

169 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Public Citizen, Inc.

Docket No. EL18-61-000

v.

PJM Interconnection, L.L.C.

ORDER DENYING COMPLAINT

(Issued October 17, 2019)

1. On February 20, 2018, pursuant to section 206 of the Federal Power Act (FPA),¹ Public Citizen, Inc. (Public Citizen) submitted a complaint against PJM Interconnection, L.L.C. (PJM) alleging that PJM potentially violated the FPA, Commission precedent, and the Amended and Restated Operating Agreement of PJM (Operating Agreement) by recovering through its Commission-approved filed rate improper campaign contributions and lobbying expenses, and by failing to disclose its spending on political activity. In this order, we deny the complaint, as discussed below.

I. Background

2. PJM has a rate on file with the Commission, which was last updated in 2016, that recovers PJM's expense budget of roughly \$290 million.² In the 2016 rate proceeding, Public Citizen made an allegation of improper political spending by PJM similar to the one made in the instant complaint. Public Citizen argued that PJM had provided no detail of its outside services, a part of which Public Citizen alleged might include expenses related to political advocacy.³ The Commission rejected Public Citizen's contention, finding that the structure of the rate, with its oversight from the Finance Committee and the presence of a refund provision, was adequately justified. The Commission added that

¹ 16 U.S.C. § 824e (2012).

² See *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,236 (2016).

³ See *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,236 at P 13.

it permits Regional Transmission Organizations (RTOs) to recover expenses related to RTO informational and educational efforts.⁴ The Commission also stated that PJM's process ensures that the financial statements questioned by Public Citizen are subject to adequate independent review because the Finance Committee, composed of stakeholder representatives, including consumer advocates, reviewed the financial information establishing the rate and was satisfied that these figures represent legitimate expenses.⁵

II. Complaint

3. In the current complaint, Public Citizen alleges that PJM has violated the FPA's requirement that rates be just and reasonable, as well as Commission precedent, by financing partisan political activities through its filed rate.⁶ Public Citizen asserts it has identified at least \$456,500 in campaign contributions made by PJM to political action committees, i.e., the Democratic Governors Association (DGA) and the Republican Governors Association (RGA), for the purpose of financing partisan electoral politics that have not been disclosed to the Commission or PJM's stakeholders.⁷ Public Citizen states that the mission of the DGA is "the election of Democratic Governors and other non-federal candidates," and that the purpose of the RGA is "to assist in the election of Republican gubernatorial candidates and the reelection of incumbent Republican Governors."⁸ Public Citizen states that this \$456,500 in campaign contributions may not be the full universe of such payments.⁹

⁴ *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,236 at P 24 (citing *ISO New England, Inc.*, 117 FERC ¶ 61,070 (2006) (*ISO New England*), (allowing informational and educational expenses to be recovered), *order on reh'g*, 118 FERC ¶ 61,105 (2007) (*ISO New England Rehearing Order*), *aff'd sub nom Braintree Elec. Light Dep't v. FERC*, 550 F.3d 6, 16 (D.C. Cir. 2008) (*Braintree*) (finding such expenditures reasonable given the "potential impingement of government action on all stakeholders" and the need for legislative access to information regarding RTO activity)).

⁵ *Id.* P 22.

⁶ Complaint at 1-2.

⁷ *Id.* at 3. Public Citizen states that it found evidence of these contributions through its search of the Internal Revenue Service 527 database.

⁸ *Id.*

⁹ Complaint at 5.

4. Public Citizen states that Schedule 9 of the PJM Open Access Transmission Tariff (OATT) describes how the costs of the operation of PJM can be recovered from transmission customers and other users.¹⁰ Public Citizen states that PJM Manual 33 describes the allowable administrative services authorized under the PJM Operating Agreement as those that relate to PJM’s purpose “to facilitate coordinated operation of their electric systems and interchange of electric capacity and energy, to ensure the efficient operation of an energy market based on the PJM [OATT].”¹¹ Public Citizen argues that neither the OATT nor the Manual allow recovery of costs related to the financing of partisan political activity and that, indeed, the Commission has ruled that “activities such as participation in Political Action Committees [and] candidate fundraising . . . are clearly not recoverable lobbying activities.”¹²

5. In addition to the payments to the DGA and RGA, Public Citizen also lists multiple outside lobbying firms for both federal and state level lobbying purposes that PJM has retained without disclosure. Public Citizen contends that PJM does not disclose to the Commission or the PJM Finance Committee any details about lobbying expenditures or political action committee contributions, in potential violation of its Operating Agreement and Commission precedent.¹³ Public Citizen states that it reviewed archived Finance Committee meetings and contacted multiple members of PJM’s Finance Committee and was unable to obtain any detail on any of PJM’s political spending.¹⁴ Public Citizen further states that PJM routinely leaves blank the line for Account 426.4 (“Exp. for Certain Civic, Political & Related Activities”) on its Form 1 annual report filed with the Commission, despite the lobbying expenditures and campaign contributions Public Citizen has identified.¹⁵ Public Citizen further states that the Commission has ordered transparency standards for an RTO’s recoverable lobbying expenditures.¹⁶

¹⁰ *Id.* at 4 (citing PJM OATT).

¹¹ *Id.* (quoting PJM Manual 33).

¹² *Id.* at 2 (quoting *ISO New England*, 117 FERC ¶ 61,070 at P 41).

¹³ *Id.* at 5.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 5.

¹⁶ Complaint at 2 (quoting *ISO New England*, 117 FERC ¶ 61,070 at P 52) (“to provide greater transparency to [RTO] stakeholders and allow them to achieve a clear understanding of the nature of such expenditures, the Commission will require [the RTO] to prepare and post on its website a monthly report concerning ‘external affairs’ and

6. To the extent that PJM is financing partisan political activities through its filed rate, Public Citizen requests that the Commission declare PJM's rate unjust and unreasonable. Further, Public Citizen requests that the Commission require PJM to itemize and disclose all political-related spending, including campaign contributions and lobbying expenses, and clearly document which political expenses are funded through filed rates.

III. Notice of Filing and Responsive Pleadings

7. Notice of the complaint was published in the *Federal Register*, 83 Fed. Reg. 8257 (2018), with answers, interventions, and protests due on or before March 12, 2018. Timely motions to intervene were filed by: Delaware Division of the Public Advocate, PJM Industrial Customer Coalition, PJM Power Providers Group, American Municipal Power, Inc., Organization of PJM States, Inc., Sierra Club and Union of Concerned Scientists (Joint Commenters), and Maryland Office of People's Counsel.

8. New Jersey Division of Rate Counsel filed a motion to intervene out-of-time.

9. On February 20, 2018, Robert Rutkowski filed a comment. On March 9, 2018, PJM filed an answer to the complaint (PJM Answer). On March 12, 2018, as supplemented on March 30, 2018, Public Citizen filed an answer. On March 12, 2018, Joint Commenters filed a comment in support of Public Citizen.

A. PJM Answer

10. PJM argues that its payments to the DGA and RGA are recoverable expenses for educational and informational outreach, not campaign contributions or lobbying expenses. PJM states that the DGA and RGA are not Political Action Committees, but political organizations under Section 527 of the Internal Revenue Code, and PJM's payments are membership fees. According to PJM, these fees allow PJM to educate and inform state government officials about issues related to the wholesale markets and bulk power system at policy conferences and forums. Participation in these meetings,

'corporate communications.' The report, among other things, should identify all meetings (including those conducted by telephone) held in the past month by or on behalf of [the RTO] with any public official, including those in the legislative or executive branches of federal or state government, as well as a description of the attendees and the issues addressed during the meetings. This will give stakeholders the opportunity to review activities.'").

according to PJM, is directly related to the RTO's educational function and undertaken in the collective best interest of PJM's members.¹⁷

11. PJM asserts that its existing reporting practices provide sufficient oversight and transparency to its stakeholders in accordance with its Operating Agreement. PJM states that stakeholders elect representatives to the Finance Committee, which has the responsibility of reviewing, questioning, and making recommendations concerning PJM's annual capital and expense budgets. PJM further states that these information exchange requirements are embodied in both the Operating Agreement and a Financial Review, Reporting and Communication Protocol that can be amended only by a majority vote of the Finance Committee, ensuring that these protections cannot be taken away or modified without agreement of stakeholder representatives on the Finance Committee. PJM states that it is always prepared to respond to the requests of its members if greater detail and granularity is requested in the Finance Committee information; however, PJM states that no members have requested such information nor has any member complained that information submitted to the Finance Committee in the budgeting process is insufficient. PJM claims that these expenses are reviewed by its Finance Committee and are available to the Commission for review upon request. PJM asserts that Public Citizen's complaint is a collateral attack on the Commission's previous denial of Public Citizen's protest in PJM's stated rate proceeding. Regarding the recoverability of these expenses, PJM argues that "Commission precedent has placed great weight on the impartiality and independence of an RTO with no profit motive in allowing recovery of costs in monitoring legislative activity even if reported in Account No. 426.4."¹⁸

12. PJM further contends that the fees paid to the entities described in the complaint (outside lobbying firms) are properly categorized as operational expenses. PJM argues that the mere fact of registering as a state or federal lobbyist is not, in and of itself, dispositive of whether the specific type of activities he/she undertakes for PJM is recoverable by PJM because the Commission permits recovery by RTOs of such costs even if the activity is lobbying if it is in the collective best interests of PJM and its members.¹⁹ PJM also argues that expenditures for services provided by the entities identified in the complaint are for purposes of outreach, education, and other activities directly related to PJM's RTO operations.

¹⁷ PJM Answer at 4-5.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 6 (citing *ISO New England*, 117 FERC ¶ 61,070 at n.64 (citing *Ohio Edison Company*, 26 FERC ¶ 61,416, at 61,928 (1984))).

B. Comments

13. Joint Commenters assert that Commission precedent precludes recovery of expenses related to lobbying activities.²⁰ They also argue that RTO/ISO engagement in activities that look like lobbying, potentially in support of legislation or other proposals that are highly controversial among stakeholders, without check, threatens confidence in the RTO/ISO independence that is the bedrock of competitive wholesale markets. Therefore, Joint Commenters argue, to ensure transparency and confidence in their independence, RTO/ISOs should post monthly reports of all meetings with public officials in the same manner as the Commission required in *ISO New England*.

14. Further, Joint Commenters assert that the DGA and RGA are organizations whose primary objective is to support the election of non-federal candidates and the harms of allowing membership fees to such organizations to be recoverable are far greater than any negligible benefit to an RTO/ISO's mission. Joint Commenters argue that the Commission should clarify that membership fees in lobbying organizations are not recoverable, even if connected secondarily to informational activities. Finally, Joint Commenters argue that the Commission should require an explanation of PJM's Account 426.4 activities. They state that Account 426.4 covers a broad category of expenses related to both civic and political engagement with public officials, but PJM has not reported any expenses under Account 426.4 in the past five years (2012-2016) of filing Form No. 1 on record with the Commission.²¹

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We also grant, pursuant to Rule 214(d), the late-filed motion to intervene filed by the New Jersey Division of Rate

²⁰ Joint Comments at 5-6 (citing *Northern Border Pipeline Company*, 23 FERC ¶ 61,213, at 61,439 (1983) (“Expenditures incurred to influence the opinion of the public during the selection process have little or no benefit to the ratepayers, and therefore must be borne by stockholders.”); *Delmarva Power & Light Company*, 58 FERC ¶ 61,169 at 61,509 (The portion of expenses “used for lobbying activities may not, under any circumstances, be included in the utility’s cost of service.”)).

²¹ *Id.* at 13 (citing *ISO New England*, 117 FERC ¶ 61,070 at P 44 (quoting Order No. 276, 30 FPC at 1539)).

Counsel given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Public Citizen's answer and, therefore, reject it.

B. Substantive Matters

17. We deny Public Citizen's Complaint. For the reasons discussed below, we find that Public Citizen has not demonstrated that PJM's rate is unjust and unreasonable.

18. In *ISO New England*,²² the Commission analyzed similar expenditures by ISO New England Inc. (ISO-NE) and found those expenditures recoverable. The Commission explained that the expenditures were recoverable because they:

(1) represented an educational, communicative function of ISO-NE essential to its mission of efficiently and reliably operating the New England markets; (2) supported specific legislation that ISO-NE determined was in the collective best interests of its customers/stakeholders and from which it could not reap any financial or other benefit; and (3) did not include the types of activities that would not be recoverable, such as participation in Political Action Committees, candidate fundraising, entertainment expenses (e.g., meals, sporting events, junkets) and other activities not at issue here that do not directly relate to ISO-NE's operations.²³

19. Public Citizen asserts that the DGA and RGA are political action committees, that PJM's contributions to them are campaign contributions and, therefore, the recovery of costs paid by PJM to those groups are not recoverable. Public Citizen argues that PJM's annual payments to the DGA and RGA are campaign contributions because those groups indicate in their respective mission statements that they support the election of state gubernatorial candidates.

20. On the other hand, PJM states that it does not make contributions to candidates' campaigns and maintains that it files reports with the U.S. Congress every six months affirming that PJM has not made federal congressional political contributions. PJM

²² *ISO New England*, 117 FERC ¶ 61,070.

²³ *Id.* P 49.

further states that it complies with similar state ethics disclosure reporting requirements.²⁴ PJM states that the reason it participates in the DGA and RGA is to keep informed on policy initiatives impacting the wholesale markets, bulk power system operations and infrastructure and, as a neutral information provider, to share relevant details about such matters with state policymakers. PJM further states that the payments made to the DGA and RGA are membership fees used for various purposes, including policy development, program support, and policy conferences. PJM states that both organizations host forums on energy topics, and PJM has been called upon to educate and inform state government officials on energy infrastructure and integrating new generation resources.²⁵

21. In determining whether the expenses related to any lobbying-type activities are recoverable, the Commission evaluates whether the expenditures: (1) represent an educational or informational function of the RTO essential to its core operations, and (2) support policies that the RTO determines to be in the collective best interests of its stakeholders and from which the RTO cannot reap any financial or other benefit.²⁶ The Commission has stated that expenses for lobbying “may be recoverable if they are ‘directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations’ and therefore, are not considered to be unrecoverable civic, political, or related activities costs[.]”²⁷ Based on the record in this proceeding, we conclude that Public Citizen has failed to demonstrate that the fees paid by PJM to the DGA and RGA are unrecoverable under this standard.

22. Although the DGA and RGA may support candidates for office, they also maintain fora for obtaining relevant information about energy-related matters. PJM pays membership fees to these organizations to maintain access to those fora and does not directly contribute to political campaigns. As PJM explains, by paying membership fees, PJM maintains access to these organizations to keep informed on policy initiatives impacting the wholesale markets and to help educate state policy makers on PJM

²⁴ PJM Answer at 6 & n.18.

²⁵ *Id.* at 5.

²⁶ *See ISO New England*, 117 FERC ¶ 61,070 at P 49.

²⁷ *Id.* P 46 (citing *ISO New England Inc.*, 111 FERC ¶ 61,096, at P 18 (2005)). *See Braintree*, 550 F.3d at 10 (“[o]n the non-recoverable side of the line [the Commission] identified ‘activities such as participation in Political Action Committees, candidate fundraising, [and] entertainment expenses’ [as] clearly not recoverable lobbying activities . . . [as opposed to] ‘informational and educational activities as well as monitoring and communicating on issues of direct operating concern to the RTO.’”).

activities, and such expenditures are directly related to advancing PJM's stakeholder interests; attending DGA and RGA meetings is a cost-effective way of engaging on policy matters where the governors of multiple of PJM's thirteen states and their staffs are present.²⁸ Public Citizen does not dispute PJM's assertion in this regard. Public Citizen also fails to demonstrate that such costs are not legitimate expenses approved by the PJM Finance Committee in the interest of PJM stakeholders as argued by PJM. The Commission has previously found that, because an RTO lacks a profit motive, "it is easier to see that the ISO/RTO is pursuing activities that benefit its ratepayers," when the RTO seeks recovery of costs associated with state policy monitoring.²⁹ We therefore find that Public Citizen has failed to show that PJM's membership payments to the DGA and RGA are significantly different from those we accepted in *ISO New England* and conclude PJM should not be denied recovery of such expenses.

23. Public Citizen also argues that PJM's rate is unjust and unreasonable because it recovers expenses associated with more general lobbying activities. In support of this argument, Public Citizen identifies various individuals or firms that have registered to lobby on behalf of PJM at the federal or state level, at one time or another. Public Citizen also identifies specific dollar amounts paid by PJM to these individuals or entities over time and suggests that the expenditures are unrecoverable under Commission precedent. PJM counters that the mere fact of registering as a state or federal lobbyist is not, in and of itself, dispositive of whether the specific type of activities he/she undertakes for PJM is recoverable. PJM argues that the expenditures for services provided by the entities that Public Citizen identifies are for purposes of outreach, education, and other activities directly related to PJM's RTO operations.³⁰ Public Citizen does not dispute this assertion.

24. We deny the complaint on this issue. As the Commission noted in PJM's rate case accepting these expenditures, the Commission permits RTOs to recover expenses related to RTO informational and educational efforts.³¹ Further, in affirming the Commission's finding that ISO-NE's external affairs expenses were recoverable, the court in *Braintree*

²⁸ PJM Answer at 6.

²⁹ *ISO New England*, 117 FERC ¶ 61,070 at P 47.

³⁰ PJM provides a recent example involving its Pennsylvania-based consultants who educated members of the Pennsylvania House and Senate and the Governor's office on the impacts of a potential state tax on market participants' transactions in PJM. See PJM Answer at 7.

³¹ *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,236 at P 24 (citing *ISO New England*, 117 FERC ¶ 61,070 at PP 48, 49).

explained, “it seems eminently reasonable to encourage legislature access to such an informational resource . . . [and] allowing recovery of [ISO-NE’s] costs in monitoring legislative activity, so that it may consider how such activity might affect its operations, appears quite reasonable.”³² Public Citizen has failed to put forward evidence showing that these expenditures do not represent an educational or informational function of the RTO essential to its core operations or do not support policies that the RTO determines to be in the collective best interests of its stakeholders. We therefore see no reason to deviate from the analysis employed in *ISO New England* and upheld by the court in *Braintree*, nor from our conclusion in PJM’s rate case that the expenditures in question are recoverable.

25. Public Citizen also requests that the Commission require PJM to itemize and disclose all political-related spending, including campaign contributions and lobbying expenses, and clearly document which political expenses are funded through filed rates. Public Citizen asserts that the Commission previously ordered “transparency standards” in *ISO New England* where the Commission directed ISO-NE to prepare and post on its website a monthly report concerning external affairs and corporate communications to provide greater transparency to stakeholders.³³ PJM argues that Public Citizen’s request for the public disclosure of additional information is without merit. PJM argues that there is transparency with PJM’s stakeholders through its Finance Committee as PJM’s budgets are prepared. PJM states that the operational expenses in PJM’s annual budgets, forecasts, and actual results reviewed with the Finance Committee include the consulting fees and the membership fees that are the subject of the complaint.

26. We will not require PJM to itemize and disclose all political-related spending and deny the complaint on this issue. In PJM’s rate case, the Commission found that the structure of the rate, with its oversight from the Finance Committee and the presence of a refund provision, was adequately justified.³⁴ The Commission also stated that PJM’s process ensures that the financial statements questioned by Public Citizen are subject to adequate independent review because the Finance Committee, composed of stakeholder representatives, including consumer advocates, reviewed the financial information establishing the rate and was satisfied that these figures represent legitimate expenses.³⁵ We see no reason to deviate from our findings in PJM’s rate proceeding. Public Citizen

³² *Braintree*, 550 F.3d at 12.

³³ Complaint at 2 (citing *ISO New England*, 117 FERC ¶ 61,070 at P 52. *See also* Joint Commenter’s Comment at 9 (requesting that the Commission issue a directive similar to *ISO New England*).

³⁴ *See PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,236 at P 24.

³⁵ *Id.* P 22.

has not, in this case, meaningfully augmented its argument on this issue from the rate proceeding. Further, although the Commission ordered additional transparency measures in *ISO New England*, we find that the oversight and review functions PJM has established through its Finance Committee provide sufficient transparency and review of these expenditures. Therefore, we find that Public Citizen has not demonstrated that additional transparency measures, beyond those which already exist, are needed.

The Commission orders:

The Public Citizen Complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.