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601 13th Street, NW  
Suite 1000 South  
Washington, DC 20005-3807  
TEL 202.661.2200  
FAX 202.661.2299  
www.ballardspahr.com

Howard H. Shafferman  
Direct: 202.661.2205  
Fax: 202.626.9036  
hhs@ballardspahr.com

June 7, 2011

**VIA ELECTRONIC FILING**

The Honorable Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Re: Joint Petition of PJM Interconnection, L.L.C. and Designated FirstEnergy Utilities for Authorization to Intervene in a Compliance Enforcement Authority Hearing, Docket No. RC11-3-000; Motion to Intervene Out-of-Time and Comments of the ISO/RTO Council**

Dear Secretary Bose:

Transmitted electronically for filing in the referenced docket is the Motion to Intervene Out-of-Time and Comments of the ISO/RTO Council.

If there are any questions concerning this filing, please call me at (202) 661-2205.

Very truly yours,

*/s/ Howard H. Shafferman*

Howard H. Shafferman  
Counsel for  
ISO New England Inc. and  
On Behalf of the ISO/RTO Council

Enclosure

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

***In re: Joint Petition for Authorization to Intervene in a Compliance Enforcement Authority Hearing***        )

**Docket No. RC11-3-000**

**MOTION TO INTERVENE OUT-OF-TIME  
AND COMMENTS OF THE ISO/RTO COUNCIL**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. §§ 385.212 and 385.214 (2011), the ISO/RTO Council (the “IRC”) moves to intervene out-of-time in the above-captioned proceeding to submit the following comments related to the petition filed on May 13, 2011 in the above-referenced docket by PJM Interconnection, L.L.C. (“PJM”) and Monongahela Power Company, West Penn Power Company and The Potomac Edison Company (collectively, the “FirstEnergy Utilities”) (the “Joint Petition”), and in response to the Motion to Intervene and Protest of ReliabilityFirst Corporation (“RFC”) filed in this proceeding on May 27, 2011 (the “RFC Protest”).

In particular, the IRC believes that Rule 214 of the Commission’s Rules of Practice and Procedure is inapplicable to the intervention at issue in this proceeding, and is concerned that the RFC Protest presents both a misinterpretation of, and an impermissible collateral attack on, the Commission’s March 28, 2008 order regarding the recovery of reliability costs by Regional Transmission Organizations (“RTOs”) and Independent System Operators (“ISOs”).<sup>1</sup>

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<sup>1</sup> See *Order Providing Guidance on Recovery of Reliability Costs by Regional Transmission Organizations and Independent System Operators*, 122 FERC ¶ 61,247 (2008) (the “RTO/ISO Guidance Order”).

## I. COMMUNICATIONS

Correspondence and communications regarding this filing should be addressed to the undersigned as follows:

Carl F. Patka\*  
Assistant General Counsel  
Raymond Stalter  
Director, Regulatory Affairs  
New York Independent System Operator,  
Inc.  
10 Krey Blvd  
Rensselaer, New York 12144  
[cpatka@nyiso.com](mailto:cpatka@nyiso.com)  
518.356.6220 (ph)

Raymond W. Hepper  
Vice President, General Counsel, and  
Secretary  
Theodore J. Paradise\*  
Senior Regulatory Counsel  
ISO New England Inc.  
One Sullivan Road  
Holyoke, Massachusetts 01040  
[rhepper@iso-ne.com](mailto:rhepper@iso-ne.com)  
[tparadise@iso-ne.com](mailto:tparadise@iso-ne.com)  
413.535.4000 (ph)

Kelsey A. Colvin\*  
Compliance Attorney  
Midwest Independent Transmission  
System Operator, Inc.  
P.O. Box 4202  
Carmel, IN 46082-4202  
[kcolvin@midwestiso.org](mailto:kcolvin@midwestiso.org)  
317.249.5400 (ph)

Brian Rivard\*  
Manager, Regulatory Affairs  
Ontario's Independent Electricity System  
Operator  
655 Bay Street, Suite 410  
Toronto, Ontario  
M5G 2K4  
[brian.rivard@ieso.ca](mailto:brian.rivard@ieso.ca)  
905.855.6135 (ph)

Anthony Ivancovich\*  
Assistant General Counsel-Regulatory  
California Independent System Operator  
Corporation  
151 Blue Ravine Road  
Folsom, California 95630  
[aivancovich@caiso.com](mailto:aivancovich@caiso.com)  
916.608.7135 (ph)

Matthew Morais\*  
Assistant General Counsel  
Electric Reliability Council of Texas, Inc.  
2705 West Lake Drive  
Taylor, Texas 76574  
[mmorais@ercot.com](mailto:mmorais@ercot.com)  
512.248.4577 (ph)

Heather Starnes, J.D.\*  
Manager, Regulatory Policy  
Southwest Power Pool  
415 North McKinley  
#140 Plaza West  
Little Rock, Arkansas 72205  
[hstarnes@spp.org](mailto:hstarnes@spp.org)  
501.614.3380 (ph)

\*Persons designated for service

## **II. IDENTITY OF THE IRC**

The IRC is comprised of the Alberta Electric System Operator (“AESO”), the California Independent System Operator (“CAISO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario, Inc., (“IESO”), ISO New England, Inc. (“ISO-NE”), Midwest Independent Transmission System Operator, Inc., (“MISO”), New York Independent System Operator, Inc. (“NYISO”), PJM,<sup>2</sup> Southwest Power Pool, Inc. (“SPP”), and New Brunswick System Operator (“NBSO”).<sup>3</sup> IESO is not subject to the Commission’s jurisdiction, and these comments do not constitute agreement or acknowledgement that they can be subject to the Commission’s jurisdiction.

The IRC’s mission is to work collaboratively to develop effective processes, tools and standard methods for improving the competitive electricity markets across North America. In fulfilling this mission, it is the IRC’s goal to provide a perspective that balances reliability standards with market practices so that each complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers.

IRC members conduct their operations in compliance with the NERC Reliability Standards. IRC members operate the bulk power system, administer the organized wholesale electricity markets, and act as the planning authorities within their respective regions.

## **III. SUMMARY OF COMMENTS**

The RFC Protest opposes Commission authorization of the FirstEnergy Utilities’ participation in the short-form hearing currently being conducted by RFC, as a Regional Entity,

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<sup>2</sup> PJM, as a filer of the Joint Petition, is already a party to this proceeding.

<sup>3</sup> AESO and NBSO are not subject to the Commission’s jurisdiction, and do not join in these comments.

in its Docket Nos. RFC201000334, *et al.* (“Enforcement Hearing”). This opposition is based on the assertion that the FirstEnergy Utilities do not meet the intervention standards enunciated under Rule 214 of the Commission’s Rules of Practice and Procedure because: the utilities do not have a “direct” interest;<sup>4</sup> no statute or Commission rule, order or other action mandates the requested intervention;<sup>5</sup> and the requested intervention is not in the public interest.

The Commission should deny the RFC Protest, as Rule 214 is a rule governing participation in *Commission proceedings*, not in Regional Entity enforcement hearings, and is therefore inapplicable. Instead, the NERC Rules of Procedure govern participation in the Regional Entity enforcement process. Furthermore, even if, *arguendo*, Rule 214 were pertinent to the question of participation in Regional Entity enforcement hearings, it is difficult to see why its standards would not be met in the circumstances presented in the Joint Petition.

Beyond this, and perhaps more fundamentally, the RFC Protest represents an impermissible collateral attack on the RTO/ISO Guidance Order and, indeed, turns the order on its head. In particular, a grant of the RFC Protest would deprive entities potentially at risk for direct assignment of reliability penalty costs by RTOs/ISOs of due process, as well as deprive ISOs/RTOs of their rights to petition the Commission for direct assignment of penalty costs, in direct contravention of the policies reflected in the RTO/ISO Guidance Order.

For these reasons, as discussed further in Section VI below, the Commission should deny the RFC Protest.

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<sup>4</sup> RFC Protest at 6-9.

<sup>5</sup> RFC Protest at 9-10.

#### IV. MOTION TO INTERVENE OUT-OF-TIME

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the IRC moves to intervene out-of-time in order to provide comments in connection with the Joint Petition and the RFC Protest.

In considering motions for late intervention under the standards of Rule 214(d), the Commission "may consider: whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting the intervention."<sup>6</sup> Applying these factors to the instant matter, the Commission should grant the IRC's motion to intervene.

First, the IRC had good cause for not intervening earlier. Until the RFC Protest was filed, the IRC had no reason to expect that the Joint Petition would encounter opposition, or that a protest would misinterpret or collaterally attack the holdings of the ISO/RTO Guidance Order. Second, no disruption would result from a grant of the motion, as the Commission has yet to issue a dispositive order.<sup>7</sup> Third, because it is likely that the order issued in response to the Petition could have precedential value affecting all ISOs and RTOs, these broader interests of other ISOs and RTOs besides PJM are not currently represented by other parties. Fourth, grant of the motion will not result in any prejudice to, or burden on, existing parties. To the extent that

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<sup>6</sup> *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 30 (2006).

<sup>7</sup> Therefore, the IRC need not meet the higher burden established by the Commission for when late intervention is sought after the issuance of a dispositive order, where "the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial." *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,009 at P 13 (2004).

the Commission views these comments as an answer to a protest, the IRC moves for leave to file these comments.<sup>8</sup>

## V. BACKGROUND

The Joint Petition seeks authorization from the Commission for the FirstEnergy Utilities to intervene in the Enforcement Hearing, and the grant of any waivers as may be necessary for the FirstEnergy Utilities to fully participate in the Enforcement Hearing as a Participant.

The Enforcement Hearing concerns a Notice of Alleged Violation and Proposed Penalty (“NAV”) issued by RFC with respect to PJM’s compliance – as the registered Transmission Operator (“TOP”) – with certain North American Electric Reliability Corporation (“NERC”) Reliability Standards that apply to the TOP function (the “TOP Standards”). According to the Joint Petition, following PJM’s receipt of the NAV, PJM undertook analysis indicating that certain Bulk Power System (“BPS”) components affected during the system disturbances arising from the alleged violations were owned by the FirstEnergy Utilities, and that those utilities could therefore be implicated in the enforcement action reflected in the Enforcement Hearing. Despite their ownership of those BPS components, the FirstEnergy Utilities have not been served with a

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<sup>8</sup> The Commission has the authority to waive the prohibition against answers to protests for good cause. *See, e.g., Pacific Interstate Transmission Co.*, 85 FERC ¶ 61,378, at p.62,443 (1998), *reh’g denied*, 89 FERC ¶ 61,246 (1999). The Commission has found good cause to permit answers where they are otherwise prohibited in various circumstances, including where the answer would provide information helpful to the disposition of an issue (*see, e.g., CNG Transmission Corp.*, 89 FERC ¶ 61,100, at p.61,287 n.11 (1999)), permit the issues to be narrowed or clarified, (*see, e.g., PJM Interconnection, LLC*, 84 FERC ¶ 61,224, at p.62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335, at p.62,323 n.1 (1998)), or aid the Commission in understanding and resolving issues (*see, e.g., Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,009, at p.61,016 (2000).) The IRC believes that these comments will clarify issues and be helpful in their disposition, and aid the Commission in understanding and resolving these issues. Accordingly, the Commission should accept these comments.

NAV. Accordingly, the FirstEnergy Utilities have no ability, absent Commission authorization, to participate in the Enforcement Hearing.

The Joint Petition states that PJM notified the FirstEnergy Utilities of these matters by letter dated May 4, 2011. Subsequently, the FirstEnergy Utilities joined with PJM to file the Joint Petition because: (i) the FirstEnergy Utilities' actions, or inactions, arising from the same set of facts at issue in the subject investigation could be raised at the Enforcement Hearing, and (ii) findings of fact regarding the utilities' culpability made at the hearing could result in PJM proposing a direct assignment of a monetary penalty against the utilities pursuant to the provisions of Section 1.3 of Schedule 11 to the PJM Operating Agreement. A direct assignment is permitted under that Commission-accepted<sup>9</sup> provision of the PJM Operating Agreement only if, *inter alia*, the PJM members (here, the First Energy Utilities) have "received notice and an opportunity to fully participate in the underlying Compliance Monitoring and Enforcement Program [("CMEP")] proceeding."

The filing of the Joint Petition – and its request for Commission authorization for the utilities to become Participants in the Enforcement Hearing – was necessitated by the provisions of Section 1.2.12 of "Attachment 2 – Hearing Procedures" of the CMEP, found in Appendix 4C to the NERC Rules of Procedure. That section states that:

[t]he Respondent(s) [here, PJM] and Staff [here, RFC Staff] shall be Participants to the proceeding. *Unless otherwise authorized by FERC*, no other Persons shall be permitted to intervene or otherwise become a Participant to the proceeding. (emphasis added)

The RFC Protest opposes the Joint Petition's request for Commission authorization under Section 1.2.12, on the grounds discussed in Sections III and VI of this pleading.

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<sup>9</sup> See *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,260 (2008) ("PJM").

## VI. COMMENTS

### A. Rule 214 Is Inapplicable in this Context

The RFC Protest’s attempt to bar the FirstEnergy Utilities from participation in the Enforcement Hearing is premised implicitly on the incorrect and unexplained assertion that Commission Rule 214 – entitled “Intervention” – governs participation in Regional Entity enforcement hearings.<sup>10</sup>

The Commission’s Rules of Practice and Procedure govern *Commission* proceedings.<sup>11</sup> An enforcement hearing conducted by a Regional Entity is manifestly *not* a Commission proceeding. Through the Joint Petition, the FirstEnergy Utilities are not seeking to intervene in a Commission proceeding, but to be a Participant, with PJM’s consent, in a Regional Entity’s enforcement hearing. Such hearings are, of course, governed by the NERC CMEP Hearing Procedures,<sup>12</sup> the RTO/ISO Guidance Order and, in this case, provisions of the PJM Operating Agreement approved by the Commission in furtherance of the RTO/ISO Guidance Order. Accordingly, Rule 214 and its standards for intervention are inapplicable for purposes of the Joint Petition.

Specifically, Section 1.2.12 of “Attachment 2 – Hearing Procedures” of the CMEP, found in Appendix 4C to the NERC Rules of Procedure, governs interventions in Regional Entity enforcement proceedings. That section states that:

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<sup>10</sup> RFC Protest at 5.

<sup>11</sup> See 18 C.F.R. § 385.101(a)(1), stating that Part 385 (*i.e.*, the Commission’s Rules of Practice and Procedure) applies to any filing or proceeding under that Part. An enforcement hearing conducted by a Regional Entity is not a filing or proceeding listed in Part 385.

<sup>12</sup> The hearing procedures were accepted in *Order Addressing Revised Delegation Agreements* issued in *North American Electric Reliability Council, North American Electric Reliability Corporation*, 122 FERC ¶ 61,245 at P 74 ff. (2008).

[t]he Respondent(s) [here, PJM] and Staff [here, RFC Staff] shall be Participants to the proceeding. *Unless otherwise authorized by FERC*, no other Persons shall be permitted to intervene or otherwise become a Participant to the proceeding. (emphasis added)

As discussed below, the Commission's RTO/ISO Guidance Order specifically contemplates that the Commission may authorize such interventions, and in fact requires that parties that potentially may be assigned a penalty arising out of a reliability violation have the opportunity to participate in the pertinent NERC/Regional Entity enforcement proceeding. Consequently, the Commission's authorization of the FirstEnergy Utilities' intervention is appropriate.

**B. The RFC Protest Is an Impermissible Collateral Attack on the RTO/ISO Guidance Order, Which, if Granted, Would Deprive Entities Such as the FirstEnergy Utilities of Due Process Rights**

In its effort to demonstrate that the standards of an (inapplicable) Rule 214<sup>13</sup> are not met by FirstEnergy Utilities, the RFC Protest makes disturbing arguments that amount to a collateral attack on the RTO/ISO Guidance Order. If accepted, these arguments would turn that order on its head, and would deprive entities such as the FirstEnergy Utilities of their due process rights. In addition, the RFC position effectively barring participation of the FirstEnergy Utilities and similarly situated entities would, if accepted by the Commission, deprive ISOs/RTOs of their right to petition the Commission for the direct assignment of penalty costs, in contravention of the RTO/ISO Guidance Order as well as individual ISO/RTO orders.<sup>14</sup>

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<sup>13</sup> The IRC also disagrees more generally with the RFC Protest's assertion that the Rule 214 standards, even if – *arguendo* – they were relevant here, would not be met by the FirstEnergy Utilities.

<sup>14</sup> *See, e.g.*, PJM at PP 37-41.

The RFC Protest relies – for its assertion that the FirstEnergy Utilities do not have a “direct” interest in the Enforcement Hearing – on a single sentence in the RTO/ISO Guidance Order (citing Order No. 693) stating neither the Commission nor NERC may assess a penalty directly against an entity that is not registered as the responsible party for complying with the violated standard.<sup>15</sup> While it is true that such an entity will not receive the citation directly from the Regional Entity, it may nevertheless be held *financially responsible*, directly, for any resulting monetary sanction. Accordingly, this selective quotation<sup>16</sup> should not be read in isolation but in context with all of the provisions of the RTO/ISO Guidance Order, including the key recognition that entities such as transmission and generation owners within an RTO/ISO region can be found – through root-cause analyses conducted in enforcement investigations and

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<sup>15</sup> RFC Protest at 7.

<sup>16</sup> In fact, the sentence quoted selectively by RFC does not support its position, but rather supports granting the intervention. That is, RFC’s selective use of the sentence is taken out of context and is misleading as presented. The relevant discussion in the RTO/ISO Guidance Order (at P 24) reads as follows:

*The Commission has ruled, moreover, that neither NERC nor the Commission may assess a penalty for the violation of a Reliability Standard against an entity which is not registered as the responsible party for complying with that Standard. Similarly, we will not allow the direct assignment of penalty costs to another entity under section 205 unless that entity had previously been put on notice of its potential liability for penalty costs in the event that it contributed to the RTO or ISO’s violation of a Reliability Standard and incurrence of the penalty. It is therefore important for the RTOs and ISOs to include provisions regarding the appropriate responsibility for reliability-related monetary penalties in their contracts with their members and customers and/or in their tariffs, including provisions regarding the appropriate responsibility for such penalties on the ISOs and RTOs. (emphasis added)*

From the context, it is clear that the Commission is not applying the principle reflected in the sentence cited by RFC (*i.e.*, the first sentence quoted above) to ISO/RTO third-party penalty allocations, as suggested by RFC. Rather, the sentence is part of a paragraph emphasizing that those third-party entities must receive due process before ISOs/RTOs can allocate penalties to them.

hearings – to be culpable in whole or in part for violations for which a penalty can only be assessed on the RTO or ISO as the registered entity responsible for compliance.

Indeed, as the Commission has noted in the RTO/ISO Guidance Order, NERC has already committed to extending the compliance enforcement investigations of NERC and the Regional Entities beyond the registered entity, and even to entities that are not on the compliance registry, if that proved to be necessary – as it is in this case. Specifically, the RTO/ISO Guidance Order at P 19 notes that

...NERC stated that it is committed to uncovering the causes of Reliability Standard violations. NERC affirmed that both it and the Regional Entities will conduct thorough investigations which will examine the ‘root cause’ of a violation. NERC stated that, while RTOs as registered entities would be liable for penalties that apply to functions for which they are registered, NERC and the Regional Entities would extend the investigation to entities that are not on the compliance registry if that proved necessary.<sup>17</sup>

Based on this recognition of the potential contribution of such an entity to a reliability standard violation, one of the core purposes of the RTO/ISO Guidance Order was to formulate the mechanism by which an RTO or ISO may seek to directly assign all or part of its assessed penalty to a targeted culpable or contributing entity that may not receive a direct assignment of the penalty through the NERC process.<sup>18</sup> A cornerstone of the mechanism selected by the

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<sup>17</sup> See RTO/ISO Guidance Order at P 19. Oddly, the RFC Protest appears to spurn these NERC affirmations and commitments to undertake a root-cause examination, through its statement (at 7) that the Enforcement Hearing concerns *only* whether PJM allegedly violated the TOP Standards. This statement could be read to convey that RFC will conduct its investigation and/or hearing in a manner which consciously ignores whether any other entity could have contributed to the alleged PJM violation. If this were true, which hopefully it is not, it would still be no basis for asserting that a contributing entity’s interest is “speculative,” especially in light of the possible cost liability that could subsequently be approved in the Section 205 proceeding. The claim that the FirstEnergy Utilities’ interests are “speculative at best” (RFC Protest at 7) is further belied by the fact that PJM undertook analysis that specifically identified those utilities as potentially implicated in the Enforcement Hearing.

<sup>18</sup> See RTO/ISO Guidance Order at PP 21-24. This could occur, for example, where a generator operator causes an ISO or RTO to violate a BAL standard.

Commission is “to ensure due process to that targeted entity.”<sup>19</sup> To that end, one of the prerequisites of the mechanism – pursuant to which RTOs/ISOs will make individual Section 205 filings reflecting proposed direct assignments of penalty costs to targeted entities – is that the targeted entity be “notified during the course of the investigation, other inquiry into, or hearing of that matter, that an RTO or ISO believes that the targeted entity may be responsible for a violation.”<sup>20</sup> In this same paragraph, the RTO/ISO Guidance Order states that, “to avoid duplicative investigations and hearings, the Commission repeats that it does not intend any section 205 direct assignment proceeding to function as a second de novo review of the investigation.”<sup>21</sup> Rather, the Commission limits its role in ruling on a notice of penalty to that of an “appellate body,” simply “reviewing the record created by the Regional Entity or NERC and entertaining reasons to affirm, modify or set aside the penalty.”<sup>22</sup>

As correctly explained in the Joint Petition, the necessary cumulative impact of those two statements is that, if the targeted entity will not be allowed to challenge the factual findings leading to its full or partial culpability in the Section 205 proceeding, the only way by which the entity may exercise its due process rights is through participation in the Regional Entity’s enforcement proceedings.<sup>23</sup> Otherwise, either the Regional Entity or the registrant subject to the NAV would have to assume a fiduciary relationship on behalf of the targeted entity, which would be neither prudent nor consistent with the RTO/ISO Guidance Order. Thus, the only

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<sup>19</sup> *Id.* at P 23.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at P 23.

<sup>22</sup> *Id.* at P 18.

<sup>23</sup> Joint Petition at 8.

means by which a targeted entity that has not received an NAV may participate is through Commission authorization, such as is sought in the Joint Petition.

The Commission’s acceptance of Section 1.3 of PJM Operating Agreement Schedule 11 – the means, as discussed above, by which PJM will make Section 205 filings to direct assign penalty costs – clearly recognizes the interest of a targeted entity in participating in investigations and hearings, and makes this avenue available, as that section incorporates the requirement that the targeted entity have “notice and an opportunity to fully participate in the underlying [CMEP] proceeding.” Indeed, the order accepting that PJM provision states that even unregistered entities will “have the opportunity, if they so choose, to raise similar challenges before NERC during the [CMEP] phase.”<sup>24</sup> In these circumstances, it is more than obvious that a targeted entity has a “direct interest” to protect in the pertinent investigation and hearing.

Significantly, the RFC Protest’s insistence<sup>25</sup> that the Section 205 proceeding will provide a due process-protective avenue for the substantive determination of a targeted entity’s culpability or contribution to a violation turns a specific holding of the RTO/ISO Guidance Order on its head. That order states “a section 205 proceeding *will be limited to* the question of whether penalty costs should be assigned to an entity *already identified during the investigative or hearing stage of the enforcement process.*”<sup>26</sup> The “already identified” phraseology clearly conveys that the Commission is presuming that the culpability or contribution of the targeted entity will previously have been resolved through those enforcement proceedings. Thus, the RFC Protest’s espousal of the Section 205 proceeding as appropriate for substantive resolution of

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<sup>24</sup> PJM at P 41.

<sup>25</sup> RFC Protest at 8-9.

<sup>26</sup> RTO/ISO Guidance Order at P 23 (emphasis added).

the underlying culpability of the non-registered entity<sup>27</sup> represents an impermissible collateral attack – or untimely rehearing request concerning – the RTO/ISO Guidance Order.<sup>28</sup>

The Commission should reject this attack, and deny the Protest.

## VII. CONCLUSION

Wherefore, for the foregoing reasons, the IRC respectfully requests that it be permitted to intervene in, and be made a party to, the subject proceeding. The IRC also asks the Commission to consider the comments provided herein and issue an order denying the Protest.

Respectfully submitted,

/s/ Craig Glazer

Craig Glazer  
Vice President – Federal Government Policy  
Robert Eckenrod  
Counsel

**PJM Interconnection, L.L.C.**  
1200 G Street, N.W. Suite 600  
Washington, D.C. 20005

/s/ Raymond W. Hepper

Raymond W. Hepper  
Vice President, General  
Counsel, and Secretary  
Theodore J. Paradise  
Senior Regulatory Counsel  
**ISO New England Inc.**  
One Sullivan Road  
Holyoke, Massachusetts 01040

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<sup>27</sup> The RFC Protest attempts to support its position by reference to the RTO/ISO Guidance Order’s statement (at P 16) that the Commission will consider in a Section 205 proceeding “the nature of the Reliability Standard violation and the factors that contributed to the violation....” However, the plain language of this statement (referring to the “nature” rather than the “existence” of a violation) clearly implies that the existence of a violation and its contributing factors will already have been determined in the enforcement proceeding, and will simply be brought forward into the Section 205 proceeding.

<sup>28</sup> *See, e.g., Alamito Co.*, 43 FERC ¶ 61,274 at p. 61,753 (1988) (“Absent a showing of significant change in circumstances, the relitigation of an issue is simply not justified. Sound public policy reasons support the Commission’s policy against relitigation of issues.”).

*/s/ Stephen G. Kozey*

Stephen G. Kozey  
Vice President, General Counsel, and Secretary  
**Midwest Independent Transmission System  
Operator, Inc.**  
P.O. Box 4202  
Carmel, Indiana 46082-4202

*/s/ Anthony Ivancovich*

Anthony Ivancovich  
Assistant General Counsel-Regulatory  
**California Independent System Operator  
Corporation**  
151 Blue Ravine Road  
Folsom, California 95630

*/s/ Heather Starnes*

Heather Starnes  
Manager, Regulatory Policy  
Southwest Power Pool  
415 North McKinley  
#140 Plaza West  
Little Rock, Arkansas 72205

*/s/ Brian Rivard*

Brian Rivard  
Manager, Regulatory Affairs  
**Ontario's Independent Electricity System  
Operator**  
655 Bay Street, Suite 410  
Toronto, Ontario  
M5G 2K4

*/s/ Carl F. Patka*

Carl F. Patka  
Assistant General Counsel  
Raymond Stalter  
Director, Regulatory Affairs  
**New York Independent System Operator,  
Inc.**  
10 Krey Blvd  
Rensselaer, New York 12144

*/s/ Matthew Morais*

Matthew Morais  
Assistant General Counsel  
Electric Reliability Council of Texas, Inc.  
2705 West Lake Drive  
Taylor, Texas 76574

Date: June 7, 2011

**CERTIFICATE OF SERVICE**

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

Dated at Washington, D.C. this 7<sup>th</sup> day of June, 2011.

/s/ Pamela S. Higgins  
Pamela S. Higgins  
Ballard Spahr LLP  
601 13th Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2258