

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Citizen v. PSE&G)
) Docket No. EL26-40
)

**Harvard Electricity Law Initiative Comments
in Support of Consumers¹**

The Commission concluded that the “nature and seriousness of” Public Service Electric & Gas’s (PSE&G) “conduct” during a PJM transmission planning process warranted a \$6.6 million civil penalty.² Here, the Commission should find that its 2024 Enforcement Order imposing that penalty provides sufficient evidence to shift the evidentiary burden in this proceeding to PSE&G and compel it prove that its transmission expenditures are prudently incurred.³ Alternatively, the Commission should direct Enforcement Staff to file a report in this docket about how PSE&G’s misconduct could have directly affected transmission rates.

To ensure just and reasonable transmission rates, the Commission demands that utilities accurately disclose their past and planned transmission expenditures and relies on third parties to scrutinize utility spending. Transparency, information exchange, and related requirements in regional planning and formula rate proceedings are intended to mitigate the inherent information asymmetry between utilities and other parties in order to enable meaningful engagement and review.⁴

¹ The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School’s Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.

² *Public Service Electric and Gas Co.*, 189 FERC ¶ 61,175 at P 42 (2024) (Enforcement Order).

³ *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, at p. 61,645 (1980) (cleaned up).

⁴ *See, e.g.*, Order No. 890 at P 471 (“This information should enable customers, other stakeholders, or an independent third party to replicate the results of planning studies and thereby reduce the incidence of after-the-fact disputes regarding whether planning has been conducted in an unduly discriminatory fashion.”); *MISO, et al.*, 139 FERC ¶ 61,127 at P 15 (2012) (“The lack of a formal discovery process and procedures to require the transmission owner to answer a party’s reasonable

When a utility provides incomplete or inaccurate information, it deprives the Commission, state regulators, consumers, and other parties the evidence needed to evaluate project selection and assess prudence or otherwise challenge cost recovery.

Dismissing Public Citizen’s complaint for lack of evidence would insulate PSE&G’s rates from Section 206 review precisely because PSE&G impeded the transparency necessary for that review. That result would further entrench the utility’s monopoly power by allowing its control over information to benefit shareholders at the expense of consumers. Although the Commission retains discretion in determining how to evaluate whether rates meet statutory standards, it may not “simply choose not to regulate rates.”⁵ Where the evidence is shrouded by the utility’s own violations, the Commission must ensure that its authority is not nullified by the very information asymmetries its rules are supposed to counteract.

I. The Consent Agreement does not Prohibit a Section 206 Order about PSE&G’s Transmission Rates

In the 2024 Enforcement Order, the Commission determined that PSE&G violated 18 C.F.R. § 35.41(b), which requires regulated entities to “provide accurate and factual information” and prohibits the submission of any “false or misleading information” and omission of “material information” in communications with a Regional Transmission Organization.⁶ Communications covered by 18 C.F.R. 35.41(b) are “limited to false statements that will ‘directly affect’ the rate of []

information requests may make the formula rate protocols unjust and unreasonable”); *MISO, et al.*, 143 FERC ¶ 61,149 at P 83 (2013) (“To be just and reasonable, the MISO formula rate protocols must be revised to provide interested parties with the information necessary to understand and evaluate the implementation of the formula rate for either the correctness of inputs and calculations, or the reasonableness of the costs to be recovered in the formula rate.”); *id.* at P 120 (Utilities “frequently possess the information necessary for an interested party to succeed in a complaint before the Commission but retain discretion in providing that information.”).

⁵ *Texaco v. FPC*, 417 U.S. 380, 394 (1974).

⁶ *See* 18 C.F.R. 35.41(b).

electricity.”⁷ The Enforcement Order thus links PSE&G’s deficient communications to PSE&G’s transmission rates.

The Enforcement Order resolved PSE&G’s violations of 18 C.F.R. § 35.41(b), but it did not decide whether PSE&G’s transmission rates are just and reasonable and does not prevent Public Citizen from challenging those rates as unjust and unreasonable. If anything, the Commission’s findings about PSE&G’s communications underscore the Commission’s responsibility to examine whether the rates tainted by PSE&G’s violations remain just and reasonable.

PSE&G’s contention that settlement of an enforcement proceeding about communications that directly affect its rates forecloses section 206 review of those same rates has no legal basis. Acceptance of PSE&G’s theory would allow a utility to resolve misconduct affecting rates in order to preclude examination of the rates themselves. Nothing in the Enforcement Order suggests such immunity, and section 206 contains no exception for rates associated with enforcement settlements.⁸

A. The Enforcement Order Does Not Prevent Action under Section 206

The Enforcement Order covers PSE&G’s communications to PJM and does not prevent separate action under section 206 about PSE&G’s transmission rates. Enforcement Staff’s consent agreement with PSE&G releases PSE&G from liability only “for any and all administrative or civil claims brought or initiated *by the Commission* arising out of the conduct covered by the investigation.”⁹ Public Citizen’s complaint is neither brought nor initiated by the Commission.

⁷ FERC v. Coaltrain Energy L.P., 2018 WL 7892222 (S.D. OH) (summarizing the development of 18 C.F.R. 35.41(b)).

⁸ In Re Permian Basin Area Rate Cases, 390 U.S. 747, 783 (1968) (“Section 206 provides “*without qualification or exception* that the Commission may determine whether ‘any rule, regulation, practice, or contract affecting (any) rate is unjust, unreasonable, unduly discriminatory, or preferential.’”) (emphasis added).

⁹ Enforcement Order, Consent Agreement and Stipulation at P 43 (emphasis added).

That said, both the consent agreement and the Enforcement Order allow the Commission to institute its own section 206 proceeding about PSE&G's rates. The enforcement order specifies that the covered violations are limited to PSE&G's "Powerpoints to PJM."¹⁰ The order notes that the settlement agreement does not "reflect[] a challenge by Enforcement to the end-of-life determination related to the RPV line," and that Enforcement has not sought disgorgement" of PSE&G's profits related to that project.¹¹ The Enforcement Order does not exempt these issues from consideration in a section 206 proceeding.

Entering the enforcement order's stipulated facts into the record of a section 206 proceeding about PSE&G's transmission rates would not violate the Commission's policy that settlements do not have precedential effect. In general, Commission approval of a settlement does "not constitute approval of, or precedent regarding, any issue or principle in that proceeding."¹² That policy prevents the Commission from basing subsequent decisions on a settlement's terms. PSE&G cites no authority to expand that policy's reach to prevent a non-settling party or the Commission from entering stipulated facts into the record of another proceeding.

The Commission recognizes that enforcement proceedings and section 206 complaints serve distinct and complementary functions and may proceed in parallel. For instance, in response to filed complaints challenging the results of a 2015 MISO capacity auction, the Commission authorized Enforcement Staff to open an investigation into potential market manipulation that may have occurred in connection with the auction.¹³ Reviewing the Commission's decision to deny most aspects of the complaints and close the investigation, the D.C. Circuit "held that the

¹⁰ Enforcement Order at P 36.

¹¹ *Id.* at P 31.

¹² *Alternative Dispute Resolution*, 60 Fed. Reg. 19,494, at p. 19,496 (Apr. 19, 1995) (final rule implementing the Alternative Dispute Resolution Act of 1990).

¹³ *See Public Citizen v. MISO*, 187 FERC ¶ 61,140 at P 4 (2024).

Commission did not provide any explanation for its determination that market manipulation did not lead to unjust and unreasonable rates.”¹⁴ On remand, the Commission integrated its enforcement investigation into the complaint docket by directing Enforcement Staff to file a report on whether the conduct under investigation might have affected the capacity auction rate.¹⁵

Here, the Commission could similarly direct Enforcement Staff to file a report about how PSE&G’s communications could have affected transmission rates.

B. Shielding Utility Rates from Section 206 Orders Would Irrationally Harm Consumers and Unjustly Enrich Utility Shareholders

PSE&G asserts that “it would significantly undermine the Commission’s ability to settle enforcement actions if the Commission allowed settlement agreements to subsequently be used against the settling party.”¹⁶ That proposition has no relevance here where Public Citizen’s complaint is premised on stipulated facts and not the settlement of the legal claims at issue in the prior proceeding.

PSE&G’s proposed policy would unjustly enrich enforcement targets for settling investigations. PSE&G’s profits from the transmission project at issue far exceed the \$6.6 million civil penalty imposed by the Commission. Insulating PSE&G’s transmission rates from a section 206 complaint would incentivize utilities to provide false information in order to capture valuable transmission development opportunities. But even if that’s not a realistic business strategy, the Commission should safeguard its consumer protection authority under sections 205 and 206 as separate from its authority to settle enforcement investigations.

Under its Open Access rules, the Commission oversees transmission service by imposing procedural rules on utility operations and planning. The Commission

¹⁴ *Id.* at P 35.

¹⁵ *Id.* at P 13.

¹⁶ Answer of PSE&G to Complaint of Public Citizen, Docket No. EL26-40, at 9 (Feb. 3, 2026).

does not continuously monitor compliance but instead presumes good-faith execution by regulated entities and relies on RTOs, market monitors, market participants, and consumers to report potential violations of rules or tariffs. Accurate information exchanged among market participants and utilities undergirds the presumption of good faith and enables parties to file complaints at the Commission about potential violations.

The Enforcement Order holds PSE&G accountable for breaching its duty to provide complete and correct information during PJM's transmission planning process. But the enforcement settlement does not protect consumers from the potential costs of PSE&G's violations. If PSE&G secured PJM's designation based on inaccurate and incomplete information or PSE&G management initiated the project based on faulty information, the Commission could find that PSE&G's expenditures are imprudently incurred and its rates are unjust and unreasonable.

A federal district court has explained how violations of 18 CFR 35.41(b) directly affect jurisdictional rates:

It is reasonable to assume, as FERC did when promulgating [18 CFR 35.41(b)], that whenever Sellers, in the absence of due diligence, fail to provide accurate and factual information and instead submit false or misleading information, or omit material information, . . . their statements are likely to affect the Commission's ability to regulate wholesale rates. Logically, if the organizations and entities tasked by the Commission with the responsibility of carrying out ... wholesale electric market administration [such as PJM] are relying on false or misleading information while fixing wholesale rates and evaluate the effectiveness of their current rules that fix those rates, that information will directly affect those rates.¹⁷

The Commission must not let its enforcement authority preempt its duty to protect consumers from unjust and unreasonable rates.

¹⁷ FERC v. Coaltrain Energy L.P., 2018 WL 7892222 (S.D. Ohio) (cleaned up).

II. There is Sufficient Evidence to Shift the Burden to PSE&G or Direct Enforcement Staff to File a Report in this Docket about How PSE&G’s Communications Directly Affects Rates

In this complaint proceeding, Public Citizen must establish a *prima facie* case by producing facts “which if unanswered would justify [persons] of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.”¹⁸ In its reply to the complaint, PSE&G suggests that Public Citizen’s complaint can survive only if it “present[s] evidence raising serious doubt about the reasonableness” of PSE&G’s decisions.¹⁹ Regardless of which burden applies, once Public Citizen meets the evidentiary threshold, the burden to produce evidence shifts to PSE&G.

Based on stipulated facts, the Commission may shift the burden of proof to PSE&G about whether its spending on the Roseland-to-Pleasant Valley project is prudent. PSE&G conceded that there is a direct causal connection between the faulty information it provided to PJM about the Roseland-to-Pleasant Valley project and PSE&G’s planned \$546 million spending on that project.²⁰ Because PSE&G’s communications to PJM obscured material facts, there is serious doubt about whether PSE&G secured PJM’s designation based on incomplete or inaccurate information and about whether PSE&G decision’s fell outside the range of reasonable managerial judgment.

¹⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Opinion No. 536, 149 FERC ¶ 61,116 at P 46 (2014) (quoting *Nantahala Power and Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152, at 61,276 (1982)).

¹⁹ Answer of PSE&G, Docket No. EL26-40, at 6 (Feb. 3, 2026) (citing *Re Minnesota Power & Light Co.*, Opinion No. 86, 11 FERC ¶ 61,312, at 61,645 (1980)).

²⁰ Enforcement Order at P 12 (“PSE&G determined that the RPV line violated PSE&G’s FERC Form No. 715 criteria and as such PSE&G was obligated to bring such violation to PJM for evaluation and to have the PJM Board of Managers approve PSE&G’s decision to replace the RPV line”); *id.* at P 30 (noting that “PJM designated PSE&G to complete work to replace the RPV . . . based on PSE&G’s submitted information about the RPV line”); *id.* (“PSE&G and PJM have acknowledged that PSE&G could not have rebuilt the RPV line unless PJM designated PSE&G to perform such work.”).

Public Citizen’s complaint is based on stipulated facts and not on “unsubstantiated allegations,” as PSE&G claims.²¹ Should the Commission find that Public Citizen has not met its evidentiary burden, it should further develop the record. Neither Public Citizen nor any other party can possibly obtain potentially relevant information from PSE&G or PJM without a Commission investigation. The Commission has two options: 1) shift the burden to PSE&G and force it to prove that its expenditures are prudent; or 2) direct Enforcement Staff to provide relevant information and then order an evidentiary hearing. Once it has all of the facts, the Commission could then order disgorgement or dismiss the complaint.

In its reply to the complaint, PSE&G faults Public Citizen for not providing “any examples of any imprudent costs,” not identifying “the costs that a reasonable utility manager would have incurred in good faith under the same circumstances,” and not presenting an “alternative cost analysis demonstrating reasonable cost alternatives.”²² In exercising its discretion to define, detect, and remedy imprudence, the Commission should not impose these evidentiary burdens on consumers.²³ The thrust of Public Citizen’s complaint is that PSE&G’s actions prevented PJM and consumers from documenting that the utility declined more cost-effective investment options. Public Citizen should not be required to hypothesize alternative investments when PSE&G may have itself failed to do so and certainly failed to disclose a complete analysis to PJM of potential options.²⁴

²¹ Answer of PSE&G to Complaint of Public Citizen, Docket No. EL26-40, at 4 (Feb. 3, 2026) (quoting *J. William Foley Inc. v. United Illuminating Co.*, 142 FERC ¶ 61,125, at P 19 & n.25 (2013)).

²² Answer of PSE&G to Complaint of Public Citizen, Docket No. EL26-40, at 5-7 (Feb. 3, 2026).

²³ See Comment of Electricity Regulation Scholars in Support of Consumers, *Basin Electric Power Cooperative*, Docket No. ER20-2441-002, (Dec. 16, 2024).

²⁴ See, e.g., Enforcement Order at P 28 (“The subject of potential repairs and information about the cost to address, through repairs, the steel lattice tower conditions assessed by PSE&G’s external consultants was not a subject addressed in PSE&G’s PowerPoints presented to PJM.”).

Regardless, a reasonable utility manager would have only made necessary repairs actually identified by PSE&G’s external consultants and its own employees.²⁵ The Enforcement Order summarizes that the consultant “assessed only 8 towers using the precise words ‘[e]xtensive foundation rehabilitation” and that such repairs had routinely cost PSE&G between \$20,000 and \$40,000 per incident.²⁶ The stipulated facts provide a starting point for identifying reasonable alternatives to PSE&G’s \$546 million project and for assessing whether PSE&G management acted prudently.

III. Motion for Leave to File These Comments

Although the Commission’s rules do not require it to accept comments at this stage of the proceeding, the Commission routinely accepts filings that aid or assist its decisionmaking process.²⁷ We respectfully request that the Commission accept this comment because it corrects PSE&G’s mischaracterizations about how enforcement settlements interact with section 206 complaints and explains why dismissing the complaint on the merits would be inconsistent with the Federal Power Act and fundamental utility regulation principles.

²⁵ See *New England Power Co.*, Opinion No. 231, 31 FERC ¶ 61,047, at 61,084 (1985) (stating that the test for prudence is “whether they are costs which a reasonable utility management. . . would have made, in good faith, under the same circumstances, and at the relevant point in time”).

²⁶ Enforcement Order at PP 17, 29.

²⁷ See, e.g., *MISO*, 182 FERC ¶ 61,175 at P 28 (2023) (accepting a filing because it “provided information that assisted us in our decision-making process”); *PJM Interconnection*, 182 FERC ¶ 61,143 at P 19 (2023) (same); *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,073, at P 13 (2023) (same); *Pac. Gas and Elec Co.*, 176 FERC ¶ 61,196 at P 29 (2021) (same); *New Fortress Energy LLC*, 174 FERC ¶ 61,207 at P 7 (2021) (same); see also *Alaska Gasline Dev. Corp.*, 171 FERC ¶ 61,134 at P 7 (2020) (accepting filings that “clarify the concerns raised and provide information that has assisted in our decision making”); *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,232 at P 10 (2014) (accepting filing because it “aids in the disposition of the issues”).

Conclusion

Section 206 is intended to protect consumers. It cannot operate if a utility can distort the information necessary for review and then invoke the absence of a developed record as a defense. The Commission should either grant Public Citizen's complaint or order further development of the record.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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