

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Independent Market Monitor for PJM
v.
PJM Interconnection LLC

Docket No. EL23-50

**Comments of Public Citizen In Support Of The Complaint, And
Request To Address PJM Governance Shortcomings In A Notice
of Inquiry of Order 719**

On March 27, PJM's Independent Market Monitor filed a complaint under Section 206 of the Federal Power Act that details how PJM's refusal to allow non-members – including FERC staff – to attend meetings of the Liaison Committee violates PJM's tariff. It follows on the heels of the March 8 complaint of the Public Service Commission of West Virginia that it is also barred from the Liaison Committee.¹

In contrast, the Public Interest & Environmental Organizations User Group once-a-year meeting with PJM's Board of Managers is open to all PJM members and to the public. PJM has failed to explain why Liaison Committee meetings with the Board must be closed to the public and yet PIEOUG meetings with the Board are open to free attendance by the public. PJM has provided no detail why one stakeholder Board meeting requires complete secrecy while the other does not.

These successive complaints suggest fundamental problems with PJM's governance that require corrective intervention by the Commission. A Commission order granting the IMM access to PJM's Liaison Committee will leave unaddressed similarly situated non-PJM members (such as Public Citizen, the Public Service Commission of West Virginia, FERC staff and countless others) that are also denied access to PJM's Liaison Committee. The Commission must therefore initiate a Notice of Inquiry of Order 719 to pursue long-neglected, comprehensive governance reforms for PJM that ensure all impacted stakeholders – not just PJM members – have access to PJM's Board of Managers.

¹ Docket No. EL23-45.

more votes, and PJM preserves no record of their votes cast. Meanwhile, organizations like Public Citizen are not permitted to vote.

Liaison Committee Chair Midgley’s testimony (attached as Exhibit A) against HB1186 made the outlandish claim that state legislation requiring such disclosure was pre-empted by federal law, and could only be required by FERC. This claim by the Liaison Committee Chair was debunked two days later by a written opinion of the Maryland Attorney General, included as Exhibit B. Despite the efforts of the Maryland Attorney General to correct the record, Exelon’s aggressive and misleading lobbying was effective to kill the legislation.

It is more than bad optics for PJM to allow a representative of a company sanctioned for violations of federal criminal bribery laws to chair the Liaison Committee, and for this same Liaison Committee Chair to deliver discredited testimony to a state legislature in a successful effort to thwart transparency reforms—all the while PJM non-members like Public Citizen, the IMM and state regulators are barred from entry. Governance reforms under Order 719 should limit RTO stakeholder committee participation for any corporation or individual that has been convicted of a crime or is under the terms of a deferred prosecution agreement.

RTO’s Origins As An Experiment In Governance Deregulation

PJM Interconnection LLC is a private corporation and administrative construct of FERC, tasked with sweeping Federal Power Act authorities of power market oversight. PJM is governed by a FERC-approved tariff that sets rules for the wholesale market covering all or parts of 13 U.S. states with 65 million people. Companies like PJM are public utilities classified as regional transmission organizations (RTOs).

More than 23 years ago, FERC encouraged the formation of RTOs in part to “facilitate lighter handed regulation” and “reduce the need for Commission oversight and scrutiny”.⁷ Deregulation of RTO governance, and FERC’s assumption that RTOs internally-managed stakeholder procedures would be fair and transparent, has failed. The result is the privatization of electricity policy making in RTO service territories that excludes critical public interest stakeholders.

⁷ FERC Order 2000, at pages 3 and 96, www.ferc.gov/sites/default/files/2020-06/RM99-2-00K_1.pdf

A Notice Of Inquiry Of Order 719 Is Required To Address PJM’s Tariff Violations And Abuses Of Just And Reasonable Rates

The intent of Order 719 in 2008 was “to improve the operation of organized wholesale electric markets in the areas of . . . the responsiveness of RTOs to their customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services”, with a requirement for “RTOs and ISOs to establish a means for customers and other stakeholders to have a form of direct access to the board of directors, and thereby to increase the boards of directors’ responsiveness to these entities”, and “that RTOs and ISOs continue over time to consider customer and other stakeholder needs as the architecture or market environment of the RTO or ISO changes. This criterion is necessary to ensure that responsiveness continues into the future” [emphasis added].⁸

By design, PJM’s stakeholder process excludes key public interest perspectives from witnessing important proceedings and blocks our ability to meaningfully participate. PJM unreasonably limits its definition of stakeholders to: PJM members; the Organization of PJM States (comprised of state public utility commissions); state consumer advocates; the Independent Market Monitor; PJM staff; and the PJM Board of Managers.⁹ Any entity that falls outside these narrow categories—like Public Citizen, environmental justice organizations, advocates representing the interests of low-income households, community organizations concerned about climate change—are excluded for consideration as stakeholders. We are all on the outside looking in, while powerful Wall Street financial traders and private equity owners of coal power plants are vested with an array of rights, including the right to vote and the right to freely participate in Liaison Committee meetings.

PJM shoehorns Public Citizen and all other public interest organizations into the Public Interest & Environmental Organizations User Group. While participation in this User Group is free, there is little value for public interest groups, as PIEOUG conveys no voting rights or access to Liaison Committee or Finance Committee meetings. The

⁸ At 1, 477 and 509, <https://ferc.gov/media/order-no-719>

⁹ Christina Simeone, *PJM Governance: Can Reforms Improve Outcomes?* May 19, 2017. At page 9, <https://kleinmanenergy.upenn.edu/wp-content/uploads/2020/08/PJM-Governance-Reforms-1.pdf>

primary PIEOUG benefit is that *once a year* its members get to meet with the Board of Managers for an hour and 45 minutes, split up between all of the PIEOUG members. For the 2023 annual meeting, Public Citizen has been allotted 10 minutes to engage with the Board. In contrast, the Liaison Committee meets with the Board at least four times a year, providing its attendees far more access and engagement with the Board. The discrepancy of access between PIEOUG and the Liaison Committee is incomparable, and imposes unreasonable burdens on non-PJM members like Public Citizen.

Furthermore, the PIEOUG meeting with PJM’s Board of Managers is freely available for any interested member of the public to attend. PJM has provided no explanation or guidance as to why PIEOUG meetings with the Board are open to the public while Liaison Committee meetings are not.

FERC’s Suggested Remedy is Unjust and Unreasonable

Three years ago, in response to Public Citizen’s complaint that we were denied access to certain PJM stakeholder committees, including the Finance Committee, the Commission determined that “Public Citizen could join PJM as a non-voting member and thus be able to represent its interests by attending PJM Finance Committee meetings.”¹⁰

FERC’s proposed remedy is unjust and unreasonable. PJM’s only avenue for non-voting membership is to pay an annual fee of \$2,500 for Associate Membership. There is a reason that no public interest stakeholders have availed themselves of this approach: a \$2,500 annual membership that conveys no voting rights and only allows access to Finance Committee meetings is unjust and unreasonable. Exhibit C is a list of current PJM Associate Members. A \$2,500 annual fee simply to attend Finance Committee meetings on a non-voting basis is a punitive barrier for public interest participation. PJM has provided no rationale for charging \$2,500/year for Associate Members—because there is none. PJM is authorized to recover its administrative costs through its Commission-approved tariff, so the \$2,500 fee is not justified to cover any PJM administrative burdens. Rather, the fee appears designed simply to establish a

¹⁰ *Public Citizen v. PJM Interconnection*, May 21, 2020 Order Denying Rehearing, Docket No. EL18-61-001, at 12.

steep financial threshold for Associate Membership—a divide that is blatantly an unjust and unreasonable burden for public interest organizations.

Imagine the howls of protest if FERC issued an order that Exelon Corporation or any other generator should be satisfied relegated to non-voting observer status in PJM's stakeholder process. The Commission's advocacy of second-class stakeholder status for the public interest is indefensible.

Conclusion

There is no justification for denying the public and other non-PJM members access to attend Liaison Committee meetings. Interactions between PJM members and the Board should be transparent, and efforts to cloak such meetings in secrecy are wrong. The once-a-year PIEOUG public Board meeting is not a substitute for ensuring that Liaison Committee meetings are also open to the public.

The Federal Power Act guarantees broad rights and protections to the public and does not allow for PJM's narrow, discriminatory discretion to determine who is a rightful "stakeholder". A Notice of Inquiry of Order 719 is long overdue and necessary to address PJM's unjust and unreasonable barriers for public interest participation.

Respectfully submitted,

Tyson Slocum

Tyson Slocum, Energy Program Director
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Washington, DC 20003

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EXHIBIT A



March 28, 2023

112 West Street
Annapolis, MD 21401

Oppose- House Bill 1186- Public Service Companies- Annual Report on Votes Cast at Meetings of Regional Transmission Organizations

Exelon respectfully opposes *House Bill 1186- Public Service Companies- Annual Report on Votes Cast at Meetings of Regional Transmission Organizations*. House Bill 1186 requires each public service company that is a member of a regional transmission organization to provide to the Maryland Public Service Commission (PSC) an annual report on votes cast by the public service company at any meeting of the regional transmission organization (RTO). The report includes all votes cast by the public service company, regardless of whether the vote is already disclosed by the RTO, as well as an explanation of how each vote cast by the public service company is in the interest of the public.

Exelon is a member of PJM Interconnection (PJM), the RTO that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia and is responsible for transmission planning to serve that region. PJM is exclusively regulated by the Federal Energy Regulatory Commission (FERC) through the Federal Power Act.

PJM holds regular meetings with stakeholders, which are integral to developing and refining PJM's rules, policies, and processes. Additionally, many different subcommittees and groups that are part of PJM's governance structure and help administer an open grid and transparent market hold 100's of meetings throughout the year. Meetings are open to the public and the press, with few exceptions and many votes are both formal and recorded. At some lower-level PJM stakeholder committee meetings, votes are not recorded because the structure is intentional to encourage consensus building and brainstorming. The stakeholders recognize the unique role of the stakeholder process in exploring, solving and negotiating regional solutions for the RTO and the wholesale power markets.

At the PJM Members Committee, which is the senior most standing committee and through which every major vote is taken, votes are recorded by company and are publicly available and published by PJM. It is **only** at the PJM Members Committee that votes are considered "final" which is why there is a detailed record of how all participating PJM Members voted on a matter.

In addition, the stakeholders understand the importance of transparency of the process to all those affected by it. The PJM Manual requires that all members acknowledge that documents, reports, slide shows, and other written material used are intended to be works in progress and to encourage dialogue, discussion, debate, and preferably, movement towards consensus. Therefore, these work products and discussion should be treated in the spirit to which they are intended, that is not as final or complete documents nor the final position or view of a participant. The current structure of voting accomplishes that goal and is, itself, in the public interest. (See PJM's Manual 34 Section 4.5)

Apart from that, however, House Bill 1186 is preempted by federal law. The rules governing PJM stakeholders' right to vote on PJM committee matters, including the disclosure of those votes and/or the reasoning underlying those votes, are matters that are within FERC's exclusive legal authority over PJM's operating rules and procedures. By requiring a public service company to explain how votes cast at PJM meetings on issues that are completely within the scope of federal jurisdiction are in the *State's* public interest, the bill attempts to regulate areas—the wholesale power market and oversight of regional transmission operators—that Congress has exclusively delegated to the federal government. House Bill 1186 interferes with and intrudes on FERC's exclusive legal authority.

Finally, the proposed statute change would impose a vague “public interest” standard on a private company's activities and votes regarding the interstate wholesale power market and transmission grid which spans multiple states. As a result, House Bill 1186 has the practical effect of impermissibly regulating interstate commerce in violation of the Dormant Commerce Clause. PJM, under the federal regulatory oversight of FERC, operates the regional transmission grid and wholesale power market, which are quintessential areas of interstate commerce. The Dormant Commerce Clause prohibits states from interfering with interstate commerce by interjecting one state's regulatory regime on otherwise interstate conduct. Public service companies vote at PJM on issues related to the interstate wholesale power market and related to their roles as transmission asset owners, not as distribution utilities, since PJM operates as a regional transmission organization. Requiring a company to demonstrate how each of its votes in PJM are in the interest of the public is an impermissible regulation of interstate commerce.

Exelon opposes House Bill 1186 as it is pre-empted by federal law and is in violation of the Dormant Commerce Clause. Not only are there legal implications with the proposed legislation, it is poor policy. This legislation, even were it lawful, has the ability to curb innovation and collaboration at a time when all hands should be on deck considering many novel ideas to help ensure our grid is safe, reliable and resistant to climate change. Exelon understands that some parties are interested in additional transparency beyond the substantial transparency already assured under current law and PJM procedures, however we believe there are other opportunities and options for sharing information and ideas. House Bill 1186 is unnecessary, administratively overburdensome and intrudes upon activity that is exclusively federally regulated. Exelon respectfully requests that the Committee issue an unfavorable committee report on House Bill 1186.

Contact:

Sharon Midgley

Vice President, Federal Regulatory Affairs

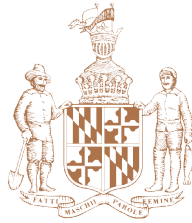
Sharon.Midgley@exeloncorp.com

Exhibit B

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 30, 2023

The Honorable Lorig Charkoudian
220 Lowe House Office Building
Annapolis, Maryland 21401-1991
Via email

Dear Delegate Charkoudian:

You have asked for advice concerning House Bill 1186, “Public Service Companies – Annual Report on Votes Cast at Meetings of Regional Transmission Organizations.” Specifically, you have asked whether the bill would violate the Commerce Clause of the United States Constitution and whether it is preempted by federal law. It is my view that the bill does not violate the Commerce Clause and is not preempted by federal law.

House Bill 1186 requires a public service company in Maryland that is a member of a regional transmission organization (“RTO”), in this case, PJM Interconnection, LLC (“PJM”), to report annually on all of the votes cast by the public service company at a meeting of an RTO in the previous year. The report must include both the votes and a brief description of how each vote cast by the public service company is in the interest of the public.

FEDERAL PREEMPTION

There are three instances in which state law is preempted by federal law. Clearly, federal law will preempt state law when Congress has specifically stated that it is preempted. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). There is also field preemption, which arises when “Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.” *Hughes v. Talen Energy Marketing*, 578 U. S. 150, 163 (2016). Finally, state law is preempted when it actually conflicts with the federal law. *English*, 496 U.S. at 79. This happens when it is impossible for a party to comply with both federal and state requirements. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672 (2019), or when the law “creates an unacceptable ‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’” *Wyeth v. Levine*, 555 U.S. 555, 563–564 (2009).

In the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. § 791a et seq., Congress divided authority over the regulation of the sale of electric energy between the Federal Energy Regulatory Commission (“FERC”), which can regulate “the sale of electric energy at wholesale in interstate commerce,” including both wholesale electricity rates and any rule or practice “affecting” such rates, §§ 824(b), 824e(a), and the states, which have jurisdiction over “any other sale”—most notably, any retail sale—of electricity. § 824(b). *FERC v. Electric Power Supply Association*, 577 U.S. 260, 264 (2016). Thus, the federal law specifically not only protects state power to regulate local sales and public service companies operating in the state, it prohibits the federal government from interfering with that regulation. Federal law also provides that the provisions of federal law relating to Electric Reliability Organizations do not preempt “any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State.” 16 U.S.C. § 824o(i)(3). “One aspect of PJM’s duties as an RTO is the day-to-day operation and maintenance of the bulk electric power system ‘to ensure reliability of electricity delivery across the [PJM] region.’” *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 802 (D. Md. 2013). Finally, federal law expressly authorizes state commissions to examine the books, accounts, memoranda, contracts and records of an electric utility company subject to its regulatory authority under state law. 16 U.S.C. § 824(g)(1)(A). The law further states that it does not preempt any applicable state law concerning the provision of records and other information. 16 U.S.C. § 824(g)(4)(A).

Based on the above, it is clear that Congress did not intend to preempt information requirements like those found in House Bill 1186 and also that it has not preempted the field with respect to regulation of public services companies. It is also fair to say that it is in no way impossible for a public service company to comply with both state and federal law with respect to this matter, nor can it be said that the requirement of the bill would “[create] an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

COMMERCE CLAUSE

The Commerce Clause provides that “Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States.” U.S. Const., Art. I, § 8, cl. 3. Although the Constitution does not in terms limit the power of states to regulate commerce, the Supreme Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Authority*, 550 U.S. 330, 338 (2007). The Supreme Court has explained that, under the dormant Commerce Clause, a state law that discriminates against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose. *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 2641 (2019).

The provisions of House Bill 1186 do not relate to out-of-state goods or nonresident economic actors. The bill requires only the disclosure of votes, and the reasons for those votes, from public service companies in the State. It does not control those votes. The requirement does

The Honorable Lorig Charkoudian
March 30, 2023
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not apply to votes from public services companies outside the State. There is simply no ground on which to conclude that the bill violates the Commerce Clause.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Rowe', written in a cursive style.

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
charkoudian06

Exhibit C

Company	Voting Member	Sector	Member Type
<input type="text" value="Search"/>	<input type="text" value="Search"/>	All	Associate
Albertsons Companies, Inc.	Not applicable	None	Associate
Amperon Holdings, Inc.	Not applicable	None	Associate
Atmospheric G2, LLC	Not applicable	None	Associate
Aurora Energy Research LLC	Not applicable	None	Associate
Balyasny Asset Management L.P.	Not applicable	None	Associate
BARCHART.COM INC.	Not applicable	None	Associate
BTU Analytics, LLC	Not applicable	None	Associate
Cambridge Energy Solutions LLC	Not applicable	None	Associate
Clarity Grid Solutions, Inc.	Not applicable	None	Associate
Clone Capital LLC	Not applicable	None	Associate
ConnectGen East LLC	Not applicable	None	Associate
DTN, LLC	Not applicable	None	Associate
Elevate Energy	Not applicable	None	Associate
Elliott Advisors (UK) Limited	Not applicable	None	Associate
Enverus, Inc.	Not applicable	None	Associate
Filsinger Energy Partners, Inc.	Not applicable	None	Associate
Five Rings LLC	Not applicable	None	Associate
Genability Inc.	Not applicable	None	Associate
Genscape, Inc.	Not applicable	None	Associate
GT Power Group, LLC	Not applicable	None	Associate
Guidehouse Inc.	Not applicable	None	Associate
Hitachi Energy USA Inc.	Not applicable	None	Associate
IHS Global Inc.	Not applicable	None	Associate
Marginal Unit, Inc.	Not applicable	None	Associate
MCG Energy Solutions, LLC	Not applicable	None	Associate

Company	Voting Member	Sector	Member Type
<input type="text" value="Search"/>	<input type="text" value="Search"/>	All	Associate
Metis Energy, LLC	Not applicable	None	Associate
Morningstar Commodity Data, Inc.	Not applicable	None	Associate
National Renewable Energy Corporation	Not applicable	None	Associate
Nodal Exchange, LLC	Not applicable	None	Associate
OPEN ACCESS TECHNOLOGY INTERNATIONAL, INC.	Not applicable	None	Associate
Orennia US LLC	Not applicable	None	Associate
Osaka Gas USA Corporation	Not applicable	None	Associate
Palladium Energy, LLC	Not applicable	None	Associate
Pharos Enterprise Intelligence LLC	Not applicable	None	Associate
Power Analytics Software, Inc.	Not applicable	None	Associate
Radiant Geospatial Solutions LLC	Not applicable	None	Associate
Refinitiv US LLC	Not applicable	None	Associate
REsurety, Inc.	Not applicable	None	Associate
RTR Energy Solutions LLC	Not applicable	None	Associate
S&P Global Inc.	Not applicable	None	Associate
Statkraft US LLC	Not applicable	None	Associate
Tesla, Inc.	Not applicable	None	Associate
Teza Technologies LLC	Not applicable	None	Associate
The Brattle Group, Inc.	Not applicable	None	Associate
TimberRock Consulting LLC	Not applicable	None	Associate
Tymeware Inc.	Not applicable	None	Associate
Vesper Energy Development LLC	Not applicable	None	Associate
WattTime Corporation	Not applicable	None	Associate
Yes Energy LLC	Not applicable	None	Associate