

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

Rate Recovery, Reporting, and Accounting	:	
Treatment of Industry Association Dues	:	Docket No. RM22-5-000
and Certain Civic, Political, and Related	:	
Expenses	:	
	:	

**JOINT REPLY COMMENTS OF PJM INTERCONNECTION, L.L.C., CALIFORNIA
INDEPENDENT SYSTEM OPERATOR CORP., MIDCONTINENT INDEPENDENT
SYSTEM OPERATOR, INC., AND SOUTHWEST POWER POOL, INC.**

PJM Interconnection, L.L.C. (“PJM”), California Independent System Operator Corp. (“CAISO”), Midcontinent Independent System Operator, Inc. (“MISO”), and Southwest Power Pool (“SPP”) (collectively, the “Joint RTO Commenters”¹) respectfully submit² this limited reply to a submission filed in response to the Federal Energy Regulatory Commission’s (the “Commission”) Notice of Inquiry regarding Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses.³

¹ The Joint RTO Commenters filed Initial Comments in this docket on February 22, 2022. *See* Joint Comments of PJM Interconnection, L.L.C., California Independent System Operator Corp., Midcontinent Independent System Operator, Inc., and Southwest Power Pool, Inc., Docket No. RM22-5-000 (Feb. 22, 2022) (“Initial Joint RTO Comments”).

² The Joint RTO Commenters respectfully seek leave to file these comments in response to the New England Consumer-Owned Systems’ (“NECOS”) discussion and characterization of the Initial Joint RTO Comments and a question of First Amendment constitutional law. *See* Reply Comments of the New England Consumer-Owned Systems, Docket No. RM22-5-000 (Mar. 23, 2022) (“NECOS Reply”). No party will be prejudiced by granting this request to respond to the NECOS Reply that also identifies relevant judicial and Commission precedent that bear on legal questions raised in the docket. Indeed, the Commission regularly accepts otherwise impermissible filings where, as here, they will assist the Commission’s understanding of the record and its decision-making. *See e.g.*, *Southwest Power Pool, Inc.*, 167 FERC ¶ 61,275, at P 38 (2019); *California Indep. Sys. Operator Corp.*, 168 FERC ¶ 61,003, at P 17 (2017); *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,133, at P 12 (2017); *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,152, at P 17 (2016).

³ *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, Notice of Inquiry, 177 FERC ¶ 61,180 (2021) (“NOI”).

The Joint RTO Commenters clarify that certain arguments advanced in this docket:

- Overlook and misconstrue the fact-intensive, case-specific Commission assessment of whether proposed rates are just and reasonable in addition to the existing stakeholder processes relating to the development of rates for Regional Transmission Organizations (“RTOs”) and Independent System Operators (“ISOs”) (collectively, “RTOs”); and
- Incorrectly suggest that a First Amendment Supreme Court decision about public-sector union dues mandated by a state statute⁴ applies to and alters the ability of RTOs/ISOs to recover in their rates educational and informational government affairs costs essential to their core operations.

On the first point, the Joint RTO Commenters do not claim a right to “*carte blanche* cost recovery” or “blanket recovery” of costs under the Commission’s existing ratemaking construct.⁵ Unlike traditional public utilities, each of the Joint RTO Commenters review budgets and administrative fees with stakeholders through established processes that are then scrutinized by the Commission.⁶ Moreover, nothing in the existing administrative rate recovery procedures of RTOs (each of which has been approved by the Commission) impairs stakeholders’ rights to challenge at the Commission in a rate case or file Section 206 complaints.

⁴ *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2481-82 (2018).

⁵ NECOS Reply at 3, 6 (claiming the Joint RTO Commenters’ Initial Comments “assert[] that the decision in *Braintree* . . . somehow provides *carte blanche* cost recovery” and suggesting the Joint RTO Commenters claim some sort of “blanket recovery” of such expenses).

⁶ Initial Joint RTO Comments at 3-4; *see also Braintree Elec. Light Dep’t v. FERC*, 550 F.3d 6, 14 (D.C. Cir. 2008) (“FERC did not merely assume that any and all expenditures would be germane to ISO-NE’s mission, but reviewed and analyzed the *actual content* of ISO-NE’s communications.” (emphasis in original)).

On the second point, a 2018 First Amendment Supreme Court case – *Janus v. AFSCME Council 31* – does not warrant a change in the Commission’s case-specific approach to RTO rate recovery of government affairs costs essential to their core operations. At the threshold, as the Commission has repeatedly held, there is no “state action” here, which is the essential predicate for application of the compelled speech doctrine invoked by certain commenters.⁷ But even if there was state action, “[t]he Commission’s establishment of a reasonable rate for a regulated entity is not in any way equivalent to the government compulsion of association or speech.”⁸ Government affairs costs are legitimate RTO/ISO business expenses.⁹

The Commission dealt with this exact issue in response to a challenge to the Commission-approved funding of the Consumer Advocates of the PJM States, Inc. (“CAPS”). The Commission found that these CAPS expenditures are not intended to “fund specific speech” but involve a “funding proposal” that “enable” RTOs/ISOs to work with stakeholders, regulators, legislatures, and other government officials “more easily and efficiently” to ensure outcomes that “promote the provision of reliable service at reasonable rates.”¹⁰ At their core, RTOs/ISOs are cooperative ventures¹¹ which require cooperative work with regulatory commissions,

⁷ See *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229, at PP 20-23 (2016) (“First Amendment applies only to governmental action, and the [rate that PJM has chosen to establish of its own volition] does not constitute governmental action because PJM is a private, non-profit corporation” and further finding no state action by the Commission); *ISO New England Inc.*, 114 FERC ¶ 61,315, at P 22 (2006) (holding that Commission acceptance of ISO-NE’s rates is not “state action”); see also *Braintree Elec.*, 550 F.3d at 13-14 (passing on the state action issue in the context of a challenge to an RTO’s ability to recover certain costs and rejecting the challenges on other grounds).

⁸ *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292, at P40 (2005)

⁹ See *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,147, at P42 (2016), *reh’g denied*, 157 FERC ¶ 61,229, at PP 20-23 (2016) (rejecting First Amendment challenges to PJM’s proposal to fund CAPS and finding such expenses a legitimate business expense as it did with the funding of OPSI); see also *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292, at P 40 (2005) (rejecting First Amendment challenges to Organization of PJM States, Inc. funding).

¹⁰ See n.9, *supra*.

¹¹ 18 C.F.R. § 35.34(j)(1)(ii).

legislatures, and other agencies and governmental bodies within their geographic territory.¹² *Janus* does not apply to RTOs/ISOs as that decision is confined to cases where the government compels unwilling public employees to subsidize non-government speech.¹³ Moreover, contrary to the contention of some commenters,¹⁴ multiple post-*Janus* decisions affirm the continued use of the “germaneness” inquiry.¹⁵ In sum, *Janus* does not and should not alter the Court of Appeals for the District of Columbia’s and the Commission’s reasoning in rejecting prior First Amendment challenges to the recovery in rates of government affairs expenses germane to the mission of an RTO/ISO.¹⁶

The Joint RTO Commenters respectfully request that the Commission consider these comments, and its initial comments, in developing any further issuances in this docket.

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¹² See *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,292, at P 40 n.13 (2005).

¹³ *Janus*, 138 S. Ct. at 2479-80 (observing that the public-sector unions at issue in *Janus* present distinct First Amendment concerns not implicated in other contexts); see also n.7, *supra*.

¹⁴ NECOS Reply at 6-7 (arguing that “the rationale for the D.C. Circuit’s decision in *Braintree* was that those activities were ‘germane’ to the regulatory purpose of RTOs and ISOs” and that this “rationale has been since recognized as unworkable in the Supreme Court’s 2018 decision in *Janus*”).

¹⁵ See *United Nurses & Allied Prof’ls v. NLRB*, 975 F.3d 34 (1st Cir. 2020) (a post-*Janus* decision applying the germaneness inquiry to private-sector unions); see also *Schell v. Chief Justice & Justices of the Okla. Sup. Ct.*, 11 F.4th 1179, 1182 (10th Cir. 2021) (a post-*Janus* decision applying the germaneness inquiry to state bar association fees), *cert. denied*, 2022 WL 994342 (2022).

¹⁶ See *Braintree Elec.*, 550 F.3d at 6; see also n.9, *supra*.

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