

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.

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Docket No. ER16-561-000

**PROTEST OF THE PJM POWER PROVIDERS GROUP,
THE TALEN COMPANIES, AND THE ESSENTIAL POWER PJM COMPANIES**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ and the Commission’s December 18, 2015, Combined Notice of Filings #1, the PJM Power Providers Group (“P3”),² the Talen Companies,³ and the Essential Power PJM Companies⁴ submit this protest of the December 18, 2015 filing by PJM Interconnection,

¹ 18 C.F.R. § 385.211 (2015).

² P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. region. Combined, P3 members own over 84,000 MWs of generation assets, produce enough power to supply over 20 million homes and employ over 40,000 people in the PJM region covering 13 states and the District of Columbia. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, visit www.p3powergroup.com. On December 29, 2015, P3 filed a doc-less Motion to Intervene in the above-captioned proceeding.

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. On January 4, 2016, the Talen Companies filed a doc-less Motion to Intervene in the above-captioned proceeding.

⁴ The Essential Power PJM Companies are: Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, and Lakewood Cogeneration, L.P. On January 7, 2016, the Essential Power PJM Companies filed a doc-less Motion to Intervene in the above-captioned proceeding.

L.L.C. (“PJM”) in the above-referenced docket.⁵ In the filing, PJM submits a proposed amendment to its Open Access Transmission Tariff (“Tariff”) to add Schedule 9-CAPS (“Schedule 9-CAPS”), a Tariff mechanism designed to fund the Consumer Advocates of the PJM States, Inc. (“CAPS”), a non-profit organization formed to coordinate the participation of State Consumer Advocate⁶ offices in the PJM stakeholder process (the “CAPS Funding Proposal”).

I. EXECUTIVE SUMMARY

P3, the Talen Companies and the Essential Power PJM Companies understand and appreciate the significant value that consumer advocate participation provides to the PJM stakeholder process. Given the direct impact that PJM policies can have on consumer bills, consumer advocates play an important role as representatives of consumer interests, whose viewpoints are important and welcome. Consumer advocates have consistently and productively participated in the PJM stakeholder process for decades. These advocates exercise their voting rights at PJM stakeholder meetings, and P3, the Talen Companies, and the Essential Power PJM Companies welcome and encourage their continued participation.

⁵ *PJM Interconnection, L.L.C.*, Proposal to Fund Consumer Advocates of the PJM States, Inc., Docket No. ER16-561-000 (filed Dec. 18, 2015)(“CAPS Funding Proposal”).

⁶ Pursuant to the PJM Reliability Assurance Agreement Among Load Serving Entities in the PJM Region (“RAA”), “State Consumer Advocate” means “a legislatively created office from any State, all or any part of the territory of which is within the PJM Region, and the District of Columbia established, inter alia, for the purpose of representing the interests of energy consumers before the utility regulatory commissions of such states and the District of Columbia and the FERC.” PJM RAA at § 1.80.

However, while P3, the Talen Companies and the Essential Power PJM Companies appreciate the value of consumer advocates participating at PJM, P3, the Talen Companies and the Essential Power PJM Companies do not support funding that participation through tariff-based assessments. Amending the PJM Tariff is not an appropriate method of funding any special interest affinity group or member regardless of the constituency represented by the group. Proposed Schedule 9-CAPS, if approved, would set a legally problematic precedent and establish a policy with possible unintended consequences.

As a matter of policy, stakeholder advocacy should be supported financially by individual stakeholder interests. CAPS has non-tariff based funding sources available to it that should be used to support its participation in the PJM stakeholder process. State consumer advocates have participated in the PJM stakeholder process for decades and have hired expert witnesses and outside counsel to inform and represent their interests. This advocacy is and was presumably accomplished with state level resources. There is nothing in state or federal law or regulation to prevent CAPS from being funded the same way.

In essence, the PJM CAPS Funding Proposal asks the Commission to perform the role of a state legislature and appropriate money for state consumer advocacy. The Commission is being asked to fund something that presumably state legislatures have chosen not to fund. The Commission should not be pulled into the role of financial savior for those causes that cannot acquire funding from their appropriate financiers.

If the Commission accepts the proposed funding of an individual affinity group member, in this instance CAPS, why then would it not fund other groups in the same manner such as environmental groups, commercial groups, industrial groups, low income groups, financial associations, and trade associations? The CAPS Funding Proposal is a slippery slope⁷ to funding other affinity group members and is a road that the Commission should not travel.

Moreover, the Commission should reject the CAPS Funding Proposal for a variety of legal reasons. First, nowhere does the Federal Power Act (“FPA”) grant the Commission jurisdiction to approve charges to be assessed as part of wholesale transmission rates that are not associated with the provision of transmission service, but that instead are handouts sought by stakeholder groups to pursue their self-interests. CAPS’ advocacy efforts are not services rendered with PJM assets and are not legitimate business expenses of PJM.

Acceptance of Schedule 9-CAPS would amount to the Commission requiring PJM Transmission Customers that serve load to fund private speech with which they may disagree, and would thereby violate the First Amendment to the United States Constitution. CAPS’ speech cannot be considered government speech not only because CAPS’ message is not controlled by any sovereign government, but also because not all CAPS’ members are government representatives. Because each official position adopted by CAPS is subject to

⁷ This already has begun. Notably, Public Citizen, Inc. on this date submitted a letter in this docket seeking similar funding to that sought by CAPS in organized markets throughout the country. See, e.g., *PJM Interconnection, L.L.C.*, Intervention and Comment of Public Citizen, Inc., Docket No. ER16-561-000 (filed Jan. 8, 2016).

the unanimous consent of its members and Board of Directors, its non-governmental entity members effectively have control over CAPS' message.

Even assuming the Commission had jurisdiction to approve the CAPS Funding Proposal and assuming compelling funding were lawful in this circumstance, the CAPS Funding Proposal has not been shown to be just and reasonable and not unduly discriminatory. State Consumer Groups should not be given preferential treatment through a Tariff funding mechanism when other stakeholder groups are not similarly funded. Rather, it should be the states' responsibility to fund the activities of their consumer advocate groups.

The CAPS Funding Proposal also is unjust and unreasonable because it fails to contain appropriate cost controls. As proposed, CAPS will be able to nearly double its budget within approximately 10 years without any additional Commission approval. Furthermore, proposed Schedule 9-CAPS is inconsistent with cost causation principles since it imposes costs on PJM Transmission Customers that serve load, but the intended beneficiaries of CAPS' services are retail customers. The cost causation rule requires that approved rates reflect the costs actually caused by the customer who must pay those costs. The CAPS Funding Proposal does not meet the burden of showing how CAPS costs are caused by PJM Transmission Customers that serve load. Accordingly, the CAPS Funding Proposal has not been shown to be just and reasonable and should be rejected.

II. BACKGROUND

On December 18, 2015, PJM submitted proposed Schedule 9-CAPS as an amendment to its Tariff,⁸ seeking a Commission order by February 28, 2016 and an effective date of March 1, 2016.⁹ The CAPS Funding Proposal asserts that because State Consumer Advocates¹⁰ are charged by state statute with representing the interests of state consumers, the PJM stakeholder process may benefit from State Consumer Advocate participation¹¹ and such participation “provides useful information to PJM and the PJM stakeholders.”

CAPS is described as an organization of State Consumer Advocates that was formed to accept temporary, one-time funding resulting from a Commission-approved settlement stemming from an enforcement proceeding.¹² CAPS was formed to “facilitate State Consumer Advocates’ participation in PJM matters.”¹³ CAPS expects “to actively engage in the PJM stakeholder’ process,”¹⁴ advance the interests of utility consumers, and provide “a means for the PJM State Consumer Advocate Agencies to act in concert.”¹⁵

In relevant respect, Schedule 9-CAPS proposes the following:

⁸ CAPS Funding Proposal at 1.

⁹ *Id.*

¹⁰ *See supra* n.6.

¹¹ CAPS Funding Proposal at 3.

¹² *Id.* at 4 (citing *Constellation Energy Commodities Group, Inc.*, Order Confirming Rulings from October 4, 2012 Oral Argument, Docket No. IN12-7-000 (Oct. 10, 2012); *Constellation Energy Commodities Group, Inc.*, Order Approving PJM State Agencies Request for Adjustment to Authorized Allocation and Distribution Proposal, Docket No. IN12-7-000 (Nov. 5, 2012).

¹³ *Id.* at 3.

¹⁴ *Id.* at 5 (quoting CAPS’ website).

¹⁵ *Id.* at 5-6.

- PJM will collect CAPS' annual budget through a dedicated formula rate;¹⁶
- Annually, CAPS will submit its budget for the following calendar year by no later than June 1 to the PJM Finance Committee for comment;¹⁷
- PJM will inform the Commission of CAPS' final budget and post the CAPS funding rate on its website by no later than October 31;¹⁸
- PJM will submit an FPA Section 205 filing for Commission approval if CAPS' budget for any calendar year includes an increase in excess of 7.5 percent;¹⁹
- The CAPS funding rate is based on (i) an estimate of energy deliveries expected in the following calendar year and (ii) a true-up to account for actual under- or over-recovery of CAPS' budget during the prior calendar year;²⁰
- The CAPS funding rate for 2017 will be set based on the formula in Schedule 9-CAPS, but will take into account funds remaining from a settlement of an enforcement matter and any funds received by CAPS as a result of settlement agreements regarding the merger of Exelon Corporation and Pepco Holdings, Inc. ("Exelon/Pepco Merger"), or other receipts that offset the revenue requirement;²¹ and
- PJM will assess a monthly charge to each customer using Network Integration and Point-to-Point Transmission Service pursuant to the PJM Tariff, multiplied times the total quantity of megawatts of energy delivered to load (including transmission line losses), that the customer serves in the PJM region during the month.²²

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 9.

III. PROTEST

A. The Commission does not have Jurisdiction to Compel PJM Transmission Customers that Serve Load to Pay Charges for the Work of Public Advocates Representing State Consumer Interests

1. The Commission Only Has Authority Bestowed Upon it by Statute.

It is well-settled that as a creature of statute, the Commission may only exercise jurisdiction that Congress has granted to it.²³ The United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has stated that “[a]s a federal agency, FERC is a “creature of statute,” having “no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.”²⁴ “[I]f there is no statute conferring authority, FERC has none.”²⁵ Accordingly, the D.C. Circuit stated that “[i]n the absence of statutory authorization for its act, an agency’s ‘action is plainly contrary to law and cannot stand.’”²⁶ Courts consistently have applied this principle to strike down agency decisions that have gone beyond the agency’s statutory mandate. For example, in *California Indep. Sys. Operator Corp. v. FERC*, the Commission ordered the California Independent System Operator Corporation (“CAISO”) to replace its

²³ *Atl. City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002)(citing *Mich. V. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) and *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)).

²⁴ *Id.* (citing *Mich. v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

²⁵ *Id.* (citing *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that “an agency literally has no power to act . . . unless and until Congress confers power upon it”).

²⁶ *Id.* (citing *Mich. v. EPA*, 268 F.3d at 1081); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”).

governing board. The Commission argued that its actions were authorized by FPA Sections 205 and 206, and that “the composition of the governing board of a utility and the method of its selection [was] a ‘practice ... affecting [a] rate.’”²⁷ The D.C. Circuit held that the Commission acted outside of its jurisdiction, finding that it did “not have the authority to reform and regulate the governing body of a public utility under the theory that corporate governance constitutes a ‘practice’ for ratemaking authority purposes.”²⁸

In another example, the D.C. Circuit in *Railway Labor Executives’ Association v. National Mediation Board*, the National Mediation Board (“Board”) was given authority to investigate disputes regarding labor representation among rail carriers’ employees. The authorizing statute provided that either party to the dispute, which did not include carriers, could initiate proceedings.²⁹ The Board announced that the carriers also could initiate proceedings after railroad mergers.³⁰ The D.C. Circuit held that the Board could exercise only the authority granted to it by Congress, and that the grant of limited authority in the area of labor disputes did not confer plenary authority to act in that arena.³¹

The FPA is the source of the Commission’s jurisdictional authority. Pursuant to FPA Section 201, the Commission has jurisdiction over “the

²⁷ *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398-9 (D.C. Cir. 2004).

²⁸ *Id.* at 404.

²⁹ *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 659 amended, 38 F.3d 1224 (D.C. Cir. 1994).

³⁰ *See id.*

³¹ *See id.* at 670-71.

transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.”³² The FPA further grants the Commission “jurisdiction over all facilities for such transmission or sale of electric energy.”³³ Pursuant to FPA Section 205, the Commission has jurisdiction over all rates and charges made, demanded or received by any public utility for or in connection with the transmission or sale of electric energy subject to the Commission’s jurisdiction. All rules and regulations affecting or pertaining to such rates or charges must be just and reasonable.³⁴ Section 205 of the FPA “gives a utility the right to file rates and terms for services rendered with its assets.”³⁵

2. Congress has not Granted the Commission Authority to Impose Rates on Transmission Customers that Serve Load that are Designed to Recover Costs Incurred by State Consumer Advocate Groups.

The CAPS Funding Proposal seeks to impose on entities that serve load, through a surcharge on wholesale transmission rates, costs associated with the expenses incurred by CAPS in advocating for consumer interests within the PJM stakeholder process. CAPS’ expected role “is to actively engage in the PJM stakeholder process,” advance the interests of utility consumers, and provide “a means for the PJM State Consumer Advocate Agencies to act in concert.”³⁶ Proposed Schedule 9-CAPS is designed to fund these activities. The FPA, however, has not granted the Commission the authority to compel Transmission

³² 16 U.S.C. § 824(a).

³³ *Id.* § 824(b).

³⁴ *Id.* § 824d(a).

³⁵ *Atl. City Electric Co. v. FERC*, 295 F.3d at 9 (*citing* 16 U.S.C. § 824d)).

³⁶ CAPS Funding Proposal at 5-6.

Customers that serve load to pay charges for the work of State Consumer Advocates representing and advocating state consumer interests. Accordingly, the Commission is without jurisdiction to approve the CAPS Funding Proposal.

The Commission only has jurisdiction over the transmission of electric energy in interstate commerce, the sale of such energy at wholesale in interstate commerce, and over the rates and charges demanded by any public utility in connection with wholesale transmission or sales.³⁷ A public utility such as PJM has the right to file rates and terms for service associated with the transmission or sale of electric energy, but only insofar as such service is rendered with its assets.³⁸ CAPS' expenses associated with its advocacy of consumer interests is outside of the Commission's jurisdictional grant over the transmission and sale of energy at wholesale in interstate commerce. Moreover, it cannot be said that CAPS' advocacy work is rendered with any of PJM's assets. The CAPS Funding Proposal alleges that the PJM stakeholder process benefits from State Consumer Advocate participation because such advocates can inform stakeholders of State Consumer Advocate interests and advocate on behalf of consumers in accordance with their state mandate.³⁹ Such participation, while potentially informative or useful to PJM or other stakeholders, just as would be

³⁷ 16 U.S.C. §§ 824, 824d(a).

³⁸ *Atlantic City Elec. Co. v. FERC*, 295 F.3d at 9. PJM's "assets" include the transmission assets owned by other public utilities over which PJM has been given operational control. For purposes of this Protest, those assets are referred to as PJM's assets.

³⁹ CAPS Funding Proposal at 3.

the participation of other stakeholder groups, is not a “service rendered” with any PJM asset.

The CAPS Funding Proposal cites to the Commission’s order approving funding for the Organization of PJM States, Inc. (“OPSI”),⁴⁰ which the Commission found to be a “legitimate business expense” of PJM.⁴¹ Specifically, in that order, the Commission found that the recovery of the cost for OPSI was a “legitimate business expense” of PJM “to help coordinate [PJM’s] necessary activities with the states.”⁴² The Commission determined that “OPSI will allow PJM to more effectively and efficiently coordinate *its* interaction with the 14 regulatory commissions with which it must deal in the PJM region by providing a conduit for information between the states and the RTO.”⁴³

The OPSI Order was not appealed and it is uncertain whether the finding that OPSI funding is a legitimate business expense of PJM would withstand judicial scrutiny. Yet, even assuming funding for OPSI correctly was determined to be a legitimate business of expense of PJM, nowhere in the CAPS Funding Proposal is it alleged that CAPS funding also is a “legitimate business expense” of PJM. Rather, the CAPS Funding Proposal states only that the PJM stakeholder process benefits from State Consumer Advocate participation and

⁴⁰ *Id.* at 11.

⁴¹ *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292 at P 39 (2005)(“OPSI Order”).

⁴² *Id.*

⁴³ *Id.* (emphasis added).

that such participation “provides useful information to PJM and the PJM stakeholders.”⁴⁴

Given that CAPS was formed to “facilitate State Consumer Advocates’ participation in PJM matters,”⁴⁵ and the CAPS Funding Proposal makes clear that CAPS’ role “is to actively engage in the PJM stakeholder process, advance the interests of utility consumers,” and provide “a means for the PJM State Consumer Advocate Agencies to act in concert,”⁴⁶ it simply cannot be argued that such activities are in any way “legitimate business expenses” of PJM. Accordingly, the OPSI Order cannot be relied upon to support the CAPS Funding Proposal and an approval of the CAPS Funding Proposal clearly would be outside of any Commission jurisdictional grant.

Furthermore, State Consumer Advocates are voting members of PJM⁴⁷ and most of CAPS’ members are listed as members of PJM.⁴⁸ The members of OPSI, who are state regulatory commissions, are not eligible to vote on the PJM Members Committee, unlike other PJM members.⁴⁹ The fact that CAPS’ members are eligible to vote on PJM matters puts them in a different position than OPSI members. The Commission in OPSI did not require one set of market participants to fund the expenses of another set of voting market participants,

⁴⁴ CAPS Funding Proposal at 3.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 5-6.

⁴⁷ See PJM Member Services, available at <http://www.pjm.com/about-pjm/member-services.aspx>.

⁴⁸ See PJM Member List, available at <http://www.pjm.com/about-pjm/member-services/member-list.aspx>.

⁴⁹ See *supra* n.46.

unlike what CAPS is proposing. Thus, CAPS cannot rely on the OPSI order to support its own funding request.

B. The Commission Cannot Require Transmission Customers that Serve Load to Fund Private Speech with which they May Disagree, Consistent with the First Amendment to the United States Constitution

If the Commission were to approve the CAPS Funding Proposal 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 United States Constitution.⁵⁰ This is because CAPS' speech cannot be considered government speech both because CAPS' message is not controlled by any sovereign government and because not all CAPS' members are government representatives. The First Amendment generally precludes the government from requiring citizens or corporations to express ideological positions not their own, through what is known as the compelled speech doctrine.⁵¹ The compelled speech doctrine has been extended by the Supreme Court to mean that the government generally may not require payments to be made to fund private speech, what is known as the compelled subsidy doctrine.

1. CAPS' Speech is Not Government Speech Because CAPS is Not Controlled by a Single Sovereign.

CAPS' speech should not be considered government speech because no single government actor from a single government has ultimate control over all of

⁵⁰ *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) ("United Foods"); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977).

⁵¹ See *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. Of Ed. v. Barnette*, 319 U.S. 624 (1943).

CAPS' messages and positions. CAPS is simply a consortium of entities representing the consumers of different states. CAPS inappropriately would propose that market participants in New Jersey might be forced to pay for travel expenses of consumer advocates from West Virginia. While fees may be imposed upon resident taxpayers by their own state, local, and federal governments with which they have a nexus, CAPS would require payments to entities that do not govern the entity on whom costs would be imposed at all.

Yet in order to qualify as government speech, the speech must be "controlled by" or "developed under official . . . supervision" of a single sovereign.⁵² CAPS' speech, unlike government speech, is at best, the message of several different agencies operating under several different sovereigns, no single one of which "exercises final approval authority over every word used."⁵³ Specifically, in *Johanns*, the Court addressed a federal program that compelled funding by beef sellers and importers for generic beef advertising by the Beef Cattlemen's Beef Promotion and Research Board ("Beef Board").⁵⁴ The Beef Board sought to promote beef as a general commodity, but the beef producers wanted to promote the superiority of specific beef types. The Beef Board's generic advertising was developed by the Beef Board Operating Committee. Half of the Operating Committee members were Beef Board members who were appointed by the Secretary of Agriculture, and all Operating Committee members

⁵² *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, at 560 (2005) ("Johanns") (finding government speech where message was "from beginning to end [a] message established by the Federal Government").

⁵³ *Id.*

⁵⁴ See *Johanns*, 544 U.S. at 553.

were subject to removal by the Secretary.⁵⁵ The Court held that the “message of the promotional campaigns is effectively controlled by the Federal Government itself” and that the message “is from beginning to end the message established by the Federal Government.”⁵⁶ Specifically, the Court found that (1) Congress directed the implementation of paid beef advertising; (2) Congress and the Secretary specified in general terms what the campaign would contain; and (3) the Secretary exercised “final approval authority over every word used in every promotional campaign.”⁵⁷

Unlike the Beef Board in *Johanns*, CAPS is not centrally controlled by any one governmental entity that dictates and approves the message of the group. Each of the CAPS members has an equal vote within the group and no action may be taken without unanimous consent of all members of the group.⁵⁸ No single governmental entity has approval authority or otherwise formulates and develops the messages and positions of CAPS. Accordingly, CAPS’ speech should not be considered government speech in accordance with the established precedents.

2. CAPS’ Speech is Not Government Speech because of CAPS’ Membership.

Even if CAPS could demonstrate that its speech should be considered government speech, which it has not done, CAPS’ proposal has an additional

⁵⁵ *Id.* at 560-61.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See CAPS Bylaws at Arts. III, IV available at http://www.cblding.org/sites/default/files/field_project_docs/CAPS%20Bylaws.pdf.

flaw. CAPS' member, the Illinois Citizens Utility Board ("Illinois CUB"), is not a state governmental entity. Accordingly, CAPS should not be viewed as a governmental entity to which First Amendment protections are applicable given its membership.

The Illinois CUB, although created by state statute, is primarily funded by voluntary contributions from its members--Illinois utility customers. It has a Board that is elected by its members. Indeed, while governmental representatives would be expected either to be elected or to be appointed by an elected official, the exact opposite is true of the Illinois CUB's Board. Its Board members may not "hold any elective position, be a candidate for any elective position, be a State public official, be employed by the Illinois Commerce Commission, or be employed in a governmental position exempt from the Personnel Code."⁵⁹ The Illinois CUB Board, which is required to be comprised of private citizens and not public officials, has the authority to set the policy of the Illinois CUB.⁶⁰ The state does not retain appointment or removal power,⁶¹ and although the Illinois CUB is required to issue an annual report and conduct an annual audit,⁶² the state does not retain the power to approve or disapprove of Illinois CUB activities.⁶³

CAPS is structured such that the individual CAPS members speak directly through the organization and effectively may control whether a particular

⁵⁹ 220 Ill. Comp. Stat. § 10/6(2).

⁶⁰ *Id.* § 10/7(1).

⁶¹ *See id.*

⁶² *Id.* § 10/7(4)

⁶³ *See id.*

message or position of the organization is pursued. Pursuant to CAPS' bylaws, each official position adopted by CAPS is subject to the unanimous consent of its members and Board of Directors.⁶⁴ Because CAPS requires unanimous approval of its positions, any single member's disagreement will control whether a message issues. Thus, a single abstainer may be determined to "effectively control" whether or not any particular CAPS message or position may be taken. Illinois CUB, a non-governmental entity, is a controlling entity given the rights it has to impact whether a particular CAPS' message or position is taken.

CAPS is different from organizations at issue in cases where courts have found an entity to be a governmental entity. For example, in *Johanns*, the beef board that was created by federal statute to develop promotional materials and other programs for the beef industry was deemed to be a governmental entity because Congress and the Secretary of Agriculture directed the implementation of the advertising, and specified the general message of the campaign over which the Secretary of Agriculture exercised final full approval authority.

By contrast, the Illinois CUB is primarily funded not by Illinois taxes, but by voluntary contributions from its members--Illinois utility customers, and, as previously discussed, its members are private citizens.⁶⁵ The Illinois CUB Board, not the state government, has the authority to set the policy of the Illinois CUB.⁶⁶ The state does not retain appointment or removal power,⁶⁷ and the state does

⁶⁴ See *supra* n.58.

⁶⁵ 220 Ill. Comp. Stat. § 10/6(2).

⁶⁶ *Id.* § 10/7(1).

⁶⁷ See *id.*

not retain the power to approve or disapprove of Illinois CUB activities.⁶⁸ Accordingly, unlike the beef board, the government does not direct Illinois CUB's speech or exercise approval authority over the speech. Given that CAPS is effectively controlled by each individual member, which must unanimously approve any CAPS position, and the Illinois CUB is not a governmental entity or effectively controlled by a governmental entity, CAPS itself should not be considered a governmental entity. Accordingly, unlike in *Johanns*, CAPS's message is not established by the government "from beginning to end" because a non-government entity exerts control over the message.⁶⁹

Moreover, funding of CAPS, and at least some of its individual members, is not accomplished through general appropriations, another factor courts have found to support the conclusion that an entity is not a governmental entity.⁷⁰ For example, the Ohio Consumers' Counsel ("OCC"), like other CAPS members, is funded by a fee on utilities and other entities regulated by its state public utility commission.⁷¹ The OCC is not a government agency or division, but was established by state statute for purposes of acting on behalf of utility consumers.⁷² The OCC is selected by a governing board appointed by the Ohio

⁶⁸ *See id.*

⁶⁹ *Johanns*, 544 U.S. at 561.

⁷⁰ *See Keller v. State Bar of California*, 496 U.S. 1, 11 (1990)(finding State Bar of California to be a non-governmental entity, *inter alia*, because its funding came principally from dues levied on members rather than general appropriations and therefore disallowing the Bar's use of mandatory dues payments to fund political and ideological campaigns).

⁷¹ 49 Ohio Rev. Code § 4911.18 (2011).

⁷² *See id.* § 4911.02.

Attorney General, and confirmed by the Ohio Senate.⁷³ Given that it is not a direct state agency and it is not funded through general appropriations, the OCC may not qualify as a governmental entity for First Amendment purposes. CAPS should bear the burden of proving that its members are governmental entities.

Nonetheless, given that at least one of its members is not a governmental entity, CAPS cannot be viewed as a governmental entity. As a result, the compelled speech doctrine applies to preclude forced funding in the instant case given that the speech to be subsidized is not that of the government and the government does not retain control of the message.

⁷³ *Id.* § 4911.17.

3. CAPS Speech is not Part of a General and Comprehensive Regulatory Scheme.

Funding CAPS' advocacy efforts within the PJM stakeholder process also cannot be viewed as part of a general and comprehensive, cooperative regulatory scheme. The Commission previously found in the OPSI Order that an RTO is a valid cooperative endeavor and "a compelled subsidy is permissible when it is ancillary or germane to a valid cooperative endeavor."⁷⁴ That finding has not been challenged in any court, thus it is unclear whether it would withstand judicial scrutiny. Even if the finding would pass appellate court review, the proposed CAPS funding certainly cannot also be considered ancillary or germane to a valid cooperative endeavor.

CAPS is different from OPSI in a number of respects. While OPSI is the regional state committee ("RSC") in the PJM region, an organization contemplated by the Commission as a single committee to facilitate multi-state coordination with an RTO and the Commission on transmission planning, certification, siting and other regional electric market issues,⁷⁵ CAPS is not an RSC. OPSI is comprised of the *regulatory commissions* within PJM's footprint

⁷⁴ OPSI Order at P 40 n.13 (citing *United Foods*, 533 U.S. 405 and stating that "[a]n RTO is such a cooperative venture which requires PJM to work cooperatively with all 14 regulatory commissions within its geographic territory").

⁷⁵ See *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, FERC Stats. & Regs. ¶ 32,563, Notice of Proposed Rulemaking at PP 201, 553 (2002). A Memorandum of Understanding executed between PJM and OPSI on June 1, 2005 states that OPSI is "the multi-regional organization of state utility commissions located in the PJM Control Area" designed "to facilitate communication and, when appropriate, cooperative action among the undersigned parties on matters as to which each has substantial responsibilities so as to promote and protect the public interest in the provision of reliable and reasonably priced electric service within the PJM Control Area." *PJM Interconnection, L.L.C.*, Docket No. ER06-78-000 at Attachment A-2 (filed Oct. 27, 2005).

formed to interact with PJM and its members.⁷⁶ CAPS is not an organization of regulatory commissions. Additionally, as previously discussed, OPSI members are not voting members of PJM, whereas the members of CAPS do vote.

The Commission itself has differentiated state regulators from other stakeholders. It has recognized the “crucial role” of state regulators in transmission planning, finding that role “unique and distinctly different from the roles played by other stakeholders in transmission planning.”⁷⁷ Further, the Commission recognized the importance of state commission participation in the formation and decision-making process of RTOs and Independent System Operators (“ISOs”). Specifically, in Order No. 2000, the Commission stated that state commissions “should fully participate in RTO formation and development.”⁷⁸ OPSI funding was intended to help PJM coordinate more efficiently with multiple state commissions on necessary reliability, facility siting, transmission planning and market design matters that transgress both federal and state jurisdictional matters.⁷⁹

CAPS, on the other hand, is an organization of state consumer interest groups that are not charged with any state regulatory authority and are not in the position of state regulatory commissions that have specific jurisdictional mandates over matters that intersect with PJM’s federal jurisdictional operations.

⁷⁶ *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292 (2005).

⁷⁷ Order No. 1000-A at P 293.

⁷⁸ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,213-14 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs., ¶ 31,092 (2000), *aff’d sub nom., Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

The CAPS Funding Proposal merely is designed to allow CAPS to have a consistent presence in and advocate its members' positions within the PJM stakeholder process⁸⁰ and, thereby, is akin to compelled subsidies that have been found to be illegal. While State Consumer Advocates may have a voice in PJM issues just like any other stakeholder group, PJM does not coordinate with such groups to ensure consistency with federal and state policies in the same way as it does with state regulatory commissions. Funding one stakeholder group (to the exclusion of other stakeholder groups) is not "ancillary or germane" to an RTO's cooperative endeavor.⁸¹ Moreover, the existence of OPSI provides an existing mechanism to facilitate state-level matters within PJM.

C. The CAPS Funding Proposal has not been Shown to be Just and Reasonable and not Unduly Discriminatory

Even assuming the Commission has jurisdiction to approve proposed Schedule 9-CAPS and the funding does not run afoul of the First Amendment, the CAPS Funding Proposal has not been shown to be just and reasonable and not unduly discriminatory.

1. Including Funding for One Stakeholder Group to the Exclusion of All Other Stakeholder Groups Gives Preferential Treatment and is Unduly Discriminatory.

Section 205(b) of the FPA provides that "[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

⁸¹ See, e.g., *ISO New England Inc.*, 114 FERC ¶61,315 at PP 13, 29 (2006)(finding valid corporate communications "germane" to ISO's mission and objectives, and thereby permitted to be included in a utility's cost of service, but expenses used for lobbying activities may not be included in cost of service)(citing *Delmarva Power & Light Co.*, 58 FERC ¶ 61,169 at 61,509, *order on reh'g*, 58 FERC ¶ 61,282, *further order on reh'g*, 59 FERC ¶ 61,169 (1992)).

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.”⁸² A difference in treatment is unduly discriminatory if the difference is not justified.⁸³ In this instance, there is no justification for the disparate treatment between CAPS and other PJM stakeholders, particularly given the existence of OPSI. CAPS’ views are no more important or worthy of funding than those of other entities. State Consumer Advocate groups should not be given preferential treatment through a Tariff funding mechanism when other stakeholder groups are not similarly funded. The CAPS Funding Proposal states that State Consumer Advocates are “unique entities” that represent retail consumers who are impacted by the issues addressed in the PJM stakeholder process.⁸⁴ But there are many associations that represent diverse sets of stakeholders impacted by issues addressed in the PJM stakeholder process. There is no reason that CAPS is more worthy of funding than any of these myriad organizations that also provide meaningful input into the PJM process. Merely because CAPS may have “resource constraints” with respect to travel expenses, as suggested in the CAPS Funding Proposal,⁸⁵ does not warrant the Commission approving a tariff mechanism that would force

⁸² 16 U.S.C. § 824d(b).

⁸³ See *Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators*, Notice of Proposed Rulemaking, FERC Stat. & Regs. ¶ 32,699 at P 13 (2013)(citing *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 857 (D.C. Cir. 1979); *Transmission Agency of N. California v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010)).

⁸⁴ CAPS Funding Proposal at 3.

⁸⁵ The filing merely alleges that CAPS may have “resource constraints” but does not assert that state or local funding efforts have been attempted no less exhausted. *Id.* at 4.

transmission customers to fund one select stakeholder group. Moreover, CAPS' members are voting PJM stakeholders just like the members of P3 or EPSA, and very much unlike the state public utility commissions that the Commission has recognized as distinguishable in the past.

Furthermore, the states should be responsible for funding the activities of State Consumer Advocates. The burden of funding such activities should not be placed on a subset of entities in the private sector. Notably, market participants in the states represented within CAPS already are assessed costs for funding state agencies through taxes and other assessments.⁸⁶ If CAPS believes its respective member states' funding is insufficient, CAPS' members should seek redress within their respective states.

Finally, the CAPS Funding Proposal is unreasonable, and approval of the CAPS Funding Proposal should be rejected because it can be expected to open the door to more requested handouts from PJM participants and beyond. Why should any state dedicate its own resources to fund any locally driven efforts if the federal government is willing to require wholesale customers to foot the bill? Not only is requiring forced funding of CAPS on faulty legal footing, but it is bad policy as well.

⁸⁶ See, e.g., *supra* Section III.B.1. regarding Illinois CUB and OCC funding. In the past, attempts to establish a consumer advocate group at the Commission or to permit funding of public interest groups in Commission proceedings, never were enacted by Congress. See, e.g., Energy Policy Act of 2003, H.R. 6, 108th Cong. (2003); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009). The Commission should not permit that funding now, particularly given that it lacks statutory authority to do so.

2. The Previous Funding for CAPS does not Warrant Continued Funding of CAPS through a PJM Tariff Mechanism.

CAPS prior funding came from a one-time distribution of funds as the result of a settlement proceeding in Docket No. IN12-7-000. Specifically, funds became available through a Commission-approved Stipulation and Consent Agreement stemming from certain findings of violations of the Commission's regulations.⁸⁷ The settlement resulted in the disgorgement of profits,⁸⁸ a portion of which was used to set up a fund for the benefit of electric energy consumers in the states affected by the violations.⁸⁹

It is well understood that a settling party can agree to concessions that it could not otherwise be ordered to make. That a party settled to provide funds to CAPS does not provide any support for CAPS' current effort that forces a permanent wholesale tariff rate that forces unwilling Transmission Customers that serve load to provide it with revenues. Simply because CAPS' current funds will be depleted at some point in the future, does not justify CAPS' effort to seek forced funding from PJM's Transmission Customers that serve load.

3. Proposed Schedule 9-CAPS does not Contain Sufficient Cost Controls.

Schedule 9-CAPS misleadingly is presented as a proposal characterized by fiscal restraint and providing rate certainty given that Section 205 approval

⁸⁷ 18 C.F.R § 35.41(b). See *Constellation Energy Commodities Group, Inc.*, 138 FERC ¶ 61,168 at P 1 (2012) (“Constellation”).

⁸⁸ *Constellation*, 138 FERC at P 22.

⁸⁹ *Id.*

must be obtained whenever CAPS seeks an annual budget increase in excess of 7.5 percent from the current year's budget.⁹⁰ Yet, the precise opposite conclusion can be reached. The Commission should not approve a proposal that anticipates cost increases of up to 7.5 percent annually without the need for any Commission review. If not reviewed, and rate increases of up to 7.5 percent a year occur, the CAPS budget would double in just over 10 years. Rather than providing an incentive to keep costs in check, a provision that contemplates increases below a certain threshold would not need Commission review provides an incentive for the maximum level of non-reviewable increase to be taken each year. Just like the incentives provided by compounding interest, CAPS' funding will best compound if the maximum allowable increase that avoids the need for review is achieved annually.

Additionally, the proposal is unreasonable because CAPS may receive other funding sources without accounting for such revenues as a deduction from its Tariff funding. While the CAPS Funding Proposal states that funds remaining from the initial disbursement of funds from the Commission-approved constellation settlement and any funds to be received as a result of settlement agreements associated with the Exelon/Pepco Merger will be factored into the 2017 funding rate,⁹¹ no commitment or provision as to future year funding offsets is present.

⁹⁰ CAPS Funding Proposal at 8.

⁹¹ *Id.*

4. Proposed Schedule 9-CAPS is Inconsistent with the Commission's Cost Causation Principles.

It is inconsistent with cost causation principles to require Transmission Customers that serve load to pay the costs of State Consumer Advocates that are representing the interests of retail customers in a number of different states. Even if possible to categorize CAPS costs as wholesale transmission costs (which it is not), cost causation principles provide that customers that receive the benefit of a service should be allocated the costs of paying for that service.⁹²

State Consumer Advocate groups generally have been created to represent the interests of utility consumers within their state.⁹³ PJM Transmission Customers that serve load within the PJM region are not represented by State Consumer Advocate groups and are not the intended beneficiaries of those groups. As a result, they should not be the entities saddled

⁹² See *Williston Basin Interstate Pipeline Co.*, 71 FERC ¶ 61,019 (1995); *ANR Pipeline Co.*, 92 FERC ¶ 61,284 (2000); *Alabama Elec. Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 684 F.2d 20, 27 (D.C. Cir. 1982); *Tejas Power Corp. v. Fed. Energy Regulatory Comm'n*, 908 F.2d 998, 1005 (D.C. Cir. 1990).

⁹³ For example, the Pennsylvania Office of Consumer Advocate website states: "The Office of Consumer Advocate (OCA) is a state agency that represents the interests of Pennsylvania utility consumers before the Pennsylvania Public Utility Commission (PUC), federal regulatory agencies, and state and federal courts." See Pennsylvania Office of Consumer Advocate website, available at http://www.oca.state.pa.us/information_links/brochure.htm. Similarly, the District of Columbia Office of the People's Counsel website states: "The Office of the People's Counsel is an independent agency of the District of Columbia government. By law, it is the advocate for consumers of natural gas, electric and telephone services in the District. District of Columbia law designates the Office as a party to all utility-related proceedings before the Public Service Commission. The Office also represents the interests of District ratepayers before federal regulatory agencies." See District of Columbia Office of the People's Counsel, <http://www.opc-dc.gov/index.php/about-opc/8-about-opc/5-mission>. Also, the Consumer Advocate Division of the Public Service Commission of West Virginia website state: "The Consumer Advocate Division advocates primarily on behalf of residential customers...." See Consumer Advocate Division of the Public Service Commission of West Virginia, available at <http://www.cad.state.wv.us/>.

with the costs of that work. Those who would be saddled with these funding costs include load-serving entities (“LSEs”) with captive retail customers, LSEs with provider of last resort service obligations, and competitive retail suppliers, some of which should be expected to have long term supply obligations in place. These entities may be unable to pass the unexpected costs of funding CAPS through to their retail customers. It should be expected that much of this burden will remain shouldered by the retail suppliers, even though retail customers are the beneficiaries of the state consumer advocates’ work. This cross-subsidization is inconsistent with cost causation principles.

It is well-settled that the cost causation rule requires “that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.”⁹⁴ PJM Transmission Customers that serve load do not cause the costs CAPS may incur to represent retail consumers, thus they cannot be required to pay those costs. Further, PJM Transmission Customers that serve load in New Jersey do not cause the travel or other expenses of State Consumer Advocates in West Virginia. Yet, without providing any valid support showing any causal link, pursuant to Schedule 9-CAPS, those PJM Transmission Customers serving load in New Jersey would be required to pay the costs of West Virginia State Consumer Advocates.

⁹⁴ *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992). Courts “evaluate compliance [with cost causation principles] by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.” *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004); see also *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) (“FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.”)

Rather than provide any support showing a causal link, the CAPS Funding Proposal only states that the assessment on Transmission Customers that serve load is “appropriate . . . because the revenues from this proposed rate schedule will be utilized by CAPS to recover its costs in supporting the State Consumer Advocates’ participation in the PJM stakeholder process.”⁹⁵ The CAPS Funding Proposal does not indicate precisely why cost causation principles would permit a transmission rate surcharge on customers that serve load only within one particular state in order to fund costs incurred by State Consumer Advocates outside of that state, particularly where CAPS members are funded through state appropriations or consumers within each respective state. The CAPS Funding Proposal simply does not provide any support to justify why Transmission Customers that serve load should pay these costs. Accordingly, the CAPS Funding Proposal has not been shown to be just and reasonable in consideration of the Commission’s long-standing cost causation principles.

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, P3, the Talen Companies and the Essential Power PJM Companies respectfully request that the Commission reject the CAPS Funding Proposal.

While state consumer advocates’ participation in the PJM stakeholder process is of value, and should continue, such participation should not be funded by Transmission Customers through a tariff surcharge. Approving such a tariff provision would be ultra vires for the Commission, would run afoul of the First

⁹⁵ CAPS Funding Proposal at 9.

Amendment, would be unjust, unreasonably and unduly discriminatory, and would reflect bad policy. Accordingly, for the reasons set forth fully herein, the Commission should deny the forced funding proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 8th day of January, 2016.

/s/ Darrell B. Reddix
Darrell B. Reddix