ("FERC" or "Commission") past grants of Section 205 filings rights to regional state committees. It is important that the Board of Managers have a correct understanding of the legal issues surrounding proposals to grant states direct or indirect filing rights over the PJM tariff. Board decisions based on a misapprehension could lead to years of litigation, prolonged regulatory and investor uncertainty that diminish investment in PJM at a critical point, and possible member withdrawal.

Section 205 of the Federal Power Act

Some argue that states have filing rights under Section 205 of the Federal Power Act. Interestingly, the proponents of this view avoid citing the statutory language so I will provide the relevant language for your consideration. It is short and unambiguous: "[N]o change shall be made by any *public utility* in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public."¹ What stands out is that Section 205 filing rights are reserved to "public utilities." There is no question that states are not "public utilities" and states are not even referenced anywhere in Section 205. That answers the question of whether a regional state committee or state commissions can be directly vested with Section 205 filing rights: that is barred by the Federal Power Act, which reserves these rights to public utilities, and only public utilities. The Commission has consistently acknowledged that in the past.²

This limitation makes sense, as the origin of Section 205 was to ensure that the federal government has oversight over the rates and business practices of natural monopolies.

¹ Federal Power Act § 205(d), 16 U.S.C. § 824d(d).

² *ISO New Eng. v. New Eng. Power Pool*, 106 FERC ¶ 61,280 at P 79 (2004) (denying NECPUC request for concurrent Section 205 filing rights because "[t]he FPA grants Section 205 filing rights to public utilities only, and the Regional State Committee will not be a public utility."); *Midwest Indep. Transm. Sys. Operator, Inc.*, 122 FERC ¶ 61,283 at P 64 (2008) (denying OMS request for direct Section 205 filing rights on the grounds that "Section 205 grants filing rights to jurisdictional public utilities, not state agencies or commissions").

Accordingly, utilities are permitted to exercise a range of business judgment, so long as their rates remain within a range of reasonableness. This same framework exists in state law, where utilities make filings under Section 205 equivalents and state utility commissions act under Section 206 equivalents to impose changes in the rates, terms and conditions of state-jurisdictional services. It would turn the Federal Power Act on its head for states to gain more filing authority over utilities than FERC itself has, and more than the states have over utilities under their own state statutes.

Congress made a conscious choice in drafting the Federal Power Act to grant Section 205 rights to public utilities, and not to states. Section 201(f) is clear: no provision in Part II, which includes Section 205, applies to or includes a state or any political subdivision unless the provision specifically states otherwise. And no provision specifically vests states with the right to change the utility's tariffs; instead, a state must file a complaint under Section 206 and demonstrate that the existing tariff is unjust and unreasonable.

The courts have also held that states cannot exercise indirect Section 205 filing rights. This question was asked and answered more than forty years ago in *Massachusetts Department of Public Utilities v. FERC* (“*Mass. DPU*”).³ In *Mass. DPU* a state commission ordered the Western Massachusetts Electric Company, a public utility under the FPA, to make a Section 205 filing to change a rate-setting practice objectionable to the state commission. The public utility dutifully made the filing, but FERC rejected it, finding that Section 205 “governs changes that the utility itself proposes, not those that a state regulator requires it to propose.”⁴ As future Supreme Court Justice Breyer summarized the FERC rejection: “If Massachusetts objects to the rule, says FERC, it should file a complaint in accordance with [Section 206].”⁵ The court agreed with FERC. Under Breyer’s reasoning, Section 205 filings are limited to when a public utility seeks to change its tariff for reasons of its own, not when a public utility desires no changes, but a state commission does. ***As Breyer put it, Section 205 “governs changes that the utility itself proposes, not those that a state regulator requires it to propose.”***⁶

The *Mass. DPU* court was troubled by the prospect of allowing a state to sidestep its burden under Section 206 through the device of commanding a public utility to make a Section 205 over its objections, effectively seizing the Section 205 filing rights for the state. Allowing a state to require a public utility file a Section 205 tariff change is an end run around the Federal Power Act. That was true in 1984 and remains true in 2026.

Some proponents of sharing Section 205 public utility filing rights with non-public utility states insist their notions are consistent with *Atlantic City Electric Co. v. FERC* (“*Atlantic City*”),⁷ pointing to a stray sentence in the decision, namely: “Of course, utilities may choose to voluntarily give up, by contract, some of their rate-filing *freedom* under section 205.”⁸ This attempt is at best misleading. First, the only sharing of Section 205 filing rights discussed in

³ 729 F.2d 886 (1st Cir. 1984).

⁴ *Id.* at 886.

⁵ *Id.*

⁶ *Id.*

⁷ 295 F.2d 1 (D.C. Cir. 2002).

⁸ *Atlantic City*, 295 F.2d at 10 (emphasis added).

Atlantic City was the allocation of Section 205 filing rights between PJM, a public utility, and PJM public utility members.⁹ The court was not troubled by the sharing of Section 205 filing rights *between* public utilities, especially where one public utility would be operating the assets of other public utilities. That does not mean the court embraced the idea of sharing Section 205 filing rights with non-public utility states.

Second, the quote is misrepresented as implying *Atlantic City* applauds the notion of sharing Section 205 *filing rights* with state complainants. But that is not what the quote says. The quote does not refer to public utilities giving their *filing rights* to someone else, but only to public utilities “giv[ing] up ... some of their *rate-filing freedom* under section 205.” “What “rate-filing freedom” was the court envisioning? Not the sharing of Section 205 filing rights with a non-public utility, to be sure. It was a public utility relinquishing its right to make unilateral changes in rates for a time as part of a fixed rate contract.¹⁰ Advocates of sharing Section 205 public utility filing rights with non-public utility states effectively rewrite the *Atlantic City* sentence to read “Of course, utilities may choose to *voluntarily give, by contract*, some of their *rate-filing freedom* [*rights to a non-public utility*] under section 205.”

The central holding of *Atlantic City* is that “the power to initiate rate changes [under Section 205] rests with the utility and cannot be appropriated by FERC.”¹¹ That is true whether FERC seeks to appropriate a public utility’s Section 205 filing rights for itself or for the use of a regional state committee and state commissions. In harsh language the *Atlantic City* court concluded “FERC thereby eliminated the very thing that the statute was designed to protect – the ability of the utility owner to ‘set the rates it will charge prospective customers, and change them at will,’ subject to review by the Commission.”¹² Sharing PJM’s Section 205 filing with the states would eliminate the ability of PJM to “set the rates it will charge” and “change them at will,” subject to Commission review. Instead, PJM could be compelled or coerced to file Section 205 tariff changes it actively opposes and believes unjust and unreasonable.

Past Commission Decisions to Share Section 205 Filing Rights With Regional State Committees Were Improvident and Never Tested in the Courts

The only other argument offered by proponents of state filings rights is the Commission granted filing rights to certain regional state committee in the past, those grants have lingered in various regional transmission organization tariffs for years, and therefore they must be lawful. The suggestion seems to be that the Commission would only have taken this action after careful consideration of its legal authority and this sharing must have been upheld by the courts at some point. Both assumptions are incorrect.

First, the orders that authorized or *required* the sharing of RTO Section 205 filing rights with the states have no discussion of the Commission’s legal authority in this area. The first such Commission order that authorized or imposed the sharing of RTO Section 205 filing rights was

⁹ *Id.* at 9, 11.

¹⁰ *Id.* at 11.

¹¹ *Id.* at 10.

¹² *Id.* (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 855 (D.C. Cir. 1976).

*Southwest Power Pool, Inc.*¹³ This order is generally thought of as accepting a consensus regional state committee proposal. Having revisited the order for the first time in many years, that is a poor understanding of what took place.

In *SPP I*, the Commission rejected the regional state committee proposals submitted by both SPP and the Supporting Commissions¹⁴ and “directed” SPP (in the days before *NRG Power Marketing, LLC v. FERC*¹⁵) to file a new regional state committee proposal that would require SPP to file regional state committee proposals in certain areas “[i]f the RSC reaches a decision.”¹⁶ The Commission specifically rejected a Supporting Commission proposal that an affirmative vote of two-thirds of RSC members be required before SPP would be compelled to make such a Section 205, leaving open the prospect that a bare majority of RSC members would suffice to compel a filing.¹⁷ The Commission discussion was highly end-result oriented. It is clear the sharing of RTO Section 205 filing rights was motivated by a laudable desire for comity with state regulators, a policy goal divorced from legal considerations, however.

Interestingly, there was no Commission discussion of its legal authority under the Federal Power Act to share SPP’s Section 205 filing rights with non-public utilities in either *SPP I* or *SPP II*. Frankly, this is remarkable in the immediate wake of *Atlantic City*. In fact, the only discussion of the lawfulness of the Commission’s actions came from a state commission, the Kansas Commission, which characterized the Commission’s directive in *SPP I* as “an improper and legally questionable delegation of Commission authority.”¹⁸ The Commission’s response was, at best, slippery. In *SPP II* the Commission dismissed the arguments that *SPP I* improperly compelled SPP to make Section 205 filings on behalf of the SPP regional state committee by noting the Commission’s directive was a condition to SPP’s RTO application, and since SPP did not withdraw its RTO approval filing it had “volunteered” to share its Section 205 filing rights with the SPP regional state committee.¹⁹ In approving the settlement, the Commission proudly announced that it did not authorize the regional state committee to prohibit SPP from making its own Section 205,²⁰ which hardly needed to be said after the Commission’s attempt to divest public utilities of their Section 205 filing rights was vacated by the court in *Atlantic City*.

The Commission’s later orders sharing RTO Section 205 filing rights with non-public utilities were erected on this foundation of sand. These subsequent orders did not reinforce this foundation. First, there was no discussion of legal authority in the Commission order compelling MISO to make Section 205 filings on behalf of the Organization of MISO States, just a one sentence reference to *SPP II*.²¹ Second, the Commission order granting indirect Section 205

¹³ 106 FERC ¶ 61,110 (“*SPP I*”) (Wood, Chairman, concurring) (Kelliher, Comm’r, concurring), *order on reh’g*, 109 FERC ¶ 61,010 (2004) (“*SPP II*”).

¹⁴ The Supporting Commissions were the Arkansas, Missouri and Oklahoma Commissions, *SPP I* at P 213.

¹⁵ 862 F.3d 108 (D.C. Cir. 2017).

¹⁶ *SPP I* at PP 218-219.

¹⁷ *Id.* at P 221.

¹⁸ *SPP I* at P 215; *SPP II* at P 86 (“[T]he Kansas Commission ... argue[d] that the Commission unlawfully delegated its responsibilities under the FPA to the RSC”), P 88 (“[T]he Kansas Commission argues that the February 10 Order erroneously allows the RSC to compel SPP to make a section 205 filing.”).

¹⁹ *SPP II* at PP 92, 93.

²⁰ *Id.* at P 93.

²¹ *Midwest Indep. Transm. Sys. Operator, Inc.*, 143 FERC ¶ 61,165 at P 30 (2013).

rights to NESCOE had no discussion whatsoever of its legal authority to do so.²² Finally, the Commission order requiring the Entergy Operating Companies to make Section 205 filings at the behest of the Entergy regional state committee followed the same pattern, no discussion of the Commission's legal authority and a citation to the *SPP I* and *SPP II* orders.²³

Second, there may be a belief that since Commission approvals of tariff provisions sharing RTO Section 205 filing rights have been around a long time, they must have been upheld by the courts at some point. Any such belief would be incorrect. ***In fact, none of the tariff provisions sharing the Section 205 filing rights of SPP, MISO and ISO-NE with regional state committees have been tested in the courts.***²⁴ There is no basis to believe the lawfulness of sharing public utility Section 205 filing rights with non-public utility states and regional state committees is settled as a matter of law.

RTO Independence

Arguments about state filing rights advancing RTO independence are baseless and wrong-headed. Nothing in the Commission's cases suggests that states must have filing rights to ensure RTO independence. The independence rule requires that RTOs must "be independent of any market participant . . . [including having] a decision making process that is independent of control by any market participant or class of participants."²⁵ The Commission defines market participant to include "Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions."²⁶ State requests for Section 205 filing rights are grounded in claims that state action is needed to protect the economic interests of the state and its citizens. In order to protect those interests, some PJM states have taken steps to suppress wholesale power prices.²⁷ Allowing states to compel a Section 205 filing would make PJM *less* independent than it is today by creating a decision-making process controlled by a single class of market participants – states.

Consequences of Commission Sharing PJM Section 205 Filing Rights with States

If PJM proposes sharing its Section 205 filing rights with OPSI and the PJM States my hope would be that the Commission would confront the legal issues ***for the first time*** and reject the proposal. But if the Commission approved that proposal, it is perhaps inevitable that there would be judicial review of this notion ***for the first time***. I think it unlikely a U.S. Court of Appeals would find a statutory provision expressly limiting filing rights to "public utilities" authorizes the Commission to grant or share those rights with non-public utility states and regional state committees.

²² *ISO New England Inc.*, 106 FERC ¶ 61,280 at P 79, *on reh'g*, 109 FERC ¶ 61,147 (2004).

²³ *Entergy Arkansas, Inc.*, 133 FERC ¶ 61,211 at P 15 (2010).

²⁴ There was judicial review of the 2004 ISO New England orders, *supra* note 22, but the lawfulness of sharing Section 205 filing rights with a regional state committee was not an issue before the court. *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 281-82 (D.C. Cir. 2006).

²⁵ 18 C.F.R. § 35.34(j)(1).

²⁶ 18 C.F.R. § 35.34(b)(2)(i).

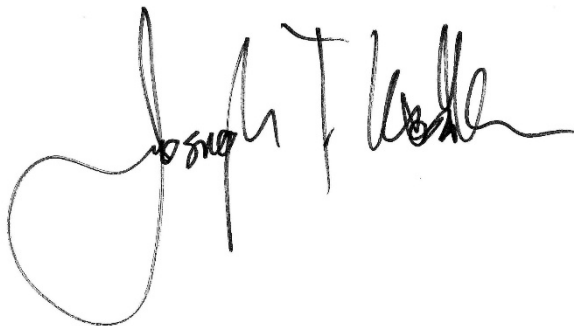
²⁷ *E.g., Hughes v. Talen*, 578 U.S. 150, 155-56 (2016); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

At the very least, there would be two or more years of uncertainty as litigation winds its way through the courts. That uncertainty would not improve PJM's ability to address current challenges. In a broader sense, I fail to see how sharing PJM filing rights with 13 states and the District of Columbia would improve PJM accountability and its speed of decisionmaking.

Providing states with direct or indirect Section 205 filing rights over the market design for wholesale sales would rewrite the Federal Power Act. It would also reinforce the perception – if not the reality – of political intervention in PJM markets, undermining confidence needed to attract investment at the very moment when PJM seeks to attract increased investment in new generation and transmission to meet surging demand. FERC and its predecessor have been charged for nearly 100 years with protecting the public interest and ensuring just and reasonable rates. PJM should not accept states' insistence, despite a statute, regulation and case law to the contrary, that awarding them Section 205 rights over the PJM markets is necessary to fulfill the duty entrusted to the Commission – not the states.

On a final note, I should disclose that I voted for the *SPP I* and *SPP II* orders and came to regret those votes. The Commission is an agency with limited powers and I always tried to respect those limits during my FERC service. Unfortunately, the Commission exceeded those limits in *SPP I* and *SPP II* and its progeny. I hope that mistake will not be compounded.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph T. Kelliher". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

Joseph T. Kelliher