

Key Open Issues in ATSI Capacity Purchase and Sale Agreement

1. **Imbalance in Remedies**: If the ATSI Utilities fail to pay, COMPANY XYZ has no right to suspend performance and has no right to terminate the Capacity Purchase and Sale Agreement. (Section 5.2)
2. **Restricted Right to Replace**: The ATSI Utilities have the right to reject replacement capacity in their sole discretion. ATSI should have no right to reject replacement capacity that has equivalent performance characteristics as the original capacity. (Section 2.1(b))
3. **Right to Assign**: ATSI has an unrestricted right to assign the agreements (without regard to assignee credit quality) and be released from its obligations upon assignment. (Section 11.3)
4. **Events of Default**.
 - a. ***Failure to Deliver***: If COMPANY XYZ fails to deliver, the ATSI Utilities would have the option to be made whole by COMPANY XYZ for their cover damages, and nonetheless terminate the agreement and seek a termination payment. Failure to pay cover damages (not the occurrence of the delivery failure) should be the event of default. (Section 5.1(e))
 - b. ***PJM Fines***: If PJM fines the ATSI Utilities, the ATSI Utilities would have the option to be made whole by COMPANY XYZ for the fines, and nonetheless terminate the agreement and seek a termination payment. Failure to reimburse the penalties (not the occurrence of the penalty) should be the event of default. (Section 5.1(i))
 - c. ***Cure Periods***: Cure periods generally commence from the occurrence of the failure (rather than receipt of written notice). (Section 5.1)
5. **Delivery**: The Agreement is not clear regarding the manner in which Seller accomplishes delivery. (Section 2.1(a))
6. **PJM Credits**. The Agreement is not clear regarding the methodology for allocating PJM Credits allocable to the Units. (Section 2.6)
7. **Compliance with Other PJM/ATSI Rules and Instructions**. COMPANY XYZ's obligation to be bound by and comply with additional PJM/ATSI rules, instructions, and procedures is not subject to any reasonableness qualifier. (Sections 2.4 and 2.5)
8. **Performance Assurance**: In the event of an early termination, ATSI has the right to draw on COMPANY XYZ performance assurance whether or not COMPANY XYZ is the defaulting party. (Section 6.3)

Key Open Issues in ATSI Attestation Form

1. **Approval of Capacity Agreement**: COMPANY XYZ is required to agree to the form of Capacity Purchase and Sale Agreement, which does not yet contain reasonable terms and conditions. (Section 5)
2. **Liability for Damages Incurred by ATSI Utilities**: Damages are determined as if COMPANY XYZ is defaulting party under Capacity Purchase and Sale Agreement. The impact of this is unclear given that the Capacity Purchase and Sale Agreement contemplates, among other things, market termination damages yet prior to the auction, there is no transaction to replace. (Section 18)

3. Indemnity: COMPANY XYZ agrees to broadly indemnify ATSI for damages incurred to ATSI “as a result COMPANY XYZ’s participation in the auction or the acceptance of COMPANY XYZ’s offer in the auction”. Seller’s indemnity should only cover damages associated with Seller violating the Auction Rules or the Agreement. (Section 19)