UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

DC Energy, LLC

v. Docket No. EL18-170

PJM Interconnection, L.L.C.

**Comments of Public Citizen, Inc.**

On February 6, the Commission published a notice soliciting comments “whether issues remain outstanding in this proceeding . . . [and] whether, if issues remain outstanding, the Commission should continue to hold the complaint in abeyance in light of any ongoing PJM stakeholder proceedings”. We make three points.

First, we are unfortunately forced to remind the Commission that PJM stakeholder proceedings actively discriminate against Public Citizen. While PJM affords every other party in this proceeding full voting rights in its stakeholder proceedings, Public Citizen is denied voting rights. As a result, any Commission deference to PJM’s biased stakeholder proceedings places us at a distinct disadvantage relative to all of the other parties, and therefore violates our rights under the Federal Power Act. We understand that the Commission encouraged the formation of PJM and the other RTO’s to “facilitate lighter handed regulation” and “reduce the need for Commission oversight and scrutiny”,[[1]](#footnote-1) but such actions cannot come at the expense of an intervenor’s FPA rights.

Second, PJM’s December 10, 2018 *Reply Brief* endorsed Public Citizen’s request for the Commission “to establish a notice-and-comment procedure as a means of screening potential participants in FTR markets”.[[2]](#footnote-2) The Commission has thus far been silent on adopting this recommended reform. If the Commission is going to continue to allow trading of FTR swaps in its jurisdictional markets, we urge it to require firms seeking to trade FTRs to submit to notice-and-comment procedures similar to those seeking market-based rate authority and detail, among other things, upstream ownership and affiliation.

Third, we reprise our concern that FTR trades are violating the terms of the exemption granted by the U.S. Commodity Futures Trading Commission (CFTC), and the Commission should therefore endorse handing jurisdiction of FTRs over to the CFTC, which is far better equipped than FERC to oversee these swaps.

Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Commodity Exchange Act to expand the exclusive jurisdiction of the CFTC to cover swaps traded, executed, or cleared: “[The CFTC] shall have exclusive jurisdiction . . .with respect to accounts, agreements . . . and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts) traded or executed on a contract market . . . or a swap execution facility . . . or any other board of trade, exchange or market.”[[3]](#footnote-3) Dodd-Frank further clarified that the CFTC retains its authorities over agreements, contracts or transactions traded pursuant to FERC-approved tariff or rate schedules.[[4]](#footnote-4) Dodd-Frank also empowers the CFTC to exempt certain swaps like FTRs:

*If the [CFTC] determines that the exemption would be consistent with the public interest and the purposes of this act, the [CFTC] shall . . . exempt from the requirements of this Act an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission.*[[5]](#footnote-5)

In accordance with the CFTC’s exclusive authority to both regulate swaps and provide exemptions to this regulatory authority, PJM joined with other RTOs and filed a joint petition to the CFTC on February 7, 2012 asking to exempt “financial transmission rights” from CFTC jurisdiction.

On April 2, 2013, the CFTC published its Final Order approving the exemption of FTRs.[[6]](#footnote-6) The Final Order explicitly reserved the right to clawback the exemption, and noted that FTR market participants would be “commercial participants that are in the business of generating, transmitting, and distributing electric energy”―not financial speculators:

*[the CFTC] expressly noted that the proposed exemption was based upon the representations made in the Petition and in the supporting materials provided by the Requesting Parties and their counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA … several of the [RTOs] representations of particular importance, including: The exemption sought by the [RTOs] relates to the transactions described in the Proposed Order, which are primarily entered into by* *commercial participants that are in the business of generating, transmitting, and distributing electric energy; . . . the transactions . . . enable the reliable delivery of affordable electric energy . . . and each transaction defined in the Proposed Order is directly tied to the physical capabilities of the Requesting Parties' electric energy grids* [emphasis added].

The *Quarterly State of the Market Report for PJM: January through September* concludes that PJM’s FTR market participants are dominated by financial speculators― and not “commercial participants that are in the business of generating, transmitting, and distributing electric energy”, as pledged to the CFTC:

*FTR design does not serve as an efficient mechanism for returning congestion [revenues] to load . . . For the Monthly Balance of Planning Period Auctions, financial entities purchased 80.9 percent of prevailing flow and 89.7 percent of counter flow FTRs for January through September, 2022. Financial entities owned 75.3 percent of all prevailing and counter flow FTRs, including 64.9 percent of all prevailing flow FTRs and 86.7 percent of all counter flow FTRs during the period from January through September 2022. Self scheduled FTRs account for 4.9 percent of all FTRs held . . . Financial entities received $225.1 million in profits, up from $100.3 million profits in the same time period in the 2021/2022 planning period.[[7]](#footnote-7)*

The fact that PJM’s FTR market participants are in violation of the terms of the exemption granted by the CFTC should result in a revocation of the exemption and place PJM’s FTR market under the exclusive jurisdiction of the CFTC.

Respectfully submitted,

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1. FERC Order 2000, at pages 3 and 96, www.ferc.gov/sites/default/files/2020-06/RM99-2-00K\_1.pdf [↑](#footnote-ref-1)
2. At page 9, https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01FBCF1C-66E2-5005-8110-C31FAFC91712 [↑](#footnote-ref-2)
3. 7 USC § 2(a)(1)(A) [↑](#footnote-ref-3)
4. 7 USC § 2(a)(1)(I)(i) and (ii) [↑](#footnote-ref-4)
5. Commodity Exchange Act § 4(c)(6)(A) [↑](#footnote-ref-5)
6. www.gpo.gov/fdsys/pkg/FR-2013-04-02/pdf/2013-07634.pdf [↑](#footnote-ref-6)
7. www.monitoringanalytics.com/reports/PJM\_State\_of\_the\_Market/2022/2022q3-som-pjm-sec13.pdf [↑](#footnote-ref-7)