UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.) Docket No. ER20-2046-000

REQUEST FOR REHEARING OF THE PROTESTING PARTIES

On August 11, 2020, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued an order ("August 11 Order" or "Order") approving a new transmission planning process in PJM Interconnection, L.L.C. ("PJM") proposed by a group of PJM Transmission Owners in the above-referenced proceeding ("TO Proposal").[1] Pursuant to section 313 of the Federal Power Act ("FPA")[2] and Rule 713 of the Rules of Practice and Procedure of the Commission,[3] the Protesting Parties identified herein ("Protesting Parties") hereby seek rehearing of the August 11 Order.

The Protesting Parties appreciate the importance of transmission planning for PJM Transmission Facilities that are approaching the end of their useful lives. In fact, a supermajority of PJM Members voted in support of a different transmission planning proposal, also filed with the Commission, to address the very issue of planning for new Transmission Facilities to replace existing Transmission Facilities at the end of life ("EOL").[4] The August 11 Order errs, however, in finding that the TO Proposal is just and reasonable. As demonstrated herein, the August 11 Order is arbitrary and capricious and does not reflect reasoned decision-making because it fails to

[1] *PJM Interconnection, L.L.C*, 172 FERC ¶ 61,136 (2020) (hereinafter "August 11 Order" or "Order").

[2] 16 U.S.C. § 825*l*.

[3] 18 C.F.R. § 385.713.

[4] *PJM Interconnection, L.L.C.*, FERC Docket No. ER20-2308-000.

recognize that the TO Proposal does not simply encompass a planning process for maintenance projects that could have some minor incidental increases in capacity. Rather, the TO Proposal that the Commission approved in the August 11 Order is a fundamental and unlawful shift in transmission planning responsibility from the Regional Transmission Organization ("RTO"), PJM, to the PJM Transmission Owners ("PJM TOs"). Specifically, the TO Proposal

- empowers the TOs with unilateral authority and exclusive responsibility to propose revisions related to transmission planning;
- unlawfully restricts PJM's role as the regional planner;
- unlawfully provides the TOs with veto authority over future planning methodologies;
- unjustly and unreasonably limits the participation rights of PJM stakeholders in regional transmission planning; and
- unjustly and unreasonably limits transparency and coordination in planning and constructing transmission projects.

The August 11 Order fails to engage protesters' arguments concerning the division of planning authority between PJM and the TOs.

The August 11 Order errs in applying orders governing planning in the California Independent System Operator ("CAISO") region to PJM. The August 11 Order did not provide a reasoned explanation for departing from Order No. 2000 principles and other precedent that establishes the predominance of regional planning. The August 11 Order further errs by not addressing the record evidence demonstrating that the TO Proposal would categorically and arbitrarily prohibit regional cost allocation for projects that provide regional benefits.

The August 11 Order does not demonstrate that the TO Proposal is just and reasonable. Not only is the Order's decision to accept the TO Proposal not supported by substantial evidence, the TO Proposal is contrary to the plain language of the governing documents upon which it is based. The August 11 Order fails to reconcile the TO Proposal's conflicts with regional transmission planning protocols and procedures established in the PJM Operating Agreement.

Procedurally, the August 11 Order errs in denying the Motion to Dismiss the TO Proposal and errs in failing to adjudicate the motion to consolidate the TO Proposal in Docket No. ER20-2046 with the related proposal in Docket No. ER20-2308 that received supermajority stakeholder support. The August 11 Order also errs in finding that including End of Life Criteria in FERC Form No. 715 is voluntary.

For those reasons, and as discussed more fully herein, the Protesting Parties request rehearing of the August 11 Order. For purposes of this rehearing request, the Protesting Parties are comprised of the following:

American Municipal Power, Inc. ("AMP")

AMP Transmission, LLC ("AMPT")

Blue Ridge Power Agency

Delaware Division of the Public Advocate ("Delaware Public Advocate")

District of Columbia Office of People's Counsel ("DC OPC")

Indiana Office of Utility Consumer Counsel ("Indiana OUCC")

LSP Transmission Holdings II, LLC ("LS Power")

New Jersey Division of Rate Counsel ("NJ Rate Counsel")

Old Dominion Electric Cooperative ("ODEC")

PJM Industrial Customer Coalition ("PJMICC")

Public Power Association of New Jersey ("PPANJ")

The Public Utilities Commission of Ohio's Office of The Federal Energy Advocate

West Virginia Consumer Advocate

I. BACKGROUND

On June 12, 2020, the PJM TOs, pursuant to section 205 of the FPA,[5] Section 35.13 of the Commission's Rules and Regulations, Section 9.1(a) of the PJM Open Access Transmission Tariff ("Tariff"),[6] and acting through the PJM Consolidated Transmission Owners Agreement ("CTOA"), proposed significant modifications to Attachment M-3 of the Tariff (the TO Proposal), which effectively created a new Attachment M-3. The PJM TOs proposed in the June 12 filing to create a new, expansive application of the transmission planning procedures in Attachment M-3 that would authorize the PJM TOs, rather than PJM, to plan for all new transmission projects that expand or enhance the Transmission System[7] with the limited exception of projects to address NERC Reliability Standards, State Public Policies, Transmission Owner FERC Form 715 criteria,[8] or projects to relieve economic constraints (Market Efficiency Projects).

The new Attachment M-3 also adds new categories of projects to the Attachment M-3 transmission planning process under an umbrella label of "Attachment M-3 Projects" that include "Asset Management Projects," Supplemental Projects, and any other expansion or enhancement not planned by PJM. Asset Management Projects cover maintenance activities and entirely new Transmission Facilities that replace existing Transmission Facilities that are not expansions or enhancements of the Transmission System.[9] The described purpose of an Asset Management

[5] 16 U.S.C. § 824d (2020).

6 As discussed *infra*, Section 9.1(a) does not grant the PJM TOs a unilateral right to file a Section 205 filing that alters the regional transmission planning in PJM.

[7] "Transmission System" is defined as "the facilities controlled or operated by the Transmission Provider within the PJM Region that are used to provide transmission service under Tariff, Part II and Part III." PJM Tariff, I. Common Service Provisions.

[8] The TO Proposal does include new requirements as part of the Attachment M-3 planning process for FERC Form 715 Projects. *See, for example*, TO Proposal at Exhibit A, Paragraph (d).

[9] TO Proposal Exhibit A at Paragraph (b)(1).

Project is virtually unlimited and could encompass any maintenance or new transmission replacement for any aging infrastructure drivers, security, reliability, automation, or to meet regulatory compliance requirements.[10] To determine whether a transmission-related project (whether maintenance or new transmission) is an expansion or enhancement of the Transmission System, the PJM TO must determine whether the project will result in an Incidental Increase, which is a new term included in the new Attachment M-3.[11] Specifically, an Incidental Increase is an increase in transmission capacity that results from updated technology or replacements to meet Transmission Owner design standards, industry standards, codes, laws or regulations.[12]

The TO Proposal includes other definitions that create limits on regional planning, including EOL Need, PJM Planning Criteria Need, and Form 715 EOL Planning criteria. For instance, the definition of EOL Need is limited to transmission lines, thereby excluding substations and creating the opportunity for the PJM TOs to resort to a new right of first refusal.[13] As newly defined in Attachment M-3, PJM Planning Criteria Need also limits PJM's regional planning process to only those needs defined in the Applicability section of new Attachment M-3.

The TO Proposal was made pursuant to a unilateral FPA Section 205 filing to modify the PJM Tariff without requesting any modifications to the PJM Operating Agreement or any other governing documents. The August 11 Order accepted the new Attachment M-3, effective August 12, 2020.

[10] *Id.*

[11] *Id.* at Paragraph (b)(3).

[12] *Id.*

[13] LS Power Protest at 48.

II. STATEMENT OF ISSUES/SPECIFICATIONS OF ERRORS

The Protesting Parties respectfully submit that the August 11 Order is arbitrary and capricious, does not reflect reasoned decision-making, is insufficiently supported, and results in a transmission planning outcome that is unjust, unreasonable, unduly discriminatory, and preferential. Due to the specific errors identified herein and the Order's general failure to engage arguments and evidence contrary to the TO Proposal,[14] the Order should be modified on rehearing and the TO Proposal should be rejected.

In compliance with Rules 713(c)(1) and (2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.713(c)(1), 385.713(c)(2)(2020), the Protesting Parties respectfully provide the following specifications of error and statement of issues:

1. Whether the August 11 Order's holding that section 8.5 of the CTOA[15] does not require a vote prior to the CTOA Administrative Committee ("TOA-AC") initiating a consultative process is arbitrary, capricious and contrary to the plain language of the CTOA and ignores contractual rights of PJM TOs who are parties to the CTOA?
   Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Iberdrola Renewables v. FERC*, 597 F.3d 1299, 1304 (2010) ("If a contract is not ambiguous, extrinsic evidence cannot be used as an aid to interpretation." *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C.Cir.1985). "[I]f the intent of the parties on the particular issue is clearly expressed in the document, 'that is the end of the matter.' " *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1572 (D.C.Cir.1987) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

2. Whether the August 11 Order is arbitrary and capricious because it approved the PJM TOs' overreach into regional planning matters?
   Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Nor Am Gas Transmission*, 148 F.3d 1158, 1165 (1998)(quoting *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)("It is the duty of a reviewing court to make sure that an agency 'engage[s] the

[14] *See* May 21 Order, Glick Dissent at P 1.

[15] Section 8.5 of the CTOA provides the manner of action; specifically, "any action taken by the Administrative Committee shall require a combination of the concurrence of the representatives' Individual Votes of the representatives of those Parties entitled to vote on such matters and Weighted Votes as specified in this Section 8.5." PJM, Rate Schedules, 8.5, TOA-42, 8.5 Manner of Acting, 1.0.0.

arguments raised before it.'); *Atl. City Elec., et al v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Reg'l Transmission Organs.*, Order No. 2000, 89 FERC 61,284, at P 485, *order on reh'g*, Order No. 2000-A, *aff'd sub nom., Pub. Util. Dist. No. 1 of Snohomish City, Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Midwest Indep. Transmission, Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at P 22 (2006) (quoting *Columbia Gas Transmission Corp*., 27 FERC ¶ 61,089 at 61,166 (1984)); *S. California Edison Co. Local Transmission Planning Within the California Indep. Sys. Operator Corp*., 164 FERC ¶ 61,160, at P 10 (2018); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981-982 (2005) ("Unexplained inconsistency is. . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 436 U.S. 29, 46-57 (1983)); *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) ("[A]n agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent."); *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) ("As we have repeatedly reminded FERC, if it wishes to depart from its prior policies, it must explain the reasons for its departure."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

3. Whether the August 11 Order is arbitrary and capricious by ignoring the plain language of the TO Proposal and failing to address arguments that the definitions do not support a finding that the TO Proposal is within the TOs' authority?
   Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014).

4. Whether the August 11 Order erred in finding that "Asset Management Projects" are consistent with the type of projects and activities that the Commission found were appropriately considered transmission owner asset management projects in the California Orders?[16]
   Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Motor Vehicle Manufacturer's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem"); *see also KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1056 (2003) (explaining that "unless an agency answers objections that on their face

[16] References herein to the "California Orders" include the following: *California Pub. Utils. Comm'n v. Pac. Gas and Elec. Co.*, 164 FERC ¶ 61,161 (2018), *order on reh'g*, 168 FERC ¶ 61,171 (2019); *S. California Edison Co.*, 164 FERC ¶ 61,161 (2018), *order on reh'g*, 168 FERC ¶ 61,170 (2019).

appear legitimate, its decision can hardly be said to be reasoned") (internal alterations, quotes and citation omitted).

5. Whether the August 11 Order is arbitrary and capricious for applying erroneous rulings regarding Order No. 890 to the PJM TOs' Asset Management Projects?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

6. Whether the Commission erred in finding that incidental expansions of the transmission system are not subject to Order No. 890?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

7. Whether the August 11 Order is arbitrary and capricious for finding that the California Orders apply to the new Attachment M-3 process?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *See, e.g., ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) ("[A]n agency's unexplained departure from precedent is arbitrary and capricious."); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.")

8. Even if the California Orders can appropriately be considered for the new Attachment M-3, whether the Commission erred by failing to consider the specific provisions of the new Attachment M-3 that render it unjust and unreasonable?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Motor Vehicle Manufacturer's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem"); *see also KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1056 (2003) (explaining that "unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned") (internal alterations, quotes and citation omitted).

9. Whether the August 11 Order's acceptance of the TO Proposal's prohibition of PJM or PJM Members from ever expanding the PJM regional planning criteria absent TO acquiescence fails to provide a reasoned explanation for the Commission's departure from its prior ruling in Order 2000 that "the RTO must have ultimate responsibility for both transmission planning and expansion within its region that will enable it to provide efficient, reliable and non-discriminatory service and coordinate such efforts with the appropriate state authorities"?

Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); 18 C.F.R. § 35.34(k)(7) (2018); *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,163 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (affirming that "the RTO must have ultimate responsibility for both transmission planning and expansion within its region"). *See, e.g., Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*., 549 U.S. 312 (2007); *Motor Vehicle Manufacturer's Ass'n*, 463 U.S. 29; *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014); *KeySpanRavenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003); *Canadian Ass'n of Petrol. Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); KN Energy, Inc. v. FERC, 968 F.2d 1295 (D.C. Cir. 1992); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158 (D.C. Cir. 1990); *Union Elec. Co. v. FERC*, 890 F.2d 1193 (D.C. Cir. 1989); *ISO New England Inc.*, 158 FERC ¶ 61,138 (2017), pet. for review pending, D.C. Cir. No. 17-1110; *ISO New England Inc*., 145 FERC ¶ 61,095 (2013).

10. Whether the Commission erred by failing to provide a reasoned explanation for its departure from precedent that establishes the predominance of regional planning?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Motor Vehicle Mfs. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem…")(*citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994).

11. Whether the August 11 Order is arbitrary and capricious and contrary to record evidence in its dismissal of the cost allocation issues?
Answer: Yes. *PJM Interconnection, L.L.C. et al., 172 FERC ¶ 61,136 (2020); KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)(At its core, the cost causation principle requires that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them."); *Illinois Commerce Commission v. FERC*, 576 F.3d 470, 477-478 (7th Cir. 2009); *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 505 (5th Cir. 2016); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 at P 622 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *ODEC v. FERC*, 898 F.3d 1254.

12. Whether the August 11 Order's failure to adjudicate the motion to consolidate Docket Nos. ER20-2046 and ER20-2308 is arbitrary and capricious, and does not reflect reasoned decision-making?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v.*

FERC, 616 F.3d 520 (D.C. Cir. 2010); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *Cal. Indep. Sys. Op. Corp.*, 94 FERC ¶ 61,147 (2001); *Pacific Gas & Elec. Co.*, 106 FERC ¶ 61,036 (2004); *Seminole Elec. Coop., Inc.*, 149 FERC ¶ 61,210 (2014); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services et al.*, 135 FERC ¶ 61,177 (2011).

13. Whether the Commission ignored record evidence demonstrating the TO Proposal conflicts with, and limits, the scope of regional transmission planning as set forth in the Operating Agreement?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990) (The Court remanded a Commission decision where the Commission failed to give serious consideration to an argument raised in the proceeding.).

14. Whether the Commission erred in finding that including End of Life Criteria in Form No. 715 is voluntary?
Answer: Yes. *PJM Interconnection, L.L.C. et al.*, 172 FERC ¶ 61,136 (2020); 5 U.S.C. § 706(2)(A); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981-982 (2005)("Unexplained inconsistency is. . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 436 U.S. 29, 46-57 (1983)); *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984)("[A]n agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."); *CPUC v. FERC*, 879 F.3d 966, 978 (9th Cir. 2018) (The Commission "merely asserted that it had the authority to grant incentive adders. . . . . the orders on review were a departure from Order 679's terms and the longstanding policy it incorporates. Without any acknowledgment or explanation of that departure, the orders were arbitrary and capricious.").

III. ARGUMENT

A Commission order will be reversed on review if it is arbitrary or capricious, reflects an abuse of discretion, is not otherwise in accordance with law, or is not supported by substantial

evidence.[17] In order to satisfy its obligation to engage in reasoned decision-making, the Commission must examine the relevant data and articulate a rational connection between the facts found and the choices made.[18] The Commission must reach its conclusion through decision-making that is "reasoned, principled, and based upon the record."[19] Under the FPA, FERC's factual findings are determinative so long as they are supported by substantial evidence.[20] The "substantial evidence" standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence."[21] Substantial evidence is "relevant evidence" that "a reasonable mind might accept as adequate to support a conclusion."[22] Additionally, to avoid an arbitrary and capricious decision or one that does not reflect reasoned decision-making, the Commission must consider all important aspects of the problem at issue.[23] It is "well established that the Commission must 'respond meaningfully to the arguments raised before it.'"[24]

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[17] *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

[18] *Sacramento*, 616 F.3d at 528; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, (1983)).

[19] *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10, 20 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945, 953 (D.C. Cir. 2007); *see New York v. FERC*, 535 U.S. 1, 36 (2002); *see also Transmission Access Policy Group v. FERC*, 225 F.3d 667, 705, 716 (D.C. Cir. 2000) (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1021 (D.C. Cir. 1987)); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 893 (D.C. Cir. 1998).

[20] Section 313(b) of the FPA, 16 U.S.C. § 825l(b).

[21] *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 97 (3d Cir. 2014) (*NJBPU)* (quoting *La. PSC v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008)).

[22] *NJBPU*, 744 F.3d 74, at 97 (3d Cir. 2014) (quoting *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011)).

[23] *See e.g. Motor Vehicle Mfs. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem…") (*citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994).

[24] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015).

The August 11 Order is arbitrary and capricious because it is neither the product of reasoned decision-making nor based on substantial evidence. The specific errors in the August 11 Order are detailed below.

A. The Commission erred in denying the ODEC/AMPT Motion to Dismiss. (Statement of Error #1)

ODEC and AMPT moved to dismiss the TO Proposal because the PJM TOs failed to establish that the TOA-AC complied with provisions of the CTOA prior to initiating action, thereby violating the CTOA and the rights of the transmission owning parties to the CTOA. The August 11 Order denied the motion to dismiss. In doing so, the Commission noted that movants argued that CTOA section 8.5 requires a vote for the TOA-AC to initiate the consultative process that is required prior to making a section 205 filing with the Commission.[25] Notwithstanding the clear language requiring a vote before TOA-AC action, the Commission incorrectly found, "section 8.5 of the CTOA does not require a vote to initiate the consultative process."[26] Without explanation or reference to the actual contract language, the Commission asserted that section 8.5 of the CTOA "sets out the voting procedures necessary for the PJM TOs to make the section 205 filing with the Commission."[27] The Commission also accepted certain PJM TOs' argument that it "has been a long-standing understanding of these provisions" to not have a vote prior to the TOA-AC initiating a consultative process.[28] The August 11 Order's holding that section 8.5 of the CTOA does not require a vote prior to the TOA-AC initiating a consultative process is arbitrary,

[25] August 11 Order at P 79.

[26] *Id.* at P 78.

[27] *Id.*

[28] *Id.*

capricious and contrary to the plain language of the CTOA and ignores contractual rights of PJM TOs who are parties to the CTOA.

The August 11 Order is simply wrong that section 8.5 of the CTOA does not require a vote to initiate the consultative process required prior to the PJM TOs making a FPA section 205 filing. Section 8.5, as its title implies, governs *all manner of acting of the TOA-AC*, including but not limited to the voting procedures for the PJM TOs to make a FPA section 205 filing. CTOA section 8.5 specifically states that, subject to the limitations of Section 9.7.1(a), which are not relevant here, "*any action* taken by the Administrative Committee shall require a combination of the concurrence of the representatives' Individual Votes of the representatives of those Parties entitled to vote on such matters and Weighted Votes as specified in this Section 8.5."[29] Contrary to the August 11 Order's implication, there is no limitation in CTOA section 8.5 to voting on FPA section 205 filings. In fact, section 8.5.1 identifies the actions of the TOA-AC that require two-thirds majority, including modification of the CTOA, termination of a party to the CTOA, development of comments and recommendations for the Regional Transmission Expansion Plan, approval of assignment of the CTOA and, "[a]pproval of changes in or relating to Joint Transmission Rate or the PJM Regional Rate Design, or any provisions governing the recovery of transmission-related costs incurred by the Transmission Owners."[30] By contrast, CTOA section 8.5.2 requires a vote supported by a simple majority of the votes cast at a meeting for "[*a]ction* by the Administrative Committee on *any matter* other than those specified in Section 8.5.1…."[31]

[29] CTOA section 8.5. [emphasis added].

[30] *Id.* at section 8.5.1. [emphasis added].

[31] *Id.* at section 8.5.2. [emphasis added].

The initiation of consultation with the PJM Members Committee was an action taken by the TOA-AC. The May 7, 2020 Notice states "the CTOA Administrative Committee hereby initiates consultation with the PJM Members Committee with regard to proposed changes to Attachment M-3 of the PJM Tariff ("Proposed Attachment M-3 Amendments")."[32] Although the Notice unequivocally states that the TOA-AC is initiating the required consultation, the TOA-AC held no meeting nor took any vote authorizing the TOA-AC to initiate such action. The Movants were given no prior notice that the TOA-AC would send notice or otherwise take Committee action that could be construed as being taken on behalf of all PJM Transmission Owners, including the Movants.

Given the clear and plain language in CTOA section 8.5.2 that requires a vote prior to any action of the TOA-AC, the fact that CTOA section 7.3.2 requires the PJM TOs to consult with PJM and the PJM Members Committee but does not reference a voting requirement prior to the initiation of consultation is irrelevant. The Commission's reference to section 7.3.2 appears to confuse actions that the Transmission Owners (a defined term under the CTOA) may take, with the separate and distinct requirements for actions taken by the CTOA "Administrative Committee" (another defined term under the CTOA). Although it may be true that under section 7.3.2 one or more "Transmission Owners" could have initiated consultation with stakeholders, that is not the issue raised here. Instead, a group of Transmission Owners pushed the TOA-AC to take official Administrative Committee action without following the required contractual formalities. Section 7.3.2 provides no exception for meeting the very specific requirements of Article 8.

[32] A copy of the Notice is attached to the Motion to Dismiss as Exhibit 1.

Also irrelevant is the PJM TOs' assertion that there was a long-standing understanding that the TOA-AC would not vote prior to initiating consultation with PJM and the Members Committee as it is contrary to the clear and plain language of the CTOA. "[I]f the intent of the parties on the particular issue is clearly expressed in the document, 'that is the end of the matter.'"[33] Such is the case here. The contract's plain language settles this matter - the TOA-AC must take a vote before the TOA-AC takes *any* action. Having breached their contractual obligations to other transmission owners, the Notice of Consultation from the TOA-AC to stakeholders was a nullity. The Commission's decision to ignore the breach notwithstanding the unambiguous contract language was therefore arbitrary and capricious. Further, the Commission's reliance on past practice to override the express contract language is also arbitrary and capricious. "If a contract is not ambiguous, extrinsic evidence cannot be used as an aid to interpretation."[34]

In addition to not holding a vote prior to initiating consultation, actions taken through the TOA-AC ran afoul of several other CTOA requirements regarding TOA-AC procedures, including: that all meetings of the Administrative Committee are to be "open to entities that are signatories to the Operating Agreement and to personnel of PJM, and all matters upon which the representatives vote shall be open to such entities and to such personnel" (CTOA section 8.4.4); that notice be provided at least ten days prior to the meeting (CTOA section 8.4.1); that the notice include an agenda "sufficient to notify the representatives of the substance of the matters to be considered at the meeting" (CTOA section 8.4); and, that notice of all meetings be provided over the PJM website at the same time as it is provided to the representatives (CTOA section 8.4.1).

[33] *Nat'l Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563, 1572 (D.C.Cir.1987) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

[34] *Iberdrola Renewables v. FERC,* 597 F.3d 1299, 1304 (2010). *See also, Consol. Gas Transmission Corp. v. FERC,* 771 F.2d 1536, 1544 (D.C.Cir.1985).

The TOA-AC violated every one of the above enumerated requirements by issuing the Notice on behalf of the TOA-AC without noticing or holding a meeting, simply because a handful of transmission owners with sufficient votes to compel such action asked that the Committee chair take that action. The PJM TOs filing offered no contractual exception that would allow a handful of Transmission Owners to convince the TOA-AC to take official action without following the required contractual formalities.[35] The Commission's assertion that initiating the consultation prior to the formal vote "ensures that the PJM TOs may consider the opinions of PJM and the Members Committee prior to the formal vote on the proposal under section 8.5 of the CTOA" also misses the point. It is ODEC, AMPT and other transmission owning parties to the CTOA whose contractual rights were violated by the Indicated PJM TOs' breach of the CTOA. The Commission cannot simply waive those contractual rights by observing that other parties received appropriate notice.[36] The Commission's failure to acknowledge the contractual violation and reject the PJM TOs' inappropriate filing causes irreparable harm to ODEC, AMPT and any other minority Transmission Owner whose contractual rights were infringed.

[35] As a Party to the CTOA, it is also unclear why PJM accepted the Notice notwithstanding that contractual requirements had not been met.

[36] Given the nature of the PJM TOs' filing, money damages for the contract breach cannot address the harm suffered, nor can the Commission return ODEC, AMPT and other Transmission Owners whose rights were violated back to their pre-breach position if the Commission's arbitrary determination that no rights were violated is overturned upon judicial review.

B. The August 11 Order arbitrarily and capriciously approved the TO Proposal's overreach into Regional Planning. (Statement of Error #2)

1. The Commission erred as a matter of law in finding that the PJM TOs have unilateral authority to propose revisions related to transmission planning.

In Paragraph 81 of the August 11 Order, the Commission concluded that the Attachment M-3 revisions are within the PJM TOs' exclusive rights and responsibilities.[37] This finding is erroneous as a matter of law as it is both contrary to PJM's governing documents and fails to address the arguments raised by the Load Group or other protesting parties.[38] PJM's Tariff provides the PJM TOs with limited filing rights outside of PJM's stakeholder process. In reaching its conclusion, the Commission failed to address arguments raised by the Protesting Parties establishing that the Tariff does not provide the PJM TOs authority to submit a unilateral Section 205 filing that restricts the scope of PJM region-wide planning by expanding the scope of exclusive Transmission Owner planning in Attachment M-3 beyond Supplemental Projects. Without supporting its finding through defensible and definitive Tariff references demonstrating that the PJM TOs have a specifically provided right to make unilateral FPA Section 205 filings to alter and expand the scope of the transmission planning provisions in Attachment M-3 or to restrict the scope of PJM transmission planning as set forth in the Operating Agreement, the Commission had no statutory basis to accept the proposed revisions. As such, the Order accepting the FPA Section 205 Filing is arbitrary and capricious.

[37] August 11 Order at P 81.

[38] Courts review the Commission's decisions to ensure that the Commission responds to the argument before it. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Nor Am Gas Transmission*, 148 F.3d 1158, 1165 (1998)(quoting *KN Energy Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) ("It is the duty of a reviewing court to make sure that an agency 'engage[s] the arguments raised before it.'). The Commission's failure to address arguments that the PJM TOs do not have a unilateral right to make a FPA Section 205 Filing that alters transmission planning in PJM is not reasoned decision-making. *Id.*

The Protesting Parties fully set forth the restrictions on the PJM TOs' FPA Section 205 filing rights under the PJM Tariff.[39] As the Protesting Parties established, Sections 9.1 and 9.2 of the PJM Tariff set out the voluntary divide between the limited unilateral Section 205 filing rights retained by the PJM TOs and the broader Section 205 filing rights granted to PJM, and as it relates to the PJM Operating Agreement, PJM stakeholders.

The Tariff language in Section 9.1 demonstrates that the PJM TOs' unilateral Section 205 filing rights are limited to rate matters, specifically "changes in or relating to the establishment and recovery of the Transmission Owners' transmission *revenue requirements or the transmission rate design* under the PJM Tariff, and such filing rights shall also encompass *any provisions of the PJM Tariff governing the recovery of transmission-related costs incurred by the Transmission Owners.*"[40] None of the subsections within Section 9.1 reference transmission planning. Section 9.2 grants PJM Section 205 filing rights over all other "changes in or relating to the terms and conditions of the PJM Tariff."[41] The revisions in the TO Proposal are undisputedly related to

[39] *See* LS Power Protest at 17-19 (citing PJM Tariff section 9.1(a); *Atl. City Elec., et al v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)); *id*. at 19-20 (citing *Reg'l Transmission Organs.*, Order No. 2000, 89 FERC 61,284, at P 485, *order on reh'g*, Order No. 2000-A, *aff'd sub nom., Pub. Util. Dist. No. 1 of Snohomish City, Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)); *id*. at 19-20.

[40] PJM Tariff Section 9.1(a) [emphasis added]. *See also Atlantic City et al v. FERC*, 295 F.3d 1 (D.C. Cir.2002)(holding that the Commission cannot require a transmission owner to cede their statutory right to file "rates and terms for service rendered with its assets").

[41] Previous transmission planning and cost allocation filings provide good examples of how PJM and the PJM transmission owners use their separate filing rights – PJM files revisions to the transmission planning process and the PJM transmission owners file the related cost allocation provisions. *See PJM Interconnection, L.L.C*, "Compliance Filing," Docket No. ER13-198 (filed on Oct. 25, 2012)(PJM submitted revisions to the planning process detailed in Schedule 6 of the Operating Agreement.); *see PJM Transmissions Owners*, "PJM Open Access Transmission Tariff Revisions to Modify Cost Allocation for PJM Required Transmission Enhancements," Docket No. ER13-90 (Oct. 11, 2012)(The PJM transmission owners submitted the filing to ensure that the costs of new transmission facilities are allocated consistent with the principles in Order No. 1000).

transmission planning, and significantly impact the scope of the regional planning process,[42] and not the recovery of a transmission owner's costs of transmission ownership.[43]

In order for a utility or other person to revise an existing tariff under Section 205, it must have a right to do so. It is obvious that the Commission would not permit a stakeholder to unilaterally file under FPA Section 205 to revise a utility's tariff - only the utility may do so. To determine otherwise would allow an end-run around FPA Section 206, which requires that the Commission, whether on its own motion or based on a complaint, first determine that the existing rate is unjust, unreasonable, unduly discriminatory or preferential before establishing the just and reasonable rate.[44] The Commission cited no evidence that Section 9.1 of the PJM Tariff, nor any other provision of the PJM Tariff gives the PJM TOs unilateral FPA Section 205 filing rights to alter transmission planning in PJM, particularly the right to establish planning provisions that alter the scope of the regional planning process. Although the Commission asserts that "[u]nder the CTOA and the Tariff, the PJM TOs retain all rights that they have not specifically granted to PJM"[45] the Commission cites no specific provisions of either the CTOA or Tariff that it contends provide the PJM TOs with unilateral filing rights. Further, because the Tariff specifically limits the areas over which the PJM TOs have a unilateral FPA Section 205 filing right, to the extent that it could be alleged that under the CTOA the PJM TOs granted themselves additional rights,[46] the

[42] As discussed in later sections of this Request for Rehearing, the Applicability section in Attachment M-3 shifts from PJM the authority to define the scope of regional planning in addition to altering PJM's existing regional planning process.

[43] Neither the PJM TOs nor PJM asserted that the TO Proposal related to rate matters set forth in Section 9.1(a).

[44] 16 U.S.C. 824e.

[45] August 11 Order at P 82.

[46] *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 189 (2013) (finding that "the negotiation that led to the provisions at issue here were among parties with the same interest, namely, protecting themselves from competition in transmission development.").

Tariff must prevail. The August 11 Order wholly failed to establish a basis in the Tariff for the PJM TOs to have made a unilateral filing to change the PJM Tariff.[47] As such, the Commission had no authority under FPA Section 205 to approve it, rendering the August 11 Order arbitrary and capricious.[48]

Allowing the Attachment M-3 revisions to go into effect notwithstanding the lack of specific tariff language authorizing the filing also puts ratepayers at substantial risk of irreparable harm. There is no effective way for the Commission to make ratepayers whole if the August 11 Order is vacated on review for the likely billions of dollars of transmission additions built under the expanded Attachment M-3 provisions in the interim. The August 11 Order fails ratepayers by approving a revision to the PJM Tariff, opposed by the majority of PJM members, with no identifiable right for the PJM TOs to have made the offered filing in the first instance.

2. The Commission's reading of the CTOA and Operating Agreement essentially removes the term "enhancement."

Throughout the August 11 Order, the Commission correctly referred to "enhancements" and "expansions" when discussing PJM's planning responsibilities except the Commission never actually considered the term "enhancements" in its analysis. To support its determination that Asset Management Projects, a category that includes entirely new transmission facilities, are not within PJM's planning responsibility, the Commission pointed to its decisions in the California Orders.[49] The California Orders, however, focused on whether certain activities, including the

[47] The changes to Attachment M-3 also impact PJM's transmission planning process as set forth in the Operating Agreement. The PJM transmission owners have no filing rights to revise the PJM transmission planning process.

[48] The Commission is a "creature of statute" and has "only those authorities conferred upon it by Congress." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 at 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001)). "In the absence of statutory authorization for its act, an agency's 'action is plainly contrary to law and cannot stand.'" *Id.*

[49] August 11 Order at P 84.

replacement of existing transmission facilities, "expand" the transmission grid.[50] Applying that precedent, the Commission concluded that "Asset Management Projects" do not expand the grid. Nowhere does the Commission actually discuss whether end of life projects "enhance" the grid. Only by ignoring the term "enhancements" could the Commission reach the conclusion that "Asset Management Projects" do not fit within the categories of projects that the CTOA transferred to PJM.[51]

The Commission cannot simply read out of PJM governing documents the word "enhancement."[52] When interpreting a tariff, the Commission has stated that:

> In construing what a tariff means, certain general principles apply. One looks first to the four corners of the entire tariff, considers the entire instrument as a whole, *giving effect so far as possible to every word, clause and sentence, and attributes to the words used the meaning which is generally used, understood, and accepted*.[53]

Applying the Commission's rule here requires the Commission to give meaning to the term, "enhancement." The common definition of "enhancement" is "to increase or improve in value, quality, desirability, or attractiveness."[54] While not all replacement Transmission Facilities "expand" the transmission system, many clearly "increase or improve" the value or quality of the Transmission System. There is value in replacing aging infrastructure. A new Transmission Facility necessarily improves the quality of the Transmission System by making it more reliable and efficient. The Commission's example in the California Orders – "the replacement of an aging 1940-vintage transformer at the end of its useful life with a modern transformer, which could be

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[50] *Id*.

[51] *Id.* at P 83.

[52] *See* LS Power Protest at 31.

[53] *Midwest Indep. Transmission, Sys. Operator, Inc.*, 115 FERC ¶ 61,108, at P 22 (2006)(quoting *Columbia Gas Transmission Corp*., 27 FERC ¶ 61,089 at 61,166 (1984)) [emphasis added].

[54] Merriam Webster Dictionary Definition of Enhancement. *See also* LS Power Protest at 31.

of higher capacity"[55] – supports a finding that "enhancements" include end of life projects. The Commission's failure to give full meaning to the term enhancement is arbitrary and capricious and not the result of reasoned decision-making.[56]

3. The August 11 Order ignored that the TO Proposal shifts responsibility for determining the scope of regional planning from the PJM Stakeholders to the TOs.

The Commission's approval of the TO Proposal inexplicably ignored the fact that it shifts control over the scope of regional transmission planning from the PJM stakeholders to the PJM TOs. Protesters explained how the new Applicability section in Attachment M-3 reserves to the PJM TOs control over "any other transmission expansion or enhancement of Transmission Facilities that is not planned by PJM to address . . ." the planning criteria laid out in clauses (1) through (5) of the same section.[57] Yet the Commission did not address these arguments.[58] Instead, the Commission made a general statement that "the planning activities addressed by the Attachment M-3 Revisions Filing are within the exclusive rights and responsibility retained by the PJM TOs under the CTOA."[59]

The Operating Agreement can only be amended by the Members Committee, a committee of stakeholders that represent various sectors of PJM.[60] Specifically, Section 8.8 of the Operating Agreement states that the Members Committee has the authority to amend any portion of the

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[55] *S. California Edison Co. Local Transmission Planning Within the California Indep. Sys. Operator Corp*., 164 FERC ¶ 61,160, at P 10 (2018).

[56] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.").

[57] *See* LS Power Protest at 58-60; Load Group Protest at 21-22.

[58] While the Commission summarized the issue at Paragraph 4 of the August 11 Order in the summary section of the Order, it did not address it in the substantive section of the August 11 Order.

[59] August 11 Order at P 81.

[60] *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC 61,257 (1997); *see also* Order No. 888, 61 FR 21,257.

Operating Agreement. PJM highlighted this fact in its Order No. 1000 compliance filing, stating: "PJM's stakeholder process requires that all proposed amendments to the Schedule 6 planning process are fully vetted for endorsement before all stakeholders at the Markets and Reliability Committee ("MRC") and Members Committee ("MC") prior to filing . . .."[61] As LS Power stated in its Protest, the division of filing rights is consistent with the Commission's rules requiring PJM to be independent and no one interest dominate.[62]

In addition, in support of its determination, the Commission narrowly interpreted the definition of Asset Management Projects to "not fall under regional planning under the Operating Agreement as they relate solely to maintenance of existing facilities, and they do not 'expand' or 'enhance' the PJM grid as the CTOA requires for planning transferred to PJM."[63] The TO Proposal is broader than simply adding Asset Management Projects to Attachment M-3. Section (i) of the definition of Attachment M-3 Project also includes Asset Management Projects that materially impact the impedance of Transmission Facilities, which by its very definition are regional in nature and impact all of PJM. It now includes any project not planned by PJM to meet the specific criteria listed in the Applicability section as well as certain projects resulting from a transmission provider's Form No. 715 criteria. The Commission cannot rely on the same rationale it used for Asset Management Programs – that they are not expansions or enhancements – to find that the definition of Attachment M-3 Projects are within the PJM TOs' exclusive planning authority because the definition clearly includes "any other *expansion or enhancement* of Transmission

[61] *PJM Interconnection, L.L.C.*, Order No. 1000 Compliance Filing at 20 (filed Oct. 25, 2012).

[62] LS Power Protest at 60 (citing *Pennsylvania-New Jersey-Maryland Interconnection, et al*, 81 FERC ¶ 61,257 at 62,263 (1997); Order No. 888, 61 FR 21540-01 at 21596).

[63] August 11 Order at P 83.

Facilities . . .."[64] The definition also includes projects that *significantly* impact the impedance of existing regionally beneficial Transmission Facilities or affects Transmission Facility ratings in PJM. "Impedance changes" and "affecting transmission facility ratings" are evidence of regional benefits.[65] The Commission must evaluate the entire proposal before it and address all the arguments raised.[66]

4. The August 11 Order inexplicably allows the PJM TOs to insert a new Right of First Refusal.

The August 11 Order allows the PJM TOs to insert a new right of first refusal in the PJM Tariff contrary to Order No. 1000, ignoring the Commission's long-established finding that a right of first refusal does not exist in the PJM Tariff or CTOA.[67] Order No. 1000 required transmission providers to eliminate from Commission jurisdiction tariff and agreements rights of first refusal for an incumbent transmission provider with respect to transmission facilities selected in the regional transmission plan for purposes of cost allocation.[68] In Order No. 1000-A, the Commission clarified that there can be no right of first refusal for a project if any costs of the project are allocated regionally or outside of a transmission provider's retail distribution service territory or footprint, or in the case of an RTO such as PJM, outside the transmission provider's zone.[69]

On compliance with Order No. 1000, PJM asserted that the PJM Tariff did not include a right of first refusal in favor of the incumbent transmission owners in PJM, while the PJM TOs

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[64] Attachment M-3 (b)(2)(i) and Attachment M-3(b)(2)(iii) [emphasis added].

[65] *See, e.g., Tampa Elec. Co., et al*, 148 FERC ¶ 61,172, at P 138 (2014).

[66] *Motor Vehicle Mfrs. Assn of the U. S., Inc. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("FERC must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990) (holding that an agency has a duty to consider the seriously-pleaded contentions of a party and failure to do so is arbitrary and capricious).

[67] *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128 (2014) ("PJM Order 1000 Rehearing Order").

[68] Order No. 1000 at PP 258, 318.

[69] Order No. 1000-A at P 430.

argued that Section 4.2.1 of the CTOA granted them a right of first refusal to build reliability projects.[70] The Commission found that certain provisions were ambiguous and therefore required their removal but found that Section 4.2.1 of the CTOA did not include a right of first refusal and permitted it to remain in the PJM Tariff.[71] Thus, the status quo prior to the PJM TO Proposal was that neither the PJM Tariff nor the CTOA included a right of first refusal.

As explained above, the new Applicability section in Attachment M-3 gives each transmission owner responsibility for *planning and constructing* all transmission expansions or enhancements that are not needed for the five criteria listed in the same section, thus creating a new right of first refusal in the PJM Tariff that limits PJM's ability to create new categories of regional projects.[72] LS Power raised the issue in its Protest but the Commission did not address it in the determination section of the August 11 Order.[73] Because the Commission permitted the PJM TOs to add a new right of refusal without explanation and contrary to Order No. 1000 the August 11 2020 Order is arbitrary and capricious and not the result of reasoned decision-making.[74]

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[70] *PJM Interconnection, L.L.C.*, "Compliance Filing," Docket No. ER13-189-000 at 49 (filed on Oct. 25, 2012) (citing *Primary Power v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,054 (July 19, 2012)(finding the PJM TOs did not have a right of first refusal for economic projects); *PJM Transmission Owners*, "Compliance Filing," Docket No. ER13-195-000 at 5-6 (Oct. 25, 2012)(citing Section 4.2.1 of the CTOA).

[71] PJM Order 1000 Rehearing Order at P 129, n.250. *See also* Brief for the Federal Energy Regulatory Commission as Respondent Brief, *American Transmission System, Inc. et al v. Federal Energy Regulatory Commission*, No. 14-1085 at 15-16 (D.C. Cir. Dec. 4, 2015) (summarizing the Commission's decision in the rehearing order as "reaffirm[ing] that Transmission Owners' cited provision in the Transmission Owners Agreement and the PJM Operating Agreement are not properly read as rights of first refusal and are not entitled to *Mobile Sierra* protection." The Brief also address *Primary Power* and explain that the "Commission, however, specifically rejected Transmission Owners' assertion that Primary Power upheld their interpretation of section 4.2.1 as a right of first refusal for non-economic (i.e. reliability or operational) projects. *Id*. P 223, JA 75. While *Primary Power* found the section 4.2.1 obligation to build inapplicable to economic projects (i.e. projects that reduce energy costs), *id*. (citing Primary Power, 140 FERC ¶ 61,052 P 60), the Commission did not find it constituted a right of first refusal for non-economic projects. *Id*. Rather, the Commission pointed to its finding in Order No. 1000 that an obligation to build does not create a corresponding right of first refusal. *Id.* (citing Order No. 1000 P 261).")

[72] Attachment M-3 (a).

[73] LS Power Protest at P 6, 13-15. The Commission referenced LS Power arguments in Paragraphs 44 and 46, but then failed to provide a substantive response.

[74] Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981-982 (2005) ("Unexplained inconsistency is. . . a reason for holding an interpretation to be an

C. The August 11 Order ignores the plain language of the TO Proposal and fails to meaningfully address arguments that the definitions do not support a finding that the TO Proposal is within the TOs' authority. (Statement of Error #3)

The August 11 Order held that Asset Management Projects "do not fall under regional planning under the Operating Agreement as they relate solely to maintenance of existing facilities, and they do not 'expand' or 'enhance' the PJM grid as the CTOA requires for planning transferred to PJM."[75] The August 11 Order further elaborates that the CTOA "grants to PJM only the right to plan for 'expansion' and 'enhancement' of the grid as part of the RTEP."[76] Thus, the Commission concedes that, with the exception of Supplemental Projects, which are limited and local, transmission projects that expand or enhance the grid are rightfully planned by PJM through the RTEP. Despite this acknowledgement, however, the Commission did not examine or evaluate any of the numerous new definitions or other provisions in the TO Proposal to determine whether they include transmission planning for projects that expand or enhance the Transmission System that are not Supplemental Projects. Rather, the August 11 Order relies solely on a conclusory statement that all of the proposed revisions in the TO Proposal that "expand the applicability of the existing Attachment M-3 to include Asset Management Projects," are "just and reasonable, given the specific facts and circumstances presented here…."[77] This finding appears to be based

arbitrary and capricious change from agency practice under the Administrative Procedure Act.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 436 U.S. 29, 46-57 (1983)); *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) ("[A]n agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent."); *Panhandle Eastern Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999)("As we have repeatedly reminded FERC, if it wishes to depart from its prior policies, it must explain the reasons for its departure."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

[75] August 11 Order at P 83.

[76] *Id.* at P 86.

[77] *Id.* at P 88.

upon two assertions: (1) the Commission previously found Attachment M-3 to be just and reasonable and since the TO Proposal expands the applicability of Attachment M-3 to Asset Management Projects, it is also just and reasonable; and (2) the TO Proposal includes a "process for the identification and planning for EOL Needs" that "provide[s] for coordination of EOL Needs with the PJM RTEP planning criteria needs" thereby providing "increased opportunities to review and comment on EOL Need transmission projects, and thus provides greater transparency."[78] But the Commission did not provide any explanation of how these two points contradict the Joint Protestors' position that other definitions and new provisions in Attachment M-3, in addition to "Asset Management Projects" go beyond the PJM TOs' authority.

In addition to arguing that the proposed modifications to Attachment M-3 unlawfully modify the RTEP as set forth in the Operating Agreement or are otherwise beyond the PJM TOs' authority, the Load Group's Protest identified and described the shortcomings of the new definitions and other provisions in the TO Proposal as follows:

- The new "applicability" section not only dramatically expands the applicability of the Attachment M-3 process but also explicitly limits PJM's flexibility to improve its structure and operations to meet demands by restricting the PJM planning criteria.[79] The "applicability" provision gives the PJM TOs authority to plan both Supplemental Projects and "*any other transmission expansion or enhancement of Transmission Facilities* that is not planned by PJM to address one or more" of a limited list of PJM planning criteria, including: NERC Reliability Standards, State Agreement Approach expansions or enhancements,[80] Transmission Owner FERC Form 715 criteria provided they meet the

[78] *Id.*

[79] Load Group Protest at 13-14; LS Power Protest at 23-24.

[80] *See* LS Power Protest at 23 wherein LS Power argued:

> The Applicability Section is also conspicuous in what is missing. The Commission required in Order No. 1000 that both local and regional transmission planning processes plan for transmission needs driven by Public Policy Requirements. Currently, PJM satisfies that requirement by identifying Public Policy Requirements and Public Policy Objects and incorporating them into PJM's sensitivity studies, modeling and scenario analyses. PJM also has the State Agreement Approach that permits individual states to request that PJM study particular public policy requirements and then voluntarily assume responsibility for a project needed to meet the public policy requirement (assuming the

Additional Procedures as set for in the new section (d) of Attachment M-3, or projects to relieve economic constraints.[81] The Commission failed to explain how this provision, that authorizes the PJM TOs to plan for expansions or enhancements of the Transmission System that are not Supplemental Projects, is consistent with its finding that the TO Proposal is just and reasonable.

- The proposed definition of "Attachment M-3 Project" is unjust, unreasonable and unlawful because it confers authority for transmission planning beyond local Supplemental Projects to the Transmission Owners[82] by including Asset Management Projects that affect Transmission Facility ratings or significantly change the impedance of regional Transmission Facilities and "*any other expansion or enhancement of Transmission Facilities* that is not excluded from this Attachment M-3 under any of clauses (1) through (5) of section (a)."[83]

- The proposed definition of "Incidental Increase" is unjust and unreasonable as it is unreasonably broad and susceptible to manipulation through unfettered modifications to Transmission Owner design standards.[84] The definition also references "advancements in technology" but there is no limitation on the phrase.[85] It could refer to more efficient equipment, replacement from lower voltage to regionally beneficial higher voltage facilities, or the inclusion of new energy storage technology.[86]

- The proposed definition of "EOL Need" is unjust and unreasonable because by including a "test" for regional planning of transmission lines operating at or above 100 kV or a transformer, it is not limited to local Supplemental Projects and, thus, unlawfully confers authority for transmission planning to the PJM TOs.[87] The EOL Need definition also creates a test that will limit regional planning, by creating a backdoor right of first refusal on substations and anything else that is not a replacement transmission line or transformer.[88]

- The proposed definition of "Candidate EOL Needs List" is unjust and unreasonable

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project does not qualify as a reliability or market efficiency project). The Applicability Section only carves out State Agreement Approach project.

[81] Load Group Protest at 13-14, citing Attachment M-3 at Paragraph (a); LS Power Protest at 26

[82] *Load Group Protest at 13-14,* citing *Monongahela Power Co.*, 156 FERC ¶ 61,134 at P 13 (2016); 162 FERC ¶ 61,129; *order on reh'g*, 164 FERC ¶ 61,217 (2018).

[83] *Id.* at 38, citing Attachment M-3 at Paragraph (b)(2).

[84] *Id.* at 38, citing Attachment M-3 at Paragraph (b)(3).

[85] LS Power Protest at 45.

[86] *Id.*

[87] Load Group Protest at 39, citing Attachment M-3 at Paragraph (b)(5).

[88] LS Power Protest at 48-49.

because it is not transparent in contravention of Order No. 890 requirements.[89] More specifically, the list is shared only with PJM and only updated annually, although a Transmission Owner may change its projections of candidates on the list at any time. Stakeholders other than PJM are not privy to the Candidate EOL Needs List.

- The proposed definition of "Form No. 715 EOL Planning Criteria" is unjust, unreasonable and unlawful because it modifies the RTEP and, thus exceeds the authority of the Transmission Owners to modify the Operating Agreement through a unilateral FPA Section 205 filing.[90]

- The proposed definition of "PJM Planning Criteria" is unjust and unreasonable because it applies only to needs to plan transmission expansions or enhancements *other than those reserved to each Transmission Owner* in the "applicability" section, which confers authority for transmission planning beyond local Supplemental Projects to the PJM TOs and modifies the RTEP, which is beyond the PJM TOs' authority.[91]

- The revisions to Paragraph C(7) expand the use of Attachment M-3 to other undefined "Transmission Projects," and, thus, is unjust and unreasonable because it confers authority to the PJM TOs to use the Attachment M-3 transmission planning process beyond local Supplemental Projects.[92]

The Commission did not explain why the new project category definitions above and modifications to Attachment M-3 that reserve to the PJM TOs' authority to plan transmission that is not limited to either: (i) local Supplemental Projects or (ii) Transmission Facilities that do not expand or enhance the Transmission System is consistent with its finding that the TO Proposal is just, reasonable and lawful. The Commission made no effort to reconcile its holding that the TO Proposal is just and reasonable with the actual words included in proposed Attachment M-3. In fact, other than summarizing the definitions in a preliminary section of the Order, the Commission does not refer to any new provision of Attachment M-3 in the TO Proposal at all. The Commission also abjectly failed to explain how allowing the PJM TOs to reserve transmission planning rights

[89] Load Group Protest at 39, citing Attachment M-3 at Paragraph (d)(1)(iii).

[90] *Id*. at 39, citing proposed Attachment M-3 at Paragraph (b)(7); LS Power Protest at 51-52.

[91] Load Group Protest at 39, citing proposed Attachment M-3 at Paragraph (b)(9); LS Power Protest at 26 (also discussing interaction between the coordination of EOL Need Planning with PJM planning criteria needs.

[92] Load Group Protest at 39.

to themselves that are not Supplemental Projects but expand or enhance the Transmission System is consistent with the August 11 Order's conclusions that transmission planning for expansions and enhancements to the Transmission System are within the RTEP and PJM's planning authority. The lack of explanation, or even acknowledgement of any new term other than "Asset Management Projects" is far from sufficient to demonstrate a "rational connection between the facts found and the choice made."[93]

The August 11 Order also failed to respond meaningfully to evidence and arguments offered by the Load Group and others demonstrating that, rather than improving coordination and increasing transparency, the TO Proposal will undermine PJM's ability to develop the RTEP, will reduce transparency in the planning process, and will exacerbate issues with the generation interconnection queue, among other negative consequences.

The Load Group argued that the revisions to Attachment M-3 are the antithesis of increasing a coordinated planning approach. Specifically, the Load Group noted that whereas the existing Attachment M-3 described the tariff section as providing "additional details of the process *PJM and the PJM Transmission Owners will follow in connection with planning Supplemental Projects . . .*"[94] as part of a coordinated planning approach, the revised version deletes the reference to PJM and coordination and states only that "[*e*]*ach Transmission Owner shall be responsible for planning and constructing"* transmission projects as described therein. In other words, the

[93] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. ___, 136 S.Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)).

[94] PJM Tariff, Attachment M-3, Applicability.

revisions literally change the process from one involving both PJM and the PJM TOs to just the PJM TOs.[95]

The Load Group also argued that the new definition of "Incidental Increase" will likely dramatically reduce coordination between PJM and the PJM TOs. The inclusion of replacements that result from changes to "Transmission Owner design standards" in the definition of "Incidental Increase" authorizes any PJM TO to add any new transmission to meet updated standards that are developed exclusively by the individual TO and do not have any review, approval process or other regulatory oversight. The example provided was that if a PJM TO changes its design standard to require 1/0 copper to be replaced with 795 ACSR conductor (the new standard) at 69 kilovolts, it would increase the line carrying capability by 4-5 times (likely more than the incidental increase the Commission envisioned). It would also significantly increase the volume of transmission replacement projects for which the PJM TO would have sole planning authority. The Commission did not address the argument that this definition's broad, non-quantifiable and apparently self-policing nature makes it likely that far more transmission projects will be removed from PJM-facilitated open, transparent and coordinated transmission planning.

Similarly, several parties argued that the secret "Candidate EOL Needs List" reduces both coordination and transparency. For example, the New Jersey Board of Public Utilities ("NJBPU") argued that the "transmission planning process is not open and devoid of discrimination when everyone except for PJM and the Transmission Owner are shut out."[96] One of the bases for the NJBPU's argument is that the "number of projects opened to some form of stakeholder review will

[95] *See* LS Power Protest at 14, footnote 36. *See* specific language from the Applicability Section, "in accordance with Schedule 6 of the Operating Agreement as provided in this Attachment M-3," which effectually writes in language that Attachment M-3 provides the authority for the regional planning process.

[96] Protest of the New Jersey Board of Public Utilities at 8.

be a small percentage of the overall projects identified on the Transmission Owners' EOL Candidate Needs Lists." The NJBPU correctly noted that a PJM TO need only disclose information about an EOL Need if there is an identified overlap between the projected EOL Need and a PJM Planning Criteria Need and only after PJM consults with the PJM TO first and meets several other conditions. The NJBPU stated that there are "no temporal limits on the time it could take to satisfy the consultation or other conditions, thus creating an uncertain delay before stakeholders might review this narrow subset of projects."[97] The Commission did not address the NJBPU's conclusion that the TO Proposal falls short of Order No. 890's requirements to afford the necessary transparency to avoid undue discrimination.

J-Power presented arguments that the negative consequences of the TO Proposal could extend beyond transmission planning. J-Power argued that the proposed transmission planning changes will necessarily impact the timing and results of interconnection studies by adding uncertainty to the transmission planning process, which will "put additional pressure on an already overtaxed interconnection study system.[98] The uncertainty is created by the PJM TOs' ability to propose but then remove EOL Projects from its plan at any time. This uncertainty will have negative impacts on PJM's ability to prepare the RTEP as well.

The August 11 Order makes no mention of any of these arguments, let alone responds meaningfully to the evidence and arguments that the TO Proposal will decrease coordination between the transmission planning being done by the PJM TOs and PJM, will reduce transparency in transmission planning, and will have negative implications even beyond transmission planning in PJM. Rather, without any explanation, the Commission asserts that the TO Proposal's inclusion

[97] *Id.*

[98] Comments of J-Power USA Development Co., LTD. ("J-Power Comments") at 5.

of "a process for the identification and planning for EOL Needs" provides for "coordination of EOL Needs with the PJM RTEP planning criteria needs."[99] The August 11 Order is arbitrary and capricious and not the result of reasoned decision-making.

D. The Commission erred in finding that "Asset Management Projects" are consistent with the type of projects and activities that the Commission found were appropriately considered transmission owner asset management projects in the California Orders. (Statement of Error #4)

In the August 11 Order, the Commission determined that "Asset Management Projects do not fit within the categories of projects the CTOAs have transferred to PJM," and that its interpretation "is consistent with the *California Orders*, in which the Commission concluded that it was appropriate to define 'asset management' as activities that 'encompass the maintenance, repair, and replacement work done on existing transmission facilities as necessary to maintain a safe, reliable and compliant grid based on existing topology,' even if these projects result in an 'incidental increase in transmission capacity that is not reasonably severable from the asset management or activity.'"[100]

The Commission's finding that its conclusion regarding the CTOA is consistent with the conclusion in the California Orders ignores critical distinctions between the two proceedings – distinctions the Commission itself recognized but has now abandoned without explanation or justification. One such distinction that the Commission erred by failing to address in the August 11 Order is the difference in the scope of the RTO/ISO's authority over transmission planning as compared to the transmission owners' authority. In the California Orders, the Commission noted that the CAISO's Transmission Planning Process ("TPP") did not indicate that the CAISO would

[99] August 11 Order at P 88.

[100] August 11 Order at P 84, citing *So. Cal. Edison Co*, 164 FERC ¶ 61,160 at P 33; *Cal. Pub. Util. Comm'n.*, 164 FERC ¶ 61,161 at P 68.

evaluate non-expansion transmission-related work.[101] In the August 11 Order, the Commission failed to address the Load Group's demonstration that the PJM TOs' proposal to drastically limit PJM's flexibility and role in transmission planning is contrary to the Operating Agreement. The Load Group explained that PJM's authority over transmission planning as the independent RTO was carefully crafted in the Operating Agreement in support of competitive markets.[102] Specifically, in defining Supplemental Projects as a "transmission expansion or enhancement that is not required for compliance with the following PJM criteria,"[103] "PJM criteria" is not defined, nor are "system reliability, operational performance or economic criteria."[104] The Load Group further explained that these undefined terms reflect the flexibility afforded PJM and its stakeholders as to the regional criteria that PJM should address. PJM's authority over transmission planning as the independent RTO is also reflected in the fact that Supplemental Projects require a determination by the PJM Office of the Interconnection – not the TOs – regarding whether a proposed Supplemental Project does not meet any of the referenced PJM criteria.[105]

In the August 11 Order, the Commission summarily addressed these violations of the Operating Agreement with a finding that Asset Management Projects "do not fall under regional planning under the Operating Agreement as they relate solely to maintenance of existing facilities . . ."[106] The error in the Commission's determination that Asset Management Projects relate solely to maintenance is discussed Section III.B.3, above. However, the Commission also erred by failing

[101] *Cal. Pub. Util. Comm'n.*, 164 FERC ¶ 61,161 at P 70.

[102] Load Group Protest at 13-14; *see also* August 11 Order at P 58.

[103] *Id.* at 14, citing Operating Agreement, Schedule 6, 1.2(3).

[104] *Id.* at 14, citing Operating Agreement, Section 1, Definitions.

[105] *Id.*, citing Operating Agreement, Schedule 6, Section 1.5.6(n).

[106] August 11 Order at P 82.

to address the Load Group's demonstration that the TO Proposal violates the Operating Agreement, which is a critical distinction between PJM and the CAISO. The Commission's failure to address these arguments is a failure to engage in reasoned decision making.[107]

E. The Commission erred by applying an erroneous ruling regarding Order No. 890 to the TO Proposal regarding Asset Management Project planning. (Statement of Errors #5, #6, #7 and #8)

In the California Orders, the Commission acknowledged that Order No. 890 did not define "transmission planning."[108] Yet, over a decade after the Final Rule was adopted, the Commission has narrowed the scope of Order No. 890[109] by announcing that it applies only to expansion of the transmission grid.[110] On rehearing in the California Orders, the Commission rejected demonstrations that it erred in narrowly interpreting Order No. 890 such that projects that do not expand the transmission grid are not subject to the requirements of Order No. 890.[111] Instead, the Commission maintained its position that Order No. 890 applies only to projects that expand the transmission grid.[112] The Commission's determination in the California Orders, which it has now

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[107] *See, e.g.*, *Motor Vehicle Manufacturer's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem"); *see also KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1056 (2003) (explaining that "unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned") (internal alterations, quotes and citation omitted).

[108] *Cal. Pub. Util. Comm'n*, 164 FERC ¶ 61,161 at P 66.

[109] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[110] *Cal. Pub. Util. Comm'n*, 164 FERC ¶ 61,161 at P 66 (" . . . the transmission planning reforms that the Commission adopted in Order No. 890 were intended to address concerns regarding undue discrimination in grid expansion. Accordingly, to the extent that PG&E asset management projects and activities do not expand the grid, they do not fall within the scope of Order No. 890, regardless of whether they are capitalized in PG&E's transmission rate base.")(citations omitted).

[111] *See California Pub. Utils. Comm'n v. Pac. Gas and Elec. Co.*, 168 FERC ¶ 61,171 at PP 10-15 (the Commission explained that Complainants asserted that the Commission made six specific errors in the Order on Complaint with respect to application of Order No. 890 that warrant granting their request for rehearing).

[112] *Id.* at PP 19-35.

blindly applied to the PJM TOs' planning for Asset Management Projects under their expanded Attachment M-3, is in error and should be reversed on rehearing of the August 11 Order. Even if the Commission does not grant rehearing of its narrowed scope of Order No. 890 in general, it should grant rehearing of that determination as applied to the new Attachment M-3 at issue in this proceeding.

1. The Commission erred in finding that incidental expansions of the Transmission System are not subject to Order No. 890.

In the August 11 Order, the Commission applied its narrow view of Order No. 890 to the TOs' proposed Asset Management Projects and revisions to Attachment M-3, and found that ". . . where the transmission projects developed under the expanded Attachment M-3 process result in only incidental expansions of the transmission system, such asset management activities are not subject to Order No. 890 transmission planning principles."[113] Petitions for review of the California Orders are currently pending before the U.S. Court of Appeals for the Ninth Circuit.[114] The Load Group agrees with arguments made on rehearing of the California Orders that the Commission erred in its new-found limitation of the scope of Order No. 890 to only projects that expand the transmission system.[115] More specifically, the Load Group agrees with arguments on rehearing of the California Order that the Commission's narrow scope for Order No. 890 as announced in the California Orders is in error, including the following errors: (1) the Commission incorrectly found that the PJM Show Cause order did not address whether non-grid expansion

[113] August 11 Order at P 89 (citations omitted).

[114] *CPUC, et al. v. FERC*, Case No. 19-72886 and *Northern California Power Agency*, Case No. 19-72925. Both cases have been stayed pending settlement discussions. *See* Order issued April 22, 2020 in U.S. Court of Appeals for the Ninth Circuit, Case Nos. 19-72925, *et al.*

[115] *See, e.g.*, Request for Rehearing filed by the California Public Utilities Commission, *et al.*, in Docket No. EL17-45-001.

projects now characterized as "asset management" projects must go through an Order No. 890-compliant transmission planning process;[116] (2) the Commission's narrow scope for Order No. 890 is inconsistent with requirements in the Energy Policy Act of 2005;[117] (3) the Commission's ruling "violates longstanding Commission policy regarding the need for coordinated and transparent transmission planning, and it perpetuates undue discrimination that Order No. 890 sought to eradicate;[118] (4) the Commission violated its statutory obligation to remedy undue discrimination; (5) the ruling will result in unjust and unreasonable rates; and (6) the Commission failed to consider the fact that asset management projects require transmission planning and, therefore, must be included in a transmission planning process that complies with Order No. 890.[119]

To the extent the Commission's determination regarding the scope of Order No. 890 as set forth in the California Orders is modified or vacated, the Commission's reliance on the California Orders in this proceeding must also be modified or vacated. On rehearing of the August 11 Order, the Commission should reconsider the arguments raised against narrowing the scope of Order No. 890 such that it applies only to transmission projects that expand the transmission system, and reverse its finding in the August 11 Order that non-grid expansion projects under the new Attachment M-3 are not subject to the requirements of Order No. 890. In any event, given the Commission's reliance in the August 11 Order on its finding in the California Orders, if the California Orders are modified or vacated, the Load Group reserves its right to further challenge the Commission's determination in this proceeding that Order No. 890 is limited to grid-expanding projects.

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[116] *Id.* at pp 14, 18-21.

[117] *Id.* at 14, 22-24.

[118] *CPUC v. FERC*, 168 FERC ¶ 61,171 at P 12.

[119] *See id.* at PP 10-15.

2. The August 11 Order is arbitrary and capricious for finding that the California Orders apply to the new Attachment M-3 process.

In protests to the new Attachment M-3, the Load Group and others demonstrated that the rulings regarding asset management activities in the California Orders are limited to those proceedings and even if the California Orders did serve as precedent, the new Attachment M-3 goes well beyond any reasonable application of the California Orders.[120] In the August 11 Order, the Commission summarily "agreed with the PJM TOs that where the transmission projects developed under the expanded Attachment M-3 process result in only incidental expansions of the transmission system, such asset management activities are not subject to Order No. 890 transmission planning principles."[121] The only reasoning offered by the Commission is that it "is consistent with the findings in the California Orders that the Order No. 890 planning principles apply only to transmission projects involving grid expansion, and where Supplemental Projects result in only incidental expansions of the transmission system, do not apply to asset management activities."[122] The Commission's application of the California Orders to the new Attachment M-3 is arbitrary and capricious because it unreasonably departs from Commission precedent without explanation, ignores arguments put forth in this proceeding, and is otherwise unreasonable.

First, the Commission's findings in the August 11 Order are internally inconsistent. On the one hand, the Commission relies on its previous finding that the Attachment M-3 planning process is consistent with Order No. 890 and finds that having done so, the new Attachment M-3 is "likewise just and reasonable."[123] On the other hand, and in order to bless the shift of planning

[120] *See* Load Group Protest at 25-30, citing Supporting Comments of the PJM Joint Stakeholders in Docket No. ER20-2308-000 at 10-11, 50-57.

[121] August 11 Order at P 89.

[122] *Id.* at P 89.

[123] *Id.* at P 88.

responsibility for Asset Management Projects from PJM to the TOs, the Commission insists that the changes reflected in the new Attachment M-3 "are not subject to Order No. 890 transmission planning principles."[124] For the reasons discussed above and in the Load Group's prior pleadings, the new Attachment M-3 is *not* just and reasonable and is *not* consistent with Order No. 890. At the very least, the Commission must address its prior finding that the PJM TOs are required to conduct local transmission planning in a manner that complies with Order No. 890, and address the fact that the August 11 Order relieves them of this obligation.[125] The August 11 Order is arbitrary and capricious for failing to explain this departure from the Commission's Show Cause Orders.[126]

Second, if left unaddressed, the August 11 Order could be interpreted to vacate or at least severely limit the findings in the Show Cause Orders with respect to planning for Supplemental Projects in PJM. The August 11 Order finds that relieving the PJM TOs of the requirement to comply with Order No. 890 for "such asset management activities" "is consistent with the finding in the *California Orders* that the Order No. 890 planning principles apply only to transmission projects involving grid expansion, *and where Supplemental Projects result in only incidental expansions of the transmission system, do not apply to asset management activities."*[127] The Commission's reference to Supplemental Projects in the context of the California Orders and incidental expansions of the transmission system is unclear, at best. The Commission did not make

[124] *Id.* at P 89.

[125] *See Monongahela Power Co.*, 162 FERC ¶ 61,129 at P 72, 74.

[126] *See, e.g., ABM Onsite Servs.-W., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1137, 1142 (D.C. Cir. 2017) ("[A]n agency's unexplained departure from precedent is arbitrary and capricious."); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.")

[127] August 11 Order at P 89 [emphasis added].

any rulings in the California Orders regarding PJM Supplemental Projects that result in only incidental expansions of the transmission system. Quite to the contrary, the Commission was adamant in the California Orders that its rulings regarding CAISO Participating Transmission Owner ("PTO") asset management activities were not aligned with Supplemental Project planning in PJM and that the Commission had not made a determination regarding non-grid expanding Supplemental Projects. The Commission clarified that "[t]he question whether asset management projects and activities that do not increase the capacity of the grid must go through an Order No. 890-compliant transmission planning process was not at issue in the February 15 PJM Order."[128] The Commission also determined that "[i]n light of the specific criteria set forth in the definition of Supplemental Projects in the PJM Tariff, there is no basis to conclude that based on their definition, Supplemental Projects in many cases are identical to asset management projects."[129] It makes no sense for the Commission to now state in the August 11 Order that "where Supplemental Projects result in only incidental expansions of the transmission system," the requirements of Order No. 890 do not apply. Such a finding is directly at odds with the Commission's findings in the Show Cause Orders that transmission planning for Supplemental Projects must comply with Order No. 890. Moreover, as the new Attachment M-3 has been designed, Asset Management Projects are not Supplemental Projects. Notwithstanding the Load Group's disagreement with the notion that Asset Management Projects are not Supplemental Projects, there is no reasonable explanation for the Commission to vacate its prior findings which required planning for Supplemental Projects to comply with Order No. 890, in this proceeding which addresses a new category of projects that the PJM TOs designed to be separate and apart from Supplemental

[128] *Cal. Pub. Utils. Comm'n v. Pac. Gas and Elec. Co.*, 168 FERC ¶ 61,171 at P 54 (2019).

[129] *Id.* at P 59; *see also S. California Edison Co.*, 164 FERC ¶ 61,161 at P 67 (2018).

Projects. The August 11 Order could be interpreted as finding that where Supplemental Projects do not expand the transmission system, there is no requirement to comply with Order No. 890 transmission planning principles, which is a finding directly contrary to the Show Cause Orders.

Third, the Commission's exception to its own findings in the August 11 Order warrants rehearing. The Commission determined that "where transmission projects developed under the expanded Attachment M-3 process result in only incidental expansions of the transmission system, such asset management activities are not subject to Order No. 890 transmission planning principles"[130] and accepts the new Attachment M-3 as filed. However, in a footnote the Commission creates a gaping hole in its finding. The Commission states as follows:

> We make no determination here as to whether EOL Needs or any of these Asset Management Projects, and in particular specific replacement activities, are subject to the transmission planning requirements of Order No. 890, as the PJM TOs proposed to includes these types of projects in the Order No. 890 planning process in Attachment M-3.[131]

The very issue in this proceeding is whether the new Attachment M-3 provisions for planning to address EOL Needs, Asset Management Projects and specific replacement activities must comply with Order No. 890 and, if so, whether the TO Proposal does so. The Commission has specifically declined to address these issues, instead relying on its summary determination that the new Attachment M-3 expands the Order No. 890-compliant planning process. On rehearing, the Commission should address demonstrations put forth by the Load Group and others that the proposed definitions and planning for EOL Needs, Asset Management Projects and other provisions in the new Attachment M-3 must comply with Order No. 890, and fail to do so.

[130] August 11 Order at P 89.

[131] *Id.* at note 141.

Fourth, the August 11 Order is arbitrary and capricious because it ignores the fact that PJM's transmission planning, pursuant to its governing documents, includes not only expansions but also *enhancements*.[132] The Commission failed to address this critical distinction between transmission planning in the CAISO and PJM transmission planning. As the Load Group demonstrated in pleadings, Supplemental Projects in PJM include "expansions and enhancements," while the CAISO transmission planning process does not make provision for "enhancements." Indeed, the CAISO "clarifie[d] that the CAISO's TPP addresses 'expansion' and 'reinforcement' of the transmission system, as opposed to 'enhancement' as reflected in the Commission-approved TCA that sets forth the respective roles and responsibilities of the CAISO and PTOs."[133] There is no discussion in the California Orders of how "enhancements" should be treated for purposes of asset management, and the August 11 Order failed to address demonstrations that because of this distinction, the California Orders do not apply to transmission planning in PJM.

Fifth, the Commission's application of the California Orders departs from the Commission's consistent precedent, reinforced in the California Orders, that transmission planning and compliance with Order No. 890 will be determined on an RTO-specific basis.[134] Even if the Commission determined that the California Orders apply here, which they specifically do not, the Commission still must undertake an analysis of the specific proposals in the new

[132] The PJM Operating Agreement defines Supplemental Project to include transmission expansions or enhancements. PJM Operating Agreement, Definitions S-T.

[133] Initial Post-Technical Conference Comments of the California Independent System Operator Corporation, Docket No. EL20-45-000, *et al.*, at 4-5 (May 31, 2018).

[134] *See S. California Edison Co.*, 164 FERC ¶ 61,160 at P 37 (2018) ("We are also not persuaded by Protesters' assertions that the transmission planning practices in other RTOs/ISOs are instructive here . . .whether or not other transmission planning regions are considering asset management projects and activities through their regional transmission planning process does not, in and of itself, determine whether Order No. 890 requires them to do so.").

Attachment M-3, as opposed to simply relying on the California Orders as the basis for accepting the new Attachment M-3. Simply including the phrase, "given the specific facts and circumstances presented here" without more does not amount to an analysis of the unique features and structures of PJM. The Commission's failure to do more is arbitrary and capricious.[135]

F. The August 11 Order fails to provide a reasoned explanation for the Commission's departure from Order No. 2000. (Statement of Error #9)

Order No. 2000 is one of the seminal orders of electric restructuring.[136] Among other things, it codifies minimum characteristics and functions that a transmission entity must satisfy in order to be considered an RTO. The Commission's stated goal of Order No. 2000 was to "promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest price possible for reliable service."[137] This was achieved by establishing essential, minimum functions of an RTO, of which transmission planning and expansion is one of eight. In Order No. 2000, the Commission concluded, "the RTO must have ultimate responsibility for both transmission planning and expansion within its region that will enable it to provide efficient, reliable and non-discriminatory service and coordinate such efforts with the appropriate state authorities."[138] This requirement is memorialized in the Commission's Rules at Section 35.43(k).

Another essential function of an RTO is an "open architecture" policy to allow the RTO

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[135] *Motor Vehicle Manufacturer's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem"); *see also KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1056 (2003) (explaining that "unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned") (internal alterations, quotes and citation omitted).

[136] 18 C.F.R. § 35.34(k)(7) (2018); *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,163 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (affirming that "the RTO must have ultimate responsibility for both transmission planning and expansion within its region").

[137] *Id.*

[138] 18 C.F.R. § 35.34(k)(7) (2018); Order No. 2000 (affirming that "the RTO must have ultimate responsibility for both transmission planning and expansion within its region").

the flexibility to improve its structure and operations to meet demands.[139] Specifically, the "open architecture" rule requires that "any proposal to participate in a RTO must not contain any provision that would limit the capability of the RTO to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section."[140] Further, under this rule, RTOs must have the ability to "evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section."[141]

Several protestors raised the argument that the TO Proposal's addition of the "applicability" provision to Attachment M-3, which gives the TOs exclusive authority to plan both Supplemental Projects and "any other transmission expansion or enhancement of Transmission Facilities that is not planned by PJM to address one or more" of a truncated list of PJM planning criteria,[142] unlawfully limits PJM's ability to add new regional planning categories to the PJM RTEP absent TO approval to modify the tariff, thus preventing PJM from independently making changes to the RTEP deemed necessary.[143] The TO Proposal puts the TOs in complete control of future transmission planning and, thus, preempts open architecture and PJM's ability to evolve in direct contravention of the spirit and letter of Order No. 2000 and the Commission's rules for RTOs.

The Commission references the arguments made regarding the violation of Order No. 2000 in its summary of the arguments but makes no further mention of either the requirements of Order

[139] *See id.* § 35.34(*l*).

[140] *Id.*

[141] Order 2000.

[142] Attachment M-3 at Paragraph (a).

[143] Load Group Protest at 23-24; LS Power Protest at 19-20.

No. 2000 or the arguments regarding the same. The August 11 Order does not even attempt to provide a reasoned explanation for the Commission's departure from Order No. 2000's requirement that RTOs have open architecture and an ability to evolve. The August 11 Order fails to consider all important aspects of the problem at issue,[144] engage in reasoned decision-making,[145] or respond meaningfully to the arguments raised before it.[146] Therefore the August 11 Order is arbitrary and capricious.

G. The August 11 Order does not provide a reasoned explanation for the Commission's departure from precedent that establishes the predominance of regional planning. (Statement of Error #10)

Contrary to Commission precedent, the TO Proposal allows the PJM TOs to control through the local planning process aspects of the regional planning process. Certain definitions and provisions in Attachment M-3 allow the PJM TOs to veto regional projects in some instances. Protesters detailed these limitations at length in their pleadings and explained how they prevent PJM from carrying out its responsibility to conduct regional planning and produce a regional plan.[147] Together, these limitations prevent PJM from conducting effective regional planning consistent with Order No. 1000. The August 11 Order, however, arbitrarily and capriciously ignored evidence and arguments that PJM will no longer meet it regional planning obligations under Order No. 1000.[148]

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[144] *See e.g. Motor Vehicle Mfs. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem…") (*citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994).

[145] *Sacramento*, 616 F.3d at 528; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, (1983)).

[146] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015).

[147] LS Power Protest at 56-58; Load Group Protest at 21.

[148] *See* August 11 Order at P 49.

In Order No. 1000, the Commission adopted "reforms [that] work together to ensure that public utility transmission providers in every transmission planning region, in consultation with stakeholders, evaluate proposed alternative solutions at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers."[149] The region's needs include *all* transmission needs. In Paragraph 52 of Order No. 1000-A the Commission found that effective transmission planning means that the region "considers *all* transmission needs of all transmission customers. . .."[150] The Commission made a similar statement in Paragraph 60, stating that, "[a]s an initial matter, we note that, based on our expertise and knowledge of the industry, we do not consider it to be speculation or conjecture to conclude that regional transmission planning is more effective if it results in a transmission plan, is open and transparent, and considers *all* transmission needs."[151] The D.C. Circuit also described Order No. 1000 as requiring transmission planning for *all* transmission needs.[152] Order No. 1000 simply does not tolerate PJM having only partial rights to plan for transmission facilities needed in the PJM region.[153]

On compliance with Order No. 1000, the Commission found that PJM complied with the regional planning requirements because PJM's planning process "culminates in the RTEP, a regional transmission plan that reflects PJM's determination of the set of transmission facilities

[149] Order No. 1000-A at P 102.

[150] *Id.* at P 52 [emphasis added].

[151] *Id.* at P 60 [emphasis added].

[152] *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (citing Order No. 1000-A at PP 50, 60, and 98) [emphasis added].

[153] Indeed, the Transmittal Letter that PJM submitted as part of its Order No. 1000 compliance filing highlights the replacement of an aging transmission facility as evidence of the success of PJM's regional planning process. *PJM Interconnection, L.L.C.*, "Compliance Filing," Docket No. ER13-198-000 at 11 (Oct. 25, 2012).

that more efficiently or cost-effectively meet the transmission needs of the PJM Region."[154] There were no limitations at the time on PJM's ability to consider different types of needs. Nothing in the August 11 Order explains why PJM should now be prohibited from considering a fundamental driver of transmission in PJM. Protesters described at length how aging infrastructure is and will continue to be a significant driver of new transmission facilities in PJM over the next decade.[155]

The Commission pointed to the CTOA in support of its determination that the PJM TOs have the exclusive right to revise Attachment M-3. But, the CTOA existed at the time that the Commission evaluated whether the PJM TOs and PJM complied with the requirements of Order No. 1000 and it has remained unchanged since then. The regional planning requirements of Order No. 1000 also have not changed. Without explanation, the Commission read into the CTOA limitations on PJM's ability to plan on a regional basis for "all transmission needs." There is no justification for reading the CTOA as a bar to PJM's ability to identify and evaluate whether there are more efficient or cost-effective solutions to the region's needs. Doing so puts PJM out of compliance with Order No. 1000 and prevents PJM from engaging in transmission planning for all the transmission needs in the PJM Region and producing a regional transmission plan as is required for each Order No. 1000 Region under Order No. 1000. Order No. 1000's requirements apply equally to all Order No. 1000 regions, regardless of whether the region is an RTO or not.

The Load Group provided substantial evidence that the majority of transmission planning in PJM is occurring outside the purview of the PJM RTEP process.[156] Specifically, the Load Group demonstrated that the PJM Region has experienced severe imbalance in PJM transmission

[154] PJM First Compliance Order at P 65.

[155] *See, e.g.,* LS Power Protest at 33; Load Group Answer at 10.

[156] Load Group Protest at 4-6.

planning as compared to PJM TO-only transmission planning, with the latter undertaking the vast majority of new transmission investment (over 76 percent of the project expenses within the PJM RTEP planned as Supplemental Projects ($6.5 billion)) as opposed to regionally planned projects ($2.0 billion). The largest component of the spending on Supplemental Projects in 2018 was on projects that were claimed to be necessary due to EOL conditions. The Load Group explained that projects based on claims of EOL conditions were not subject to regional planning pursuant to the PJM RTEP.[157] However, the Commission summarily dismissed the evidence that the majority of transmission planning in PJM is occurring outside the purview of the PJM RTEP process as beyond the scope of this proceeding.[158]

The dismissal of the evidence and arguments regarding the fact that the majority of transmission planning is occurring outside of the RTEP misses the point and misunderstands the TO Proposal. As noted above, in order to comply with Order No. 1000, RTOs must have effective transmission planning that "considers all transmission needs of all transmission customers. . .."[159] But the evidence shows that already, PJM is not planning the majority of Transmission Planning needed in the PJM region. The TO Proposal will eviscerate the RTEP, which the Commission has accepted as the "regional transmission plan that reflects PJM's determination of the set of transmission facilities that more efficiently or cost-effectively meet the transmission needs of the PJM Region."[160] The Commission's failure to consider all important aspects of a problem at

[157] *See* 2019 Project Statistics presented at the May 12, 2020 PJM Transmission Expansion Advisory Committee, available at: https://www.pjm.com/~/media/committees-groups/committees/teac/2020/20200512/20200512-item-10-2019-project-statistics.ashx.

[158] August 11 Order at P 90.

[159] *Id.* at P 52.

[160] PJM First Compliance Order at P 65.

issue[161] and respond meaningfully to the arguments raised before it[162] renders the August 11 Order arbitrary and capricious.

H. The August 11 Order's summary dismissal of the cost allocation issues associated with the TO Proposal is arbitrary and capricious and contrary to substantial record evidence. (Statement of Error #11)

1. The Commission's refusal to consider whether there is a just and reasonable cost allocation method applicable to the new project categories is arbitrary and capricious and contrary to law.

Numerous protestors pointed out that the PJM Tariff does not provide a just and reasonable cost allocation method applicable to the new project categories of high voltage transmission created by the TO Proposal.[163] The August 11 Order did not substantively address this concern. Instead, the Commission found that, because the TO Proposal did not include any changes to Schedule 12, cost allocation issues were beyond the scope of this proceeding.[164] The Commission's dismissal of the cost allocation issues for new project categories is arbitrary and capricious.

The Commission cannot avoid evaluating whether the cost allocation method applicable to the new project categories is just and reasonable. FPA Section 205 requires that "[a]ll rates and charges made, demanded or received by any public utility for or in connection with transmission .

[161] *See e.g. Motor Vehicle Mfs. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem…") (*citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994).

[162] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015).

[163] LS Power Protest at 36-38; Load Group Answer at 26-27; Protest of the New Jersey Board of Public Utilities at 10-15.

[164] August 11 Order at P 91. In support of its determination that cost allocation issues are beyond the scope of the proceeding, the Commission cited *ANR Pipeline Co. v. FERC*, 771 F.2d 507 (D.C. Cir.1985), The Commission implied that protestors were asking the Commission to revise cost allocation provisions included in Schedule 12. August 11 Order at P 91 n.143. To be clear, protestors argued that the TO Proposal must be rejected because of the absence of a just and reasonable cost allocation method in Schedule 12 that applies to the new project categories. *Id*. (citing *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 514 (D.C. Cir. 1985)).

. . shall be just and reasonable . . .."[165] The TO Proposal adds entirely new project categories[166] to the PJM Tariff, the costs of which will be allocated entirely to the zone where the project is located regardless of whether other zones benefit. The Commission has a duty under Section 205 to evaluate the TO Proposal, including the applicable cost allocation method, to ensure that rates resulting from that proposal are just and reasonable.[167]

The Commission also included a vague reference to the existing cost allocation provision of Schedule 12 for Required Transmission Enhancements, implying that that somehow addressed protestors' concerns. First, it is difficult to deduce the Commission's reasoning as the new project categories do not meet the definition, which the Commission quotes in a footnote, of Required Transmission Enhancements.[168] Furthermore, Required Transmission Enhancements are not the only project category referenced in Schedule 12. Subsection (a)(iii) of Schedule 12 applies to transmission facilities that are not eligible for cost responsibility assignment, including, among other types of projects, Local Upgrades and Supplemental Projects. Nowhere does Schedule 12

[165] 16 U.S.C. 824d(a).

[166] See new Project Categories of Attachment M-3 Project (i), Attachment M-3 Project (iii), Asset Management Project, PJM Criteria Need, Candidate EOL Needs List, EOL Need, and Applicability. Just and reasonable cost allocation should have been established for each new Project Category definition.

[167] *See* Protest of the New Jersey Board of Public Utilities at 10. Furthermore, the applicable cost allocation method determines whether the need underlying the project will be in PJM's competitive process.

[168] Required Transmission Enhancements are defined in the PJM Tariff to mean:

> Enhancements and expansions of the Transmission System that (1) a Regional Transmission Expansion Plan developed pursuant to Operating Agreement, Schedule 6 or (2) any joint planning or coordination agreement between PJM and another region or transmission planning authority set forth in Tariff, Schedule 12- Appendix B ("Appendix B Agreement") designates one or more of the Transmission Owner(s) to construct and own or finance. Required Transmission Enhancements shall also include enhancements and expansions of facilities in another region or planning authority that meet the definition of transmission facilities pursuant to FERC's Uniform System of Accounts or have been classified as transmission facilities in a ruling by FERC addressing such facilities constructed pursuant to an Appendix B Agreement cost responsibility for which has been assigned at least in part to PJM pursuant to such Appendix B Agreement.

address the cost allocation of regionally beneficial enhancements or expansions included under Attachment M-3's catchall provision – section (a)(iii).

A review of Commission precedent demonstrates the arbitrariness of the Commission's position that it is not required to consider cost allocation issues. In Order No. 1000, the Commission held that ". . . there is a *fundamental link between cost allocation and planning*, as it is through the planning process that benefits, which are central to cost allocation, can be assessed."[169] The Commission also has routinely considered new project categories and their applicable cost allocation methods together. For instance, in 2013 the PJM TOs filed proposed revisions to the cost allocation method in Schedule 12 for interregional projects between PJM and the Southeastern Regional Transmission Planning region ("SERTP").[170] PJM separately filed the proposed interregional project category, including the criteria used to identify and evaluate interregional projects.[171] Because of the interdependency of the planning process and cost allocation method, the Commission accepted and suspended the proposed interregional cost allocation subject to the outcome of the related compliance proceeding.[172] The Commission's failure to address cost allocation issues when considering a fundamental change to transmission

[169] Order No. 1000 at P 559 [emphasis added]. *See also* Order No. 1000 at PP 499-500 (One of the Commission's goals in Order No. 1000 was to "establish[] a closer link between transmission planning and cost allocation [to] ensure that rates for Commission-jurisdictional service appropriately account for benefits associated with new transmission facilities.")

[170] *PJM Transmission Owners*, "PJM Open Access Transmission Tariff Revisions to Modify Cost Allocation for PJM Required Transmission Enhancements," Docket No. ER13-1927 (July 10, 2013).

[171] *PJM Interconnection, L.L.C.*, "Compliance Filing," Docket No. ER13-1936 (July 10, 2013).

[172] *PJM Interconnection, L.L.C., Duquesne Light Company*, 145 FERC ¶ 61,291, at P 31 (2013). Specifically, the Commission found that:

> proposed interregional cost allocation method is thus interdependent with the separate PJM Compliance Filing and the SERTP Sponsors Compliance Filings. We therefore cannot find that the PJM Transmission Owners' interregional cost allocation proposal is consistent with the requirements of Order No. 1000, absent a comprehensive evaluation of all the related pending Order No. 1000 interregional compliance proposals . . ..

planning in the PJM footprint is arbitrary and capricious and not the result of reasoned decision-making.

2. The Commission impermissibly failed to consider evidence that the existing cost allocation method applicable to projects resulting from Attachment M-3 will result in unjust and unreasonable rates.

The PJM TOs had the burden of demonstrating that the TO Proposal will result in a just and reasonable cost allocation method. However, there is no record evidence that the existing cost allocation method is just and reasonable as applied to the new project categories because the PJM TOs offered none. There is substantial record evidence establishing that there will be projects included in Attachment M-3 that have regional benefits that will be allocated to a single transmission zone contrary to cost allocation precedent. Applying the existing cost allocation method to every Attachment M-3 project, including higher voltage transmission facilities that are known to have significant regional benefits, thereby allocating all costs to a single zone is inconsistent with long-standing cost causation principles and precedent and ultimately leads to unjust and unreasonable rates.

Cost allocation principles require that the beneficiaries of a project pay the cost of the project in a manner that is roughly commensurate with the benefits received from the project.[173] A recent cost allocation decision, *ODEC v. FERC*, is particularly relevant in this proceeding. In *ODEC*, the Court vacated a Commission Order that accepted a single zone cost allocation method as unjust and unreasonable - the same method that would apply to projects approved through

[173] *See, e.g., KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)(At its core, the cost causation principle requires that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them."); *Illinois Commerce Commission v. FERC*, 576 F.3d 470, 477-478 (7th Cir. 2009); *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 505 (5th Cir. 2016); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 at P 622 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

Attachment M-3. The Court noted that projects known to "produce significant regional benefits within the PJM network . . .," *i.e.*, high-voltage projects, would be categorically prohibited from being eligible for cost sharing, and thus, the cost allocation method was unjust and unreasonable.[174] The Court stated that "the cost-causation principle prevents regionally beneficial projects from being arbitrarily excluded from cost sharing – a necessary corollary to ensuring that the costs of such projects are allocated commensurate with their benefits."[175]

LS Power offered ample evidence that there will be projects identified through the new Attachment M-3 process that will have significant regional benefits. First, LS Power provided an analysis of 19 previously-approved Supplemental Projects that were put forward to address Transmission Facilities reaching the end of their useful life.[176] The analysis demonstrated that the 19 end of life projects have significant regional benefits.[177] The DFAX portion of the cost allocation method found 100% of the costs being misallocated for three projects. For three other projects, the DFAX portion of the cost allocation method resulted in roughly 80% of the costs being misallocated. By way of comparison, for the Element-Cunningham project, one of the projects at issue in *ODEC v. FERC*, the complaining transmission owner received 47% of the benefits.[178] For the other project at issue, the Cunningham-Dooms project, the complaining transmission owner received 43% of the benefits of the project.[179] Just two project examples, both high voltage transmission projects resulting from local planning criteria, led to the vacatur of the

[174] *ODEC v. FERC*, 898 F.3d at 1260.

[175] *Id.* at 1263.

[176] Exhibit A of LS Power Limited Answer.

[177] *Id.*

[178] *ODEC v. FERC*, 898 F.3d 1254 at 1261.

[179] *Id.*

cost allocation provisions for the entire category of Form No. 715 projects. The Commission ignored the 10 examples presented in the record with even greater misallocation than the two examples from *ODEC vs. FERC*. Together, the 19 projects total $779,000,000 and more than half, $393,000,000, would be reallocated to other zones under the regional cost allocation methodology. If the Commission requires further evidence, protestors also pointed to the forty-four projects that PJM had to reallocate following the Commission's Order on Remand from *ODEC v. FERC,* many of which were also related to aging infrastructure needs.[180] The Commission's failure to address arguments and substantial evidence of the misallocation of transmission costs is arbitrary and capricious.

In addition, a review of the new project categories and consideration of the types of projects that would be approved under the new categories demonstrates that the TO Proposal is not just, reasonable or compliant with Order No. 1000 because there is not a just and reasonable cost allocation method applicable to the EOL projects under the existing PJM Tariff.

Incidental Increase. The definition of Incidental Increase gives each PJM TO discretion to determine what is an Incidental Increase, which could result in high voltage transmission replacements through, for instance, updating "Transmission Owner design standards." As discussed above, the Commission has found that higher voltage transmission facilities are known to have "significant regional benefits" and as such should be eligible for regional cost allocation.[181] Yet, under the Incidental Increase definition, the Transmission Facility would be categorically excluded from regional cost allocation contrary to *ODEC v. FERC*.[182] Similarly, an in-kind

[180] *See* LS Power Protest at 37-38 (citing *PJM Interconnection, L.L.C.*, Compliance Filing, Docket No. ER18-680, Attachment A (filed on June 1, 2020)); New Jersey Board of Public Utilities Protest at 13-15.

[181] *ODEC v. FERC*, 898 F.3d at 1260-61.

[182] *Id.* at 1261.

replacement of a substation also could be categorized as an Attachment M-3 Project because it may have only an Incidental Increase. In-kind replacements of substations, however, are eligible for regional cost allocation under Section 1.5.8(p) of the Operating Agreement and as Form No. 715 projects. The Commission should not have ignored this contradiction in cost allocation methodologies.

Asset Management Project. The definition of an Asset Management Project is even broader in scope than the definition of Incidental Increase and may include infrastructure security projects and system reliability projects.[183] There is no record evidence in this proceeding that infrastructure security projects and system reliability projects only benefit the zone where the project is located. Accordingly, the Commission's refusal to address the cost allocation issues results in a methodology found to be unjust and unreasonable.[184]

Attachment M-3 Projects. Attachment M-3 Projects under Part (i) of the definition clearly have regional benefits as it is "an Asset Management Project that affects the connectivity of Transmission Facilities that are included in the Transmission System, affects Transmission Facility ratings or significantly changes the impedance of Transmission Facilities."[185]

[183] For instance, there is an ongoing PJM stakeholder process to address additional CIP 14 Projects that could be regionally allocated and regional planned. A broad reading of Asset Management Projects qualifying under the *second* prong of Asset Management definition along with Attachment M-3 Definition (i) could result in regionally-beneficial Asset Management/ Attachment M-3 Projects with Incidental Increase from advancing under Attachment M-3, but limited to local cost allocation.

[184] *ODEC v. FERC*, 898 F.3d at 1260-61.

[185] Transmission Facilities is defined by the PJM Operating Agreement as: "facilities that: (i) are within the PJM Region; (ii) meet the definition of transmission facilities pursuant to FERC's Uniform System of Accounts or have been classified as transmission facilities in a ruling by FERC addressing such facilities; and (iii) have been demonstrated to the satisfaction of the Office of the Interconnection to be integrated with the PJM Region transmission system and integrated into the planning and operation of the PJM Region to serve all of the power and transmission customers within the PJM Region."

It also is possible that there could be the replacement of transmission lines operating at 765 kV, which would clearly have significant regional benefits under *ODEC v. FERC*.[186] The examples in Exhibit A of the LS Power Limited Answer also show that there are projects driven by the need to replace aging infrastructure that benefit more than one transmission zone.[187]

Part (iii) of the definition of Attachment M-3 Project is a catch all phrase that includes "any other expansion or enhancement of Transmission Facilities that is not excluded from this Attachment M-3 under any of clauses (1) through (5) of section (a)." The definition essentially limits regional cost allocation to only projects that result from clauses (1) through (5) of section (a) of the Applicability Section. There is no evidence in this proceeding that only those projects under Attachment M-3 Project (iii) have regional benefits. The definition also leaves open the possibility that there are projects planned by PJM pursuant to criteria not listed in clauses (1) through (5) of the Applicability Section that are not eligible for regional cost allocation.[188]

EOL Need. While the preceding definitions are broad and encompass projects with regional benefits, the definition of EOL Needs is unreasonably limited. An EOL Need is defined as "a need to replace a transmission line between breakers operating at or above 100 kV or a transformer, the high side of which operates at or above 100 kV and the low side of which is not connected to distribution facilities, which the Transmission Owner has determined to be near the end of its useful life, the replacement of which would be an Attachment M-3 Project." Under the

[186] 898 F.3d at 1260-61.

[187] For example, a future replacement of the AEP Kammer-Mountaineer 765kV line was shown to have local benefits of only 16.75 percent to the local AEP Zone under the new Attachment M-3 Project (i) definition, but 100% cost allocation to AEP zone. The other free-riding zones would be APS (5.77%), ATSI (21.63%), BGE (5.33%), DAYTON (3.35%), DEOK (13.23%), DL (8.53%), DVP (15.50%), EKPC (5.25%), OVEC (.32%), PEPCO-SMECO (4.34%).

[188] For instance, a future proposal could put PJM in charge of planning a new category of projects, such as a new category of public policy projects, but those projects would not be eligible for regional cost allocation because they are not planned pursuant to clauses (1) through (5) of section (a). *See* LS Power Protest at 23-24.

TO Proposal, a PJM TO identifies its EOL Needs and provides a list of its EOL Needs to PJM. PJM may determine during a regional planning cycle that there is a substantial overlap between an EOL Need and a "PJM Planning Criteria Need" or that a Required Transmission Enhancement would more efficiently or cost-effectively address the EOL Need. PJM conducts regional planning "for the enhancement and expansion of the Transmission Facilities . . . in the PJM Region."[189] Transmission Facilities are defined in the Operating Agreement and the definition is not limited to the facilities defined in EOL Needs. The definition of EOL Needs therefore limits, without explanation, projects that could otherwise be eligible for regional cost allocation, including some Form No. 715 projects. The definition also excludes without explanation substations, a category of projects that are currently eligible for regional cost allocation.[190] Had the Commission considered the record evidence demonstrating that the TO Proposal would categorically and arbitrarily prohibit from regional cost allocation projects with regional benefits, it undoubtedly would have rejected the proposal.

The Commission's failure to consider the record evidence demonstrating that the TO Proposal would categorically and arbitrarily prohibit from regional cost allocation projects with regional benefits is arbitrary and capricious.

I. The August 11 Order's failure to adjudicate the Motion to Consolidate Docket Nos. ER20-2046 and ER20-2308 Is Arbitrary, Capricious, and Does Not Reflect Reasoned Decision-making. (Statement of Error #12)

On July 6, 2020, the Load Group filed a protest to the PJM Transmission Owners' June 12 filing. In their protest, the Load Group included a Motion to Consolidate and asked the Commission to consolidate the TO Proposal in Docket No. ER20-2046 with the Joint Stakeholder

[189] Operating Agreement at Section 1.1 of Schedule 6.

[190] LS Power Protest at 49.

Proposal in ER20-2308.[191] The Load Group explained that consolidation is appropriate where the proceedings involve common issues of law and fact.[192]

On July 21, 2020, the TOs filed an answer to the protests, comments, motion for consolidation, and requests for additional procedures. In their Answer, the TOs expressly answered the Load Group's Motion to Consolidate.[193] The TOs argued that the motion should be denied and the "fact that a proposal to amend the Operating Agreement is also pending before the Commission at the same time does not demand consolidation of the two dockets."[194]

On July 31, 2020, the Load Group filed a Motion for Leave to Answer and Answer to the Transmission Owners' Answer to the Load Group's Protest. In their July 31 Answer, the Load Group reiterated their request for the Commission to consolidate Docket Nos. ER20-2046 and ER20-2308 if the Commission does not outright reject the TOs' June 12 filing in ER20-2046.[195]

The Load Group's Motion to Consolidate, the TOs' July 21 Answer requesting denial of that motion, and the Load Group's July 31 Answer created a dispute and controversy that was ripe for consideration and adjudication by the Commission. In the August 11 Order, the Commission indicated it accepted all the answers in this proceeding, which includes the PJM TOs' July 21 Answer and the Load Group's July 31 Answer.[196] However, the August 11 Order did not even acknowledge the pending Motion to Consolidate and associated dispute, let alone adjudicate the

[191] *See* Load Group Protest, Docket No. ER20-2046, at 39-40.

[192] *See id.* at 40 (citing *Cal. Indep. Sys. Op. Corp.*, 94 FERC ¶ 61,147 at 61,558 (2001); *Pacific Gas & Elec. Co.*, 106 FERC ¶ 61,036 at P 20 (2004); *Seminole Elec. Coop., Inc.*, 149 FERC ¶ 61,210 at P 29 (2014)).

[193] PJM Transmission Owners July 21 Answer, Docket No. ER20-2046, at 56-58.

[194] *Id.* at 57.

[195] *See* Load Group July 31 Answer, Docket No. ER20-2046, at p. 3.

[196] August 11 Order at P 77 (accepting all answers otherwise prohibited because they assisted the Commission in its decision-making process).

Motion to Consolidate. Such failure to engage the Motion to Consolidate is arbitrary and capricious and does not reflect reasoned decision-making.[197] To avoid such an arbitrary and capricious decision, the Commission must consider all important aspects of a problem at issue[198] and respond meaningfully to the arguments raised before it.[199] Here, the Commission did not merely overlook an insignificant argument; the August 11 Order entirely failed to adjudicate a contested motion that raised important procedural issues regarding the underlying proceeding and a closely related proceeding.

The August 11 Order's unstated rejection of the Motion to Consolidate Docket Nos. ER20-2046 and ER20-2308 is unjust and unreasonable because it fails to account for the practical consequences of not consolidating the two proceedings. Acceptance of the TO Proposal in Docket No. ER20-2046 constitutes a tacit endorsement of procedural gaming by the TOs. As explained in this proceeding and in Docket ER20-2308, a group of Joint Stakeholders developed a proposal during the PJM stakeholder process (which resulted in PJM's July 2 filing of the Joint Stakeholder Proposal) well in advance of the TOs' unilateral decision to make their June 12 filing.[200] Stakeholders developed an End of Life ("EOL") problem statement and issue charge before the PJM Planning Committee in the fall of 2019.[201] As stakeholders closed in on finalizing their EOL

[197] *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, (1983)).

[198] *See e.g. Motor Vehicle Mfs. v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("In previous cases, we have rejected agency orders when the Commission neglected to deal with an important part of the problem…") (*citing Laclede Gas Co. v. FERC*, 997 F.2d 936, 945-48 (D.C. Cir. 1993)); *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994).

[199] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015).

[200] *See* LS Power Protest, Docket No. ER20-2046 at 9; Load Group July 31, 2020 Answer Docket No. ER20-2046 at 3-4.

[201] *See* Supporting Comments of the Joint Stakeholders, Docket No. ER20-2308, at 2-3 (filed July 23, 2020). The history of the Joint Stakeholder Proposal is described on pages 2-7 of the Joint Stakeholders' supporting comments in Docket No. ER20-2308.

proposal, the TOs in early May 2020 posted the required 30-day notice to indicate their intent to modify PJM Tariff Attachment M-3 to instead address EOL planning issues unilaterally.[202] On May 21, 2020, the Joint Stakeholder Proposal was ready for a vote among PJM Members and received supermajority support, sending a clear signal where the majority of the stakeholders stood with respect to EOL planning issues.[203] Despite the May 21 vote on the Joint Stakeholder Proposal, the PJM TOs disregarded the PJM stakeholder process and the will of PJM stakeholders and proceeded to make their unilateral Section 205 filing on June 12.[204] Subsequently, PJM, on behalf of a supermajority of PJM stakeholders, submitted the Joint Stakeholder Proposal on July 2, 2020. As a result, the Commission received dueling Section 205 filings addressing the same issues around EOL planning.

Consolidation is appropriate when two proceedings involve common legal issues and facts and where "consolidation will ultimately result in greater administrative efficiency."[205] The August 11 Order fails to consider that the proposals in ER20-2046 and ER20-2308 address common issues of law and fact. Both Section 205 filings address procedures and planning for transmission facilities reaching their end of life. The TO Proposal proposed revisions to Attachment M-3 of the PJM Tariff to identify certain asset management projects and to include planning procedures for end of life needs (EOL Needs).[206] The Joint Stakeholder Proposal would revise the Operating Agreement to require PJM TOs to notify PJM that Transmission Facilities

[202] Supporting Comments of the Joint Stakeholders, Docket No. ER20-2308, at 5-6.

[203] *Id.* at 5-6.

[204] *Id.* at 6-7.

[205] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services et al.* , 135 FERC ¶ 61,177, at P 45 (2011) (citing *e.g., Sw. Power Pool, Inc*., 125 FERC P 61,001, at P 26 (2008); *Startrans IO L.L.C.*, 122 FERC P 61,306, at P 64 (2008); *PP&L Resources, Inc*., 90 FERC P 61,203, at 61,653 (2000)).

[206] *See* August 11 Order at P 1.

were reaching the end of operational life, and then require PJM to determine how to address needs arising from those Transmission Facilities through PJM's regional planning process.[207] Both filings address whether a large and growing group of transmission projects in the PJM region "will be regionally or locally planned, will be open to competition or reserved to incumbent Transmission Owners, and [whether PJM] will use an open, transparent and coordinated process or a balkanized, piecemeal and opaque process."[208]

Both filings also raise important legal procedural issues governing the overlapping FPA Section 205 filing rights in two separate PJM governing documents – the Tariff and the Operating Agreement. Acceptance of the TOs' Section 205 filing endorses the development of unilateral proposals without any regard to the stakeholder process and will further encourage preemptive unilateral filings by the TOs, resulting in a proliferation of dueling Section 205 proposals. As in this proceeding, parties that are unhappy with the proposals flowing out of the stakeholder process will "race to FERC" to ensure their proposal is filed in advance of any stakeholder proposal with which they disagree (even if the stakeholder proposal received supermajority support) in order for the 60-day clock in FPA Section 205 to run out first on their proposal.[209] As a result, affected parties (including the Commission) will need to incur more time and resources attendant to litigating two separate, but related Section 205 proposals.

Despite their common facts and legal issues, the August 11 Order concluded that "the Joint Stakeholders' proposal is not before us *here* and does not alter the FPA section 205 filing rights of

[207] *See* LS Power Protest, Docket No. ER20-2046 at 9.

[208] Supporting Comments of the Joint Stakeholders, Docket No. ER20-2308, at 7.

[209] Section 205(d) requires 60 days' notice prior to a change in rates. 16 U.S.C. § 824d(d). Section 205(g) allows a proposed rate to take effect after 60 days even if the Commission does not issue an order on that proposed rate. 16 U.S.C. § 824d(g).

the PJM TOs."[210] The August 11 Order asserted that the Commission need not determine in this proceeding whether a filing in another proceeding is more just and reasonable.[211] However, the Joint Stakeholders were not asking FERC to compare the June 12 filing to the Joint Stakeholder Proposal and select the more just and reasonable proposal.[212] Moreover, the Joint Stakeholder Proposal was before the Commission, and although the proposal was filed in a separate docket, the Commission was briefed and made aware of the Joint Stakeholder Proposal in this docket. The August 11 Order failed to acknowledge that Docket Nos. ER20-2046 and ER20-2308 address common facts (*i.e.*, EOL planning), common legal substantive issues (*i.e.*, the scope and authority of PJM's planning compared to the Transmission Owners), and common legal procedural issues (*i.e.*, the overlapping Section 205 rights in PJM governing documents – the Tariff and the Operating Agreement). Narrowly addressing only the TO Proposal and disregarding the information on the Joint Stakeholder Proposal in ER20-2308 (that was raised in ER20-2046) was unjust and unreasonable. Because "the Commission does not regulate in a vacuum,"[213] the August 11 Order's failure to adjudicate the Motion to Consolidate and consider the impact of the Joint Stakeholder Proposal in ER20-2308 on the Transmission Owners' proposal in ER20-2046 was arbitrary and capricious and does not reflect reasoned decision-making.

J. The Commission ignored record evidence demonstrating that the TO Proposal conflicts with and limits the RTEP in the Operating Agreement. (Statement of Error #13)

Parties in the proceeding raised detailed concerns over the ways in which the new definitions and procedures in the TO Proposal infringe on, and conflict with, the definitions and

[210] August 11 Order at P 87 (emphasis added).

[211] *Id.* at P 87.

[212] *Id.* at P 87.

[213] *See ISO New England Inc.*, at 158 FERC ¶ 61,138 at P 68 (2017).

regional planning procedures set forth in the Operating Agreement. Nowhere in the August 11 Order did the Commission address the specific concerns raised by parties regarding the conflicts between the revised Attachment M-3 and the existing regional planning process. Instead, the Commission summarily concluded in Paragraph 88 that the revisions are just and reasonable and "provide[] greater transparency."[214] It is arbitrary for the Commission to ignore the arguments and evidence before it and to not address the issues raised by protestors.[215]

The revisions included in Attachment M-3 shift authority to determine the scope of regional planning from PJM and the Members Committee to the PJM TOs. Although the regional planning process exists in the Operating Agreement, the new definitions in Attachment M-3 essentially write into the PJM Tariff limitations on the regional planning process. This in turn limits stakeholders' ability to revise the regional planning process while at the same time increasing the PJM TOs' authority over the regional planning process.[216] This is a significant issue and one the Commission should have addressed in the August 11 Order as the consolidation of authority over regional planning is contrary to Commission precedent.[217]

The most egregious revision is the new Applicability section, which significantly expands the PJM transmission owners' authority over transmission planning in the PJM region and conflicts with Order No. 1000.[218] Under section (a)(iii), the PJM transmission owners "shall be responsible for planning and constructing . . . any other transmission expansion or enhancement of Transmission Facilities that is not planned by PJM to address . . ." the criteria listed in clauses (1)

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[214] August 11 Order at P 88.

[215] *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1990)(The Court remanded a Commission decision where the Commission failed to give serious consideration to an argument raised in the proceeding.).

[216] *See, e.g.*, Load Group Protest at 15.

[217] *See, e.g.*, Order No. 1000 at PP 6-9; Order No. 2000, 89 FERC ¶ 61,284 at P 485.

[218] *See, e.g.*, LS Power Protest at 53.

through (5) of section (a). In addition, the new phrase, "PJM Planning Criteria Need," similarly restricts the criteria that PJM can plan to planning for needs ". . . other than those reserved to each Transmission Owner in accordance with section (a)."

Prior to the Attachment M-3 revisions, PJM stakeholders, through the Members Committee, could revise the regional planning process to include new categories of projects and planning criteria, the only limitation being the definition of Supplemental Projects. Now the Members Committee cannot propose revisions without the PJM transmission owners making corresponding changes to the Applicability Section of Attachment M-3.[219] If the Members Committee were to create a new category of regional projects without corresponding changes to the PJM Tariff, the PJM transmission owners could assert responsibility over the construction and operation of the new projects by way of Attachment M-3, section (a)(iii).

The TO Proposal also gives the PJM TOs a new veto right over projects planned to meet Form No. 715 criteria. The veto right does not exist in Schedule 6 of the Operating Agreement. Specifically, section (d) of Attachment M-3, coupled with the definition of Form No. 715 EOL Planning Criteria, give the PJM TOs the right to veto end of life projects planned by PJM pursuant to the regional planning process. Attachment M-3 achieves this by allowing TOs to determine that a PJM identified project does not address the "projected EOL need . . . [and] propose a project to address the Form No. 715 EOL Planning Criteria." Thus, while section (a)(2) of Attachment M-3 appears to grant PJM the ability to plan for an individual transmission owner's Form No. 715 planning criteria, it is limited by reference to section (d) of Attachment M-3. Those additional

[219] *See, e.g.*, LS Power Protest at 58-60.

procedures allow TOs to reject the PJM planned project as not meeting the TO's need and to instead plan a project to meet the Form No. 715 need outside the PJM planning process.[220]

Prior to the TO Proposal, the Operating Agreement contained all the relevant transmission planning definitions, including the definition of Supplemental Projects. Going forward, the relevant planning definitions will be split between the Operating Agreement and Attachment M-3. This creates inconsistencies between the two. For instance, the Operating Agreement defines "Local Plan" and includes procedures for review of Local Plans by the PJM Transmission Expansion Advisory Committee ("TEAC") as well as for the incorporation of Local Plans in the RTEP. Under the definition of Local Plan, only Supplemental Projects and Subregional RTEP projects are included in the Local Plan. There is no reference to Attachment M-3 Projects or Asset Management Projects. Yet section (c) of Attachment M-3 requires the TEAC to review Attachment M-3 Projects and anticipates the inclusion of Attachment M-3 Projects in the Local Plan, which is then integrated with the RTEP. Similarly, section (d) provides for how and to what extent that EOL planning can be incorporated into PJM's regional planning process. This is a prime example of how Attachment M-3 extends beyond "local" planning and reaches into the regional planning process in conflict with the Operating Agreement terms.[221] Furthermore, the Operating Agreement is also explicit that the PJM Board does not approve Supplemental Projects or the Local Plan, however, it is unclear whether the PJM Board must approve Asset Management Projects and/or Attachment M-3 Projects as there is no exception for these projects in the Operating Agreement.

[220] *Id.* at 26-27.

[221] *See, e.g.*, LS Power Protest at 25.

There also is inconsistency over whether PJM or PJM TOs are responsible for planning for "system reliability."[222] Supplemental Projects are defined as "a transmission expansion or enhancement that is not required for compliance with the following PJM criteria: *system reliability* . . .."[223] In contrast, Attachment M-3 section (a)(3) narrowly defines PJM's responsibility for reliability planning to "NERC Reliability Standards (which includes Applicable Regional Entity reliability standards)."[224] The Commission's failure to address these and other inconsistencies between the Operating Agreement and the TO Proposal Attachment M-3 is arbitrary and capricious.

K. The Commission erred in finding that including End of Life Criteria in Form No. 715 is voluntary. (Statement of Error #14)

1. The PJM TOs do not have unilateral filing rights to revise the regional planning process for Form No. 715 Projects.

As an initial matter, and as discussed in Section B.1. above, the PJM TOs do not have exclusive unilateral filing rights to file changes to the scope and procedures for regional transmission planning in PJM, which includes planning for Form No. 715 projects. There is no question that PJM, not the TOs, is responsible for planning for Form No. 715 criteria. Both the Operating Agreement and PJM Tariff acknowledge that PJM is responsible for planning for an individual transmission owner's Form No. 715 criteria.[225] The Commission also acknowledged in Paragraph 86 of the August 11 Order that the PJM TOs "did transfer to PJM the responsibility to plan for criteria included in Form No. 715 . . .."[226]

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[222] *See, e.g.,* LS Power Protest at 47-48.

[223] Operating Agreement, Definitions S-T.

[224] Operating Agreement, Definition Section, Supplemental Project [emphasis added].

[225] Operating Agreement, Schedule 6, Section 1.2.

[226] August 11 Order at P 86.

The TO Proposal, however, alters PJM's planning for Form No. 715 criteria by reserving to the PJM TOs the authority to veto PJM's regional solution.[227] Specifically, Attachment M-3 section (d) coupled with the definition of Form No. 715 EOL Planning Criteria, gives the PJM TOs the right to determine that a PJM identified project does not address the "projected EOL need . . . [and] propose a project to address the Form No. 715 EOL Planning Criteria." Thus, while Attachment M-3 section (a)(3) appears to recognize PJM's authority to plan to Form No. 715 planning criteria, it is limited by reference to section (d) of Attachment M-3. In other words, Attachment M-3 allows TOs to reject the PJM planned project as not meeting the TO's need and to instead plan a project to meet the Form No. 715 need outside the PJM planning process.[228] The Commission had no basis to accept the TO Proposal's alteration of planning for Form No. 715 criteria, as the PJM TOs do not have authority to do so.

2. The August 11 Order misinterpreted the Form No. 715 filing requirement as voluntary, thereby creating cost allocation issues.

The Commission concluded without discussion that a TO "may voluntarily include end of life criteria in its Form No. 715."[229] The Commission provided no citation for this broad determination.[230] Nothing in the statute underlying Form No. 715 nor the rulemaking creating the Form No. 715 filing requirement supports the Commission's determination that compliance with Form No. 715 is voluntary. Nor is there any precedent to support the conclusion that a TO may choose to simply not include planning criteria in its mandatory Form No. 715 filing if the criteria

[227] Attachment M-3 (d)(2).

[228] *See, e.g.*, LS Power Protest at 26-27.

[229] August 11 Order at P 86.

[230] Pub. L. No. 102-486, 106 Stat. 2276 (1992) codified at 16 U.S.C. § 824*l*.

meet the requirements set forth in Order No. 558.[231] The Court's discussion in *ODEC v. FERC*, addressed this very issue, finding that the Form No. 715 filing is not voluntary:

> Moreover, Form 715 is not limited to projects with purely local benefits. To the contrary, it implements Section 213(b) of the Federal Power Act, which *requires* utilities to inform FERC of *all* "potentially available transmission capacity and known constraints." 16 U.S.C. § 824l(b). In addition, under FERC regulations, utilities must submit "a detailed description of the transmission planning reliability criteria used to evaluate system performance." New Reporting Requirement Implementing Section 213(b) of the Federal Power Act, 58 Fed. Reg. 52,420, 52,421 (Oct. 8, 1993) (Form No. 715 Reporting Requirement Order); see 18 C.F.R. § 141.300(a). Neither the statute nor the implementing regulation limits reportable criteria to those involving projects with only local benefits.[232]

The August 11 Order is a wholesale departure from the requirements of set out in the Form No. 715 Reporting Requirement Order and the *ODEC*. Without explanation of that departure, the August 11 Order is arbitrary and capricious.[233] Because the requirements of Form No. 715 substantially conflict with the Tariff revisions in the TO Proposal, the Commission's failure to substantively address the issue does not comport with reasoned decision-making.

The Commission also failed to address the evidence included in LS Power's Protest establishing that end of life criteria must be included in a transmission owner's Form No. 715.[234] LS Power's evidence demonstrated not only the substance of the Form No. 715 requirement as it

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[231] Order No. 558, 58 FR 52420.

[232] *ODEC v. FERC*, 898 F.3d at 1262-1263.

[233] 5 U.S.C. § 706(2)(A); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981-982 (2005)("Unexplained inconsistency is. . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 436 U.S. 29, 46-57 (1983)); *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) ("[A]n agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."); *CPUC v. FERC*, 879 F.3d 966, 978 (9th Cir. 2018) (The Commission "merely asserted that it had the authority to grant incentive adders. . . . . the orders on review were a departure from Order 679's terms and the longstanding policy it incorporates. Without any acknowledgment or explanation of that departure, the orders were arbitrary and capricious.").

[234] LS Power Protest at 61-63.

relates to the new Attachment M-3 project categories, but also the impact of the failure of some transmission owners to include end of life criteria in their Form No. 715 filings. The consequence of the Commission's determination that it is at the discretion of individual PJM TOs whether to include end of life planning criteria in their Form No. 715 filing goes to the very heart of the D.C. Circuit's determination in *ODEC v. FERC*. In that case, the Court found that end of life projects included in Form No. 715 criteria have regional benefits and cannot be arbitrarily excluded from regional cost allocation. Yet, the August 11 Order allows an identical category of projects, planned for identical reasons, and known to result in the need for regionally beneficial projects,[235] to be treated differently for cost allocation purposes.[236]

3. The Commission erred in approving revisions to Attachment M-3 section (d) that impose new procedures for regional planning contrary to Order No. 1000.

The TO Proposal impermissibly includes planning procedures for Form No. 715 projects. As noted above, the regional planning process is located in the Operating Agreement, controlled by the Members Committee. The TO Proposal revises PJM's regional planning process by introducing new procedures that PJM must undertake while conducting the regional planning process.[237] The TO Proposal adds a requirement that in planning for Form No. 715 Projects, PJM must consider a TO's "EOL Needs" and engage in a back and forth over the potential solution. It

[235] *See PJM Interconnection, L.L.C.*, Compliance Filing, Docket No. ER18-680, Attachment A (filed on June 1, 2020).

[236] LS Power at 37. LS Power included in its Protest an example of a project located in two zones but treated differently for purposes of cost allocation. Dominion is responsible for a 3-mile portion of the Doubs-Goose Creek 500 kV transmission line as the end of life need was part of Dominions Form No. 715 criteria. At the same time, APS (FE) has included its 15-mile portion of the Doubs-Goose Creek 500 kV as a Supplemental Project. Both pieces are the same end of life project. The Dominion portion will be cost allocated region-wide based on its regional benefits because Dominion's end of life criteria are filed with its Form No. 715 criteria. The APS section will be cost allocated only to the zone in which the project is located because it is a Supplemental Project, notwithstanding that its benefits are identical.

[237] *See* Attachment M-3, Applicability (a)(iii)(2). "2. Individual Transmission Owner planning criteria as filed in FERC Form No. 715 and posted on the PJM website, *provided that the Additional Procedures for the Identification and Planning of EOL Needs, set forth in section (d), shall apply, as applicable*."

also authorizes the TOs to reject the PJM planned solution, an opportunity that does not currently exist in Operating Agreement Schedule 6. Revised Attachment M-3 leaves open the possibility that a project planned to address a transmission owner's Form No. 715 planning criteria is categorized as an Asset Management Project. Although Attachment M-3 section (a)(2) purports to exclude criteria filed in a PJM TO's Form No. 715, the procedures in Attachment M-3 section (d) apply. As explained above, the procedures in Attachment M-3 section (d) give the PJM TOs the right to reject the PJM planned solution. If a TO rejects the PJM planned solution, then it could propose an alternative local solution that meets the definition of an Asset Management Project. This result is inconsistent with the Operating Agreement, which requires PJM plan to meet Form No. 715 criteria, including the EOL criteria that some PJM TOs include in their Form No. 715. This simply does not square with the Commission's determination that the revisions to Attachment M-3 are exclusively the authority of the PJM TOs and the Commission offers no explanation for the inconsistency. The Commission's failure to address this inconsistency renders the decision arbitrary and capricious.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Protesting Parties request that the Commission grant rehearing of the August 11 Order and reject the TO Proposal in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated this the 10th day of September, 2020.

/s/ Lisa G. McAlister
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