

ATSI Responses to Suppliers' Comments to Capacity Purchase and Sale Agreement

Section	Supplier Comments	ATSI Response
Art. 1	Modify definition of "Bankrupt."	Accepted; deleted 60-day grace period. ¹
Art. 1	Modify definition of "Charge."	Accepted. Revised to limit charges to PJM charges attributable to Capacity Supplier under Agreement.
Art. 1	Modify definition of "Default Damages" to limit scope of such damages (e.g., limit to penalties rather than replacement costs); add "if applicable."	Partially accepted: added "if applicable."
Art. 1	Modify definition of "Governmental Authority" to delete references to states.	Accepted.
Art. 1	Modify definition of "Performance Assurance" to include a payment guaranty from a creditworthy parent; make reciprocal.	No change. ATSI will accept either a LOC or cash as Performance Assurance.
Art. 1	Clarify definition of "Tangible Net Worth."	Deleted "Tangible Net Worth" definition.
Art. 2	Add language stating Default Damages will be the sole and exclusive remedy for failure to deliver or receive under §2.1.	No change, but note Suppliers now have the right to pay penalties in an amount up to ½ of the Performance Assurance amount before ATSI may declare an EOD.
2.1(a)	(i) Clarify delivery obligation. (ii) Modify (delete "free and clear" language, "to the ATSI Utilities," "on a firm and continuing basis.") or delete §2.1(a).	(i) Delivery obligation has been clarified to tie delivery to entry of ICAP in PJM eRPM. See CPSA redline. (ii) Modified §2.1(a) as requested but §2.1(a) not deleted.
2.1(b)	(i) Modify §2.1(b); ATSI should grant a request to change Capacity Resources if PJM accepts them and if the Capacity Supplier notifies the ATSI Utilities in writing. (ii) Delete §§ 2.1(b) and (c).	(i) Accepted; ATSI Utilities shall permit replacement Capacity if PJM agrees it meets its requirements. (ii) §2.1(b) remains but is modified as described above; §2.1(c) has not been deleted.
2.1(c)	Clarify that Capacity Resources are only committed exclusively to ATSI Utilities for the delivery of Capacity.	Accepted.
2.3(b)	Don't preclude transfer of Capacity Supplier's generating facility together with assignment of	Accepted; restriction on transfer has been deleted.

¹ Note: Some Capacity Suppliers have requested this grace period be restored.

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	the contract in accordance with §11.3(b); don't restrict transfer of Capacity Supplier's ownership or authority.	
2.4(a)	Reciprocally require ATSI Utilities to be a member in good standing of PJM.	Accepted.
2.4(c)	(i) Modify such that (i) Capacity Suppliers should be required to comply with PJM (rather than ATSI) policies and procedures in §2.4(c)(i). (ii) Make obligation to cooperate an obligation to "reasonably" cooperate, "in good faith," and make the obligation reciprocal in §2.4(c)(ii).	(i) Accepted. (ii) Made obligation to cooperate an obligation to "reasonably" cooperate.
2.5	Delete requirement to have Market-Based Rate Authority from FERC.	Accepted.
2.5(b)	Modify §2.5(b) language (e.g., make obligation to cooperate to "reasonably cooperate" and "in good faith," replace Capacity with Capacity Resource Amount; make obligation to cooperate reciprocal).	Partially accepted; see revised version of the CPSA.
2.5(c)	Modify to make less vague or delete.	Accepted; §2.5(c) has been deleted.
2.6	(i) Increase number of days by which Suppliers must pay Charges. (ii) Clarify or change methodology for allocating Credits and Charges.	(i) Accepted; increased to three Business Days. (ii) Method for allocating Credits and Charges is explained in revised version of §2.6(c).
2.6(a)	(i) Add "unless subject to a good faith dispute" before "shall." (ii) Charges should be netted against Credits attributed to the Capacity Supplier's Capacity Resource. (iii) Increase number of days within which payment is due.	(i) No change. If PJM charges the ATSI Utilities, such Charges will be passed through to the supplier. If a supplier disputes the Charge to PJM, and PJM subsequently credits the ATSI Utilities for such disputed Charge, such Credit will be passed through to the supplier under §2.6; (ii) Accepted; see revised §2.6(c); (iii) Accepted; increased to three Business Days
2.6(c)	Clarify how Charges and Credits will be allocated; revise to that charges are handled in same time period as netting occurs; remove requirement to pay charges within one Business Day and make part of monthly settlement) or delete §2.6(c).	Deleted old §2.6(c) and replaced with new language clarifying how Charges and Credits will be allocated. Period to pay Charges changed from 1 Business Day to three

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		Business Days.
2.7	Allow for Capacity Suppliers to pay penalties instead of replacing Capacity.	Accepted; Capacity Suppliers may pay penalties up to ½ the amount of the Performance Assurance required.
2.8	Modify or delete §2.8.	Accepted; the revised §2.8 contains a general obligation for Capacity Suppliers to comply with any transmission service requirements and to pay associated costs and expenses.
3.1	(i) Revise Representations and Warranties to make less onerous. (ii) Modify language in §3.1(a) so that the provision only applies to states in which Capacity Suppliers are required to be registered and authorized to do business and only to the extent the failure to do so would be expected to adversely impact their ability to perform their obligations. (iii) Modify or delete §§ 3.1(n) and (p).	(i) Accepted; deleted §§ 3.1(k) – (n), (p), (q). (ii) Accepted; see revised CPSA. (iii) Accepted; §§ 3.1(n) and (p) have been deleted.
3.2	(i) Revise Representations and Warranties to make more balanced with § 3.1.	(i) Accepted; added §§ 3.2 (g) and (h) to ATSI's reps and warranties.
4.1(b)	Delete condition precedent that ATSI has moved to PJM.	Section deleted.
5.1	Add termination right if ATSI defaults in its obligation to pay.	Accepted. The suppliers may terminate the agreement if ATSI fails to pay after the applicable cure period.
5.1(a)	Add language re: replacement of Performance Assurance to §5.1(a).	Accepted.
5.1(e)	Increase Capacity Suppliers' cure periods for material obligations	Accepted; generally, Capacity Suppliers' cure periods increased to three Business Days
5.1(i), (j)	Modify or delete §5.1(i); make §§ 5.1(j) and (k) reciprocal; modify or delete §5.1(j).	Deleted §§ 5.1(i) and (j).
5.2	(i) Make termination right reciprocal. (ii) Delete right to "exercise any other remedies at law or in equity"	(i) Accepted. Also, deleted right to suspend for both parties. (ii) No change, but the right to exercise remedies is reciprocal.
5.3(b)	(i) Delete §5.3(b); §5.3(c) suffices for calculation of amounts owing to Non-Defaulting Party.	(i) No change. The settlement amount is part of the calculation of the Termination Payment. In any event, the Termination

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		Payment can go both ways.
5.3(c)	Delete right of ATSI Utilities to retain Termination Payment.	Right to retain Termination Payment is now reciprocal.
5.3(d), (e)	Increase number of days within which a Termination Payment must be made or disputed.	Increased to ten Business Days (from three).
6.1	(i) Delete §6.1 or change calculation of Performance Assurance. (ii) Increase the number of days within which the Performance Assurance must be posted.	(i) No change. (ii) Increased the number of days within which the Performance Assurance must be posted from one to three Business Days.
6.2(b)	(i) Delete automatic renewal and 90 days notice of termination language. (ii) Give Capacity Supplier option of (a) either a single non-renewable time period ending no earlier than ten days after Delivery Period expires, or (b) a single non-renewable time period that may be drawn by ATSI Utilities if not extended or replaced. (iii) Increase number of days to replace Letter of Credit in the event of a credit rating decline. (iv) Make expiration date of Letter of Credit 10 days after expiration of Delivery Period. (v) Substitution of Letter of Credit by cash should be credited to the ATSI Utilities' account only if the ATSI Utilities are creditworthy.	(i) Automatic renewal has been deleted but ninety days language remains; see revised CPSA. (ii) Option (a) accepted. (iii) No change. (iv) Accepted. (v) No change.
6.4	Make interest rate unconditional (i.e., remove "lower of" language) and change Interest Index definition.	No change. ATSI believes the interest rate as set forth in the CPSA is appropriate.
7.1	State that PJM is the billing agent for the ATSI Utilities and settlement and billing should be handled via PJM's normal billing and settlement process.	No change. ATSI will perform the billing under this Agreement.
7.2	(i) Make interest rate unconditional (i.e., remove "lower of language") and change Interest Index definition. (ii) Clarify whether payments can be made through PJM.	(i) No change. (ii) No change.
8.2	(i) Make submission of disputes to Summit County courts permissive rather than required. (ii) Add "venue in and" after "irrevocably agrees to." (iii) Make choice of law New York.	(i) No change. State or federal courts in Summit County, OH will be exclusive jurisdiction, unless dispute is subject to FERC jurisdiction. (ii) No change.

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		(iii) No change. Ohio law will apply.
Art. 9	(i) Delete exceptions stated in Article 9. (ii) Damages should be limited to the extent caused by a Party's acts or omissions including failure to comply with the Agreement rather than damages incurred as a result of the Party's failure to comply with the Agreement; delete the clause "except for Costs, Charges, and other expenses incurred by the ATSI Utilities in satisfying its obligations under this Agreement." (iii) Add "or enforcing" before "its obligations under this Agreement."	(i) No change. (ii) Exceptions contained in Article 9 revised to make reciprocal. (iii) Accepted.
10.1	(i) Delete §10.1(a)(a). (ii) Change "gross negligence" to "negligence" in §§10.1(a) and (b). (iii) Delete obligation of Capacity Suppliers to indemnify other Capacity Suppliers. (iv) Add language stating the indemnified Party has the right to participate or lead in defense or settlement of claims and that such Party must cooperate with the indemnifying Party. (v) Delete exclusion of situations where relevant courts find that the damages were caused by gross negligence or willful misconduct of the Indemnified Supplier.	(i) Accepted. (ii) No change. (iii) Accepted. (iv) Partially accepted; added language stating the indemnified Party has the right to participate (not lead) in defense or settlement of claims and that such Party must cooperate (in good faith) with the indemnifying Party. (v) No change.
11.3	Give Capacity Suppliers the right to assign; give neither party the right to assign; require ATSI Utilities to obtain Capacity Suppliers' consent to assign.	Capacity Suppliers have limited right to assign with ATSI consent and the ATSI right to assign without consent is now limited; see revised language in the CPSA.
11.4	Modify governing law from OH to DE or NY.	No change.
11.8	Revise such that ATSI pays all taxes and reimburses Capacity Suppliers for any taxes incurred as a result of the Agreement (except for income taxes).	No change.
11.9(g)	Delete §11.9(g).	Accepted.
11.10	Allow disclosure to lenders, PJM and PJM Market Monitor.	Accepted.
11.11	Replace language such that unless all parties agree to a proposed change, changes may be made only if required by the public interest.	No change.

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Section	Supplier Comments	ATSI Response
	Add waiver of right to seek FERC order to change terms of the Agreement.	

ATSI Responses to Capacity Suppliers' Comments Received March 1, 2010 (Not Included in the Revised Capacity Purchase and Sale Agreement)

I. Capacity Purchase and Sale Agreement

Section	Supplier Comments	ATSI Response
Art. 1	Modify definition of "Assignment and Assumption Agreement."	Accepted; the definition will be revised by changing "Capacity Supplier" to "Assignor."
Art. 1	Modify definition of "Bankrupt."	No change. The 60-day cure period was removed at the request of other Capacity Suppliers.
2.1(b)	(i) Remove "and are free and clear from any and all liens, security interests, claims, obligations or encumbrance or any interest therein by any other Person;" clarify that Capacity not Capacity Resources must be free and clear of such encumbrances. (ii) Clarify how PJM evidences its acknowledgement and agreement that the proposed replacement source satisfies requirements and what terms of Appendix A need to be agreed in writing.	(i) §2.1(b) will be revised to clarify that Capacity supplied under the Agreement (and not Capacity Resources) must be free and clear of such encumbrances. (ii) No change. Appendix A replacement is needed to document and initiate process.
2.4(c)	Add "related to the provision of Capacity by such Capacity Supplier under this Agreement" to the end of clause (ii) to clarify whether the Capacity Supplier must cooperate with respect to PJM matters that are unrelated to this Agreement.	Accepted.
2.5(b)	Add "related to the provision of Capacity by such Capacity Supplier under this Agreement" to the end of clause to clarify whether the Capacity Supplier must cooperate with respect to regulatory matters that are unrelated to this Agreement.	Accepted.
2.6(a)	Provide that the ATSI Utilities will first net the Charge against amounts payable to Capacity Supplier under the Agreement before requiring the Capacity Supplier to make a cash payment for the Charge.	Accepted – reference provisions of ARTICLE 7
2.6(b)	Specify that the ATSI Utilities will pay Credits to the Capacity Supplier within 3 Business Days.	No change. Consistent with revisions adopted for 2.6 (a).
2.7	(i) Give Capacity Suppliers the right to voluntarily increase the amount of Performance Assurance they provide above the minimum amount required by Section 6.1	(i) Accepted, but the amount of additional Performance Assurance a Capacity Supplier may provide will be capped.

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	<p>and allow Capacity Suppliers to receive a corresponding increase in the amount of Capacity Shortfall they can cover by paying penalties.</p> <p>(ii) Capacity Suppliers should have until after the third incremental auction to procure the additional capacity.</p>	(ii) No change.
3.1	Allow Capacity Suppliers to customize their representations and warranties as necessary to reflect individual factual circumstances.	No change.
3.1(f)	Insert “against it or any of its Affiliates” after “Governmental Authority.” A Capacity Supplier should not be obligated to know about other proceedings if it or its affiliates are not a party.	Accepted.
5.1	Reduce the 90-day cure period for the ATSI Utilities to not more than 30 days and increase the 3-day cure periods for Capacity Suppliers to 10 days.	Accepted.
5.1(c), (d), (e),(f)	Change cure periods so that they commence from written notice of the failure, rather than just commencing from the occurrence of the failure.	Accepted; an obligation for Capacity Suppliers will also be added requiring Capacity Suppliers to notify the ATSI Utilities of the failure.
6.1	<p>Capacity suppliers state ATSI Utilities should provide reciprocal credit to entities that have very good credit. Suggested language for 6.1 Changes highlighted in yellow:</p> <p><u>Performance Assurance Calculation</u> Each Capacity Supplier shall post Performance Assurance within three (3) Business Day of the Effective Date. The ATSI Utilities will hold the Performance Assurance through the end of the Delivery Period and shall return such Performance Assurance, along with, in the case of cash, any interest thereon calculated in accordance with Section 6.4, to the Capacity Supplier within ten (10) Business Days of the expiration of the Delivery Period. The Performance Assurance for each Capacity Supplier shall be calculated as follows: the Capacity Supplier’s Capacity Resource Amount (in Megawatts) <u>multiplied</u> by the Price <u>multiplied</u> by twenty-one days <u>multiplied</u></p>	Accepted

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	by 1.2. If the Capacity Supplier is rated at least BBB- by S&P or Baa3 by Moody's, then no Performance Assurance is required. Each Capacity Supplier must promptly notify the ATSI Utilities of any change in its credit rating by S&P or Moody's. If the Capacity Supplier's credit rating falls below BBB- by S&P and Baa3 by Moody's during the term of this Agreement, then the Performance Assurance will be required within three (3) Business Days.	
6.2(b); App. B-1 and B-7	Revert to the original language that allowing for a one year expiry date with auto-renewal clause so that the Letter of Credit would not have an expiry date that is beyond one year.	Accepted.
7.2(c)	Revise the applicable interest rate.	No change.
11.3(a)	Language regarding equal or greater creditworthiness should be clarified as being measured by an objective ratings standard.	Accepted; ATSI Utilities to provide clarifying language.
App. B.2	Clarify that the ATSI Utilities can draw on the Letter of Credit if the Applicant fails to provide a substitute letter of credit or "another acceptable form of security."	Accepted.
App. B.4	Reinsert the phrase "but shall not be obligated to" to clarify that the bank is not obligated to amend the Letter of Credit.	Accepted.
App. B.9	Revise to reflect that the bank will use a form "substantially in the form of" Annex 5.	Accepted.

II. Auction Rules

Section	Supplier Comments	ATSI Response
App. 1.G.18	Clarify that damages are calculated as if Capacity Supplier is the Defaulting Party under the CPSA only where Capacity Supplier has actually submitted a bid and then not executed the CPSA.	Accepted.
App. 1.G.19	(i) Clarify that the indemnity will only cover damages incurred as a result of the Offeror/Capacity Supplier violating the Auction Rules or the CPSA. (ii) Delete clause (b).	(i) Accepted. (ii) Accepted.