

Explanation That Provisions of the CTOA Amendments Mischaracterized as “Ancillary” Support, Protect and Facilitate PJM’s Exercise of Planning Protocol Section 205 Rights and Response to the OPSI April 3 Letter to the PJM Board

In the course of public outreach efforts to explain and obtain feedback on the proposed amendments to the Consolidated Transmission Owners Agreement (“CTOA”) to give PJM unilateral Section 205 filing rights over the Regional Transmission Expansion Planning Protocol (“Planning Protocol”), concerns have been expressed that some of the proposed provisions are “ancillary” or unrelated to the key goal of providing those rights, and suggestions made that dropping them could create a consensus behind the proposal. The indicated Transmission Owners’ February 27 letter to the PJM Board collected the provisions we understand to be subject to this concern, and explained that none of them harm planning, undermine stakeholder processes, or provide the TOs any unwarranted advantage. Given the persistence of the argument that the provisions are nonetheless “ancillary,” this note explains that each provision is important and necessary to achieving the benefits of the proposal to provide PJM the necessary independence and authority to meet the planning challenges it faces. This note also directly responds to concerns raised in an April 3 letter from the Organization of PJM States (“OPSI”) to the PJM Board and explains certain additional revisions targeted at addressing some of the concerns expressed by OPSI and other stakeholders. While OPSI raises concerns with some of the proposed changes, we appreciate that the OPSI letter agrees that “the PJM Board should have exclusive authority to amend the regional transmission planning rules.”

The context of the CTOA and the proposed amendments is key. The amendments clarify the contractual basis on which TOs through the Transmission Owners Agreement-Administrative Committee (TOAAC) transferred to PJM control of nearly \$70 billion of their assets to help preserve and maintain a reliable electric grid, and PJM accepted that responsibility. Such foundational contracts are typically an integrated whole, and their balance would be upset by deleting individual provisions, particularly at the behest of third parties with their own interests. The same is true for the proposed CTOA amendments. The TOs supporting the revisions (now collectively representing ownership of nearly 99% of the transmission assets in PJM) and PJM Staff have each carefully and thoughtfully considered the proposed amendments, offering alternative language where appropriate, remaining mindful that the CTOA must express their mutual responsibility to maintain and enhance safe and reliable service. Below is an explanation of why provisions that have been mischaracterized as “ancillary” are necessary parts of the integrated whole and a response to certain concerns raised by OPSI, including certain changes to the proposed CTOA Amendments responsive to those concerns.

1. OPSI raises a concern that the parties are proposing changes to the definition of Regional Transmission Expansion Plan. Specifically, OPSI raises concern that the change in definition could make it more difficult for non-incumbent transmission developers to participate in the planning process. The TOs do not seek to change the meaning of the term but simply to clarify it. Nonetheless, the TOs have revised the relevant language to remove the reference to the “Parties” Transmission Facilities that appears to be the cause of OPSI’s concern.

OPSI also raises a concern with introducing the concept of a “CTOA Designated Party.” This concept will directly facilitate PJM’s ability, once it has full Section 205 rights, to rationalize and streamline the process of designating entities to construct RTEP projects under the Planning Protocol by placing non-incumbent designees and CTOA Parties on the same footing with respect to their obligations to PJM. OPSI raises a concern that this new definition could affect PJM’s approach to Designated Entity Agreements. The addition of this definition does not exempt any developer from having to execute a Designated Entity Agreement, but rather ensures that PJM treats incumbent designees and non-incumbent designees (i.e., CTOA Designated Parties) the same way as part of that process by extending certain obligations to non-incumbents that are designated to construct a project.

A potential issue was raised with a proposed modification of the definition of Transmission Owner. The concern was that the proposed definition as modified could be read to affect the status of certain current TOs. That was not the intent of this proposal. Nonetheless, the proposed modification of the definition of Transmission Owner has been withdrawn and no change in the definition is proposed.

2. The annual “State of the Agreement” meeting provided for in proposed Section 2.3 also will enhance PJM’s ability to carry out its planning functions effectively. The meeting with the PJM Board’s Reliability and Security Committee will focus on the TOs’ and PJM’s responsibilities with respect to planning and provides an annual “check-in” on how things are working and how they can be improved. Annual meetings among parties to an agreement that govern long term relationships such as the CTOA are often helpful.

OPSI raises concerns that the meeting could undermine the transparency and independence of the PJM Board’s decision-making process. The meeting described in Section 2.3 would *not* be with the entire PJM Board—it will be with the PJM Board Reliability and Security Committee. Therefore, no decisions can or will be made by the PJM Board at that meeting. The meeting will be open to all PJM CTOA signatories. In addition, to address OPSI’s concerns, the TOs propose to add language to Section 2.3 providing that an agenda and minutes of the “State of the Agreement” meeting will be published.

3. OPSI raises concerns regarding Section 6.3.5, which requires PJM to maintain its RTO status, “provided such status is consistent with this Agreement.” OPSI states the language could be read as limiting PJM’s independence. That is not the intent of this language. To clarify that OPSI need not be concerned on this point, the TOs propose to revise the language in Section 6.3.5 to read “Maintain its status as an RTO consistent with its obligations under this Agreement.”

4. OPSI raises concerns that Section 6.3.11 may limit PJM’s Section 205 filing rights. While this was not the intent of the parties, the parties nonetheless have determined that they can eliminate this proposed revision as other provisions, including newly proposed Section 7.9, discussed below, protect PJM’s independence and the TOs’ rights.

5. The CTOA and its amendments govern a PJM/TO relationship based primarily on an enormous level of investment, and document significant commitments made to share important rights and responsibilities. A contract of this gravity requires the highest level of contractual protection available under the Federal Power Act. Section 9.16.3 of the proposed amendments reflects the reality that PJM has been a signatory to the CTOA since 2006 and actively negotiated that agreement setting out its and the TOs' respective rights and responsibilities. The process has also been undertaken with respect to the CTOA amendments. The CTOA itself was negotiated in light of the settlement of the *Atlantic City* litigation in which the court strongly affirmed the TOs' rights. Section 9.16.3 protects PJM's contractual rights and interests as well as those of the TOs. This is a matter of great importance given PJM's proposal to extend its planning to a full 15-year period and to broaden its use of scenario-based planning. PJM has already seen its planning decisions subject to repeated court challenges, which though unsuccessful have imposed costs, delay, and uncertainty on the system. Weakening the protections for the contractual provisions that underlie PJM's authority and, indeed, its very existence, would undermine PJM's independence and effectiveness at the very time it should be strengthened.

OPSI raises concerns that this contractual protection would apply not just to the CTOA provisions to which it is tailored, but more broadly, thus affecting FERC's ability to review just and reasonable *rates* that flow from those provisions. That is not the case. First, Section 9.16.3 only protects a discrete and identified portion of the CTOA—those provisions that govern the transfer of rights and responsibilities to PJM and the exercise by PJM and the TOs of their respective rights and commitments. Second, Section 9.16.3 does not apply to any Tariff changes proposed by PJM pursuant to its Section 205 rights, or to Tariff changes proposed by the TOs pursuant to the Section 205 rights they retained. Changes proposed by either the TOs or PJM will continue to be considered by FERC under the statutory just and reasonable standard.

6. Section 2.2 of the proposed amendments makes clear that the responsibilities the CTOA transfers to PJM, and PJM's corresponding commitments to the TOs, are to be exercised by the PJM Board and the Office of the Interconnection subject to the supervision and oversight of the PJM Board. While it has always been the case that the PJM Board acts independently and in accordance with its contractual obligations, in the past, votes of the PJM Members Committee have impacted PJM's ability to carry out its responsibilities. While it is trying to plan for the energy transition, PJM should not be vulnerable to interests that seek inappropriate and "undue influence over the operation of the PJM Region," in violation of Operating Agreement, § 7.1(i)(C). Section 2.2 thus makes clear that planning rights and the other responsibilities that have been transferred were transferred exclusively to the independent PJM Board or the Office of the Interconnection acting under its supervision and oversight. Moreover, as noted in the indicated TOs' February 27 Letter, proposed Section 7.5.1(v) ensures the existing stakeholder processes remain undisturbed and that PJM can continue to use feedback from stakeholders to develop Planning Protocol or other Tariff term and condition changes. Additionally, all stakeholders, including the TOs, will retain their rights to participate fully in proceedings before the Commission.

7. New Section 7.9 would prohibit both the TOs and PJM from making Section 205 filings inconsistent with the CTOA without the consent of their contractual counterparty, with the

TOs acting collectively under the CTOA to provide such consent to a PJM filing. Section 7.9 reinforces the contractual obligations of the TOs and PJM and protects them against demands by third parties to make Section 205 filings proposing changes that the TOs or PJM, respectively, have determined are inconsistent with the CTOA. This provision would not prevent stakeholders from seeking changes to the Tariff, including the Planning Protocol, or the CTOA through a Section 206 complaint.

Section 7.9 should also be read in connection with Section 7.6, which has been part of the CTOA since it was filed, and the Dispute Resolution Procedures added as Attachment B. Section 7.6 establishes the current process for resolving filing rights disputes. Once Attachment B is added to the CTOA, in addition to the current mechanism for resolving disputes as to whether a proposed Planning Protocol change is in fact within PJM's Section 205 filing rights, rather than falling within the TOs filing rights (Section 7.6), there will be a mechanism for resolving disputes as to whether a Planning Protocol provision may otherwise infringe on TOs' retained rights (Attachment B). Conversely, PJM will be able to use those same provisions to address a TO filing it believes contravenes the CTOA. In either case, as noted in the February 27 Letter, PJM will continue to independently exercise its own judgment to interpret the terms of the CTOA. If the TOs dispute that determination, the dispute will be resolved under one of the two dispute resolution provisions in the CTOA. If PJM's views prevail, PJM is free to make the Section 205 filing, as will the TOs, if PJM is the objecting party. The rights of the party that does not prevail to file a Section 206 complaint is specifically preserved.

8. Concerns have been raised by OPSI and others regarding Section 4.1.4(b)(ii) (and its parallel provision Section 6.3.4(b)(ii)) and Section 5.2. These provisions are intended to ensure that going forward there will be adequate coordination between PJM and a TO proposing a local project where PJM determines that an RTEP project may also address the local need. Nothing in these provisions affects PJM's ability to proceed with the RTEP project. The obligation to consult with the TO where an RTEP project would more efficiently and cost-effectively address a project that the TO has proposed will ensure that PJM's independent authority is advisedly exercised. By the same token, the revised CTOA provides that the individual TO is obligated to document its decision in the instance in which it believes it needs to proceed with its proposal to address unmet local needs and policies in order to stay compliant with its statutory responsibilities. These CTOA coordination provisions do not replace existing Attachment M-3 and PJM Manuals processes. Rather, they will facilitate the annual planning process to ensure that coordination will continue as the Planning Protocol and other Tariff provisions evolve over time. And the review of any rates associated with projects impacted by these provisions will remain unchanged. As stated above, protections applicable to the CTOA do not require the Commission to "presume" that the rates for projects that may be subject to the process set forth in Sections 4.1.4(b)(ii) and 6.3.4(b)(ii) are just and reasonable.

Similarly, the addition of the word "replace" to Section 5.2 merely confirms now-settled law as decided by the DC Circuit. Section 5.2 appropriately recognizes a TO's ability to plan for the replacement of its assets already provided for in Attachment M-3 and does not alter PJM's existing ability to proceed with an overlapping proposed RTEP project. And similar to Sections 4.1.4(b)(ii)

and 6.3.4(b)(ii), the contractual protections under Section 9.16.3 will have no impact on the Commission's ability to regulate transmission spending in any way.

9. OPSI raises concerns regarding Section 7.3.1, which allows PJM and the TOs to designate discussions among PJM and the TOs as confidential and in some cases protected by attorney-client privilege. OPSI submits that the change is not necessary to the goal of providing PJM with the Section 205 filing rights regarding the planning process, and is incompatible with PJM's status as independent system operator. PJM administers the PJM Tariff and is responsible for implementing any change in the PJM rate design or joint transmission rates. Thus, PJM's advice on implementation of a proposed change to transmission rates and rate design is necessary. Section 7.3 is an important adjunct to providing PJM with filing rights over the planning process. If PJM makes a change to the planning process, the TOs may also need to modify the rate design provisions in Schedule 12 of the Tariff as necessary to reflect that change. PJM's assistance to the TOs in developing such changes is essential. Because a proposed Tariff change always requires initiating proceedings before the Commission, discussions regarding a proposed change inherently are in anticipation of litigation and subject to protection under attorney-client and work product privileges. Those privileges would extend to discussion among the TOs and PJM where they share a common interest in the proceedings. It is important for PJM and the TOs to be able to freely discuss the implementation of any changes in rate design and for those changes to be protected if litigation occurs. This allows a smooth implementation of changes to joint transmission rates and rate design, including those necessary to accommodate changes to the planning process made by PJM. Section 7.3 does not compromise PJM's independence because the CTOA amendments explicitly preserve PJM's right to take positions adverse to the TOs before state and federal administrative bodies and the courts.

10. Finally, in order to ensure a seamless transition in preparing the RTEP, the TOs have proposed to add Section 9.23 to the CTOA Amendments. That section would provide that until the effective date of PJM Tariff provisions governing the preparation of the RTEP, PJM will continue to prepare the RTEP pursuant to Schedule 6 of the PJM Operating Agreement without interruption. This provision will remove any doubt regarding which document governs how the RTEP is to be prepared and ensure that PJM transmission planning can proceed uninterrupted while the transition from Schedule 6 of the Operating Agreement to a schedule to the PJM Tariff is taking place.

To summarize, although the CTOA amendments contain no unnecessary or ancillary provisions, the TOs have attempted to address concerns raised by OPSI and other stakeholders by proposing additional changes to the CTOA revisions. The provisions discussed above will strengthen PJM's ability to carry out the Planning Protocol responsibilities transferred to it by the TOs and improve PJM's administration of those responsibilities.