

150 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

PJM Interconnection, L.L.C.

Docket No. ER15-852-000

ORDER REJECTING TARIFF PROVISIONS

(Issued March 31, 2015)

1. On January 14, 2015, PJM Interconnection, L.L.C. (PJM) filed with the Commission changes to provisions of its Open Access Transmission Tariff (Tariff) and Reliability Assurance Agreement Among Load Serving Entities in the PJM Region (RAA). The proposed changes would significantly alter the manner in which demand resources could participate in the auctions through which PJM procures capacity. The Commission finds that PJM's filing is premature and, therefore, rejects the filing.

I. Background

A. Reliability Pricing Model (RPM)

2. To procure sufficient capacity to meet its reliability needs, PJM operates its Reliability Pricing Model (RPM) capacity market. To determine the amount of capacity PJM must procure to meet its reliability needs, PJM determines the PJM Region Reliability Requirement for each Delivery Year.¹ PJM also develops a Variable Resource Requirement Curve (VRR Curve, or demand curve) for that delivery year in its capacity auctions.² The capacity charges paid by each LSE are based on that LSE's allocated share of the Reliability Requirement.

¹ Each Delivery Year starts on June 1 and ends on May 31 of the following year.

² *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 75 (2006).

3. PJM conducts a Base Residual Auction (BRA) every year to obtain commitments to provide capacity three years in the future. Capacity suppliers submit offers into the auction, and PJM accepts enough offers to meet its Regional Reliability Requirement for the relevant delivery year.³ Capacity suppliers whose offers clear the auction take on a capacity obligation, meaning that they commit to have capacity available during the relevant delivery year, and in return, they receive capacity payments.⁴

4. To comply with their capacity obligations, generation resources must respond to dispatch instructions by producing energy, and demand resources must respond to dispatch instructions by reducing consumption, through load curtailment and/or by utilizing behind-the-meter-generation.

B. Order No. 745 and the EPSA Decision

5. In 2011, in Order No. 745, the Commission amended its regulations to require that a demand response resource participating in an organized wholesale energy market administered by a Regional Transmission Organization (RTO) or Independent System Operator (ISO) must be compensated for the service it provides to the energy market at the market price for energy, referred to as the locational marginal price (LMP).⁵

6. On May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit vacated Order No. 745, finding both that the rule exceeded the Commission's jurisdiction and that the Commission had not adequately supported its requirement as to the level of compensation.⁶ Petitions for *certiorari* of *EPSA*, filed separately by the Solicitor General on behalf of the Commission and by a group of other entities, are currently pending before the U.S. Supreme Court.⁷

³ PJM seeks to procure the majority of the capacity that it needs for each delivery year in the BRA for that year; however, it also conducts three Incremental Auctions during the period between the BRA and the beginning of the delivery year to adjust its capacity position, as necessary.

⁴ See generally PJM Tariff, Attachment DD.

⁵ Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, FERC Stats. & Regs. ¶ 31,322 (2011).

⁶ *Electric Power Supply Assoc. v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (*EPSA*).

⁷ *FERC v. Electric Power Supply Ass'n*, 2015 WL 217293 (U.S.), No. 14-840 (filed Jan. 15, 2015) and *EnerNOC, Inc. v. Electric Power Supply Ass'n*, 2015 WL 217294 (U.S.), No. 14-841 (filed Jan. 15, 2015).

7. Also, since issuance of *EPSA*, two complaints have been filed with the Commission, raising questions as to whether the jurisdictional finding in the *EPSA* ruling should apply to participation of demand response resources in Commission-regulated capacity markets. FirstEnergy Service Company (FirstEnergy) filed a complaint requesting the Commission to require PJM to remove all portions of its Tariff allowing or requiring PJM to include demand response resources as suppliers in PJM's capacity market, and to invalidate the results of the PJM capacity auction that were released on the same day that the *EPSA* decision was issued.⁸ In the second complaint, the New England Power Generators Association (NEPGA) asked that the Commission prevent demand response resources from participating in the ISO New England Inc. (ISO-NE) Forward Capacity Market (FCM) auction held in February 2015.⁹ Those complaints are currently pending before the Commission.

II. PJM'S Filing

8. PJM proposed revisions to its Tariff to alter the way demand response resources participate in the capacity market effective April 1, 2015. PJM requests that these revisions be in effect for the 2015 BRA,¹⁰ in the event that the Supreme Court denies certiorari requests for *EPSA*.

9. Under PJM's proposal, the demand curve used in its capacity auctions will be altered to reflect offers made by wholesale entities to reduce load. PJM states that, with this modification, the demand curve will reflect the actual (reduced) load that wholesale customers want to be served, based on the RPM clearing price for capacity. To effectuate this, PJM proposes to create two new products, Wholesale Load Reductions (WLR) and Wholesale Energy Efficiency Load (WEEL), through which wholesale entities may bid load reductions into the 2015 BRA and subsequent BRAs. PJM states that such wholesale load reductions will shift the capacity demand curve, reducing the amount of capacity PJM will procure in the auction and the price at which the auction will clear. According to PJM, this will ensure that the resulting clearing price reflects wholesale purchasers' willingness to reduce load in exchange for a reduction in capacity charges.¹¹ As a result, wholesale entities will be compensated through a reduction in their capacity

⁸ *FirstEnergy Service Co. v. PJM Interconnection, L.L.C.*, Docket No. EL14-55-000 (filed May 23, 2014) (the *FirstEnergy* complaint proceeding).

⁹ *New England Power Generators Association v. ISO New England Inc.*, Docket No. EL15-21-000 (filed November 14, 2014) (the *NEPGA* complaint proceeding).

¹⁰ The 2015 BRA will apply to the 2018-19 delivery year.

¹¹ Transmittal at 7.

charges, but they will not receive any capacity payments or energy revenues for load reductions.

10. PJM states that if the proposed Tariff revisions are accepted, all current provisions for supply-side demand resources' participation in future capacity auctions will be made ineffective, until they are removed in a future filing. PJM explains that its proposal is not intended to foreclose, either legally or practically, the Commission's consideration of the larger issues that *EPSA* may raise, and the rules are being proposed out of caution in light of the "unusual circumstances" the PJM area currently faces.¹² PJM states that its intent is to ensure that its RPM auctions will operate with accurate representations of demand and thus provide prices that remain just and reasonable for the capacity needed to maintain resource adequacy. PJM argues that "a functional market should accurately reflect demand, as well as supply,"¹³ and it states that its proposed new Tariff provisions will enable at least some amount of demand response to participate in the BRA, although PJM notes that this will likely be at lower participation levels than in previous auctions. PJM states that it does not contend that the "stop-gap" rules it proposes in this submission are superior to the current RPM rules; rather, PJM asserts that these new rules would preserve the reliability and economic benefits of some demand response and would be superior to rules that do not recognize any demand response.¹⁴ According to PJM, this approach is necessary to recognize the risks and uncertainties that would arise if PJM cleared demand response in its capacity auctions under existing rules, after the *EPSA* mandate issues.

11. As noted above, PJM requests an April 1, 2015 effective date. PJM requests that the Commission accept these Tariff provisions now, so that they are already in place in the event that the Court denies *certiorari* between the April 1 effective date and the 2015 BRA. However, PJM states that if the Supreme Court grants *certiorari* of *EPSA* before the 2015 BRA, it intends to withdraw these proposed Tariff revisions and conduct the auction under the currently effective rules. PJM also requests that the Commission accept and suspend its filing for five days, until April 6, to enable PJM to further defer the effective date of these new Tariff provisions if necessary.¹⁵ Finally, PJM states that in the event that there is no decision by the Supreme Court before the BRA, then regardless of how the Commission rules on PJM's filing, PJM will run the auction under

¹² *Id.* at 11-12.

¹³ *Id.* at 3.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 6, 11-12.

its current rules (filing motions as necessary to keep the effective date of the new provisions in suspension).¹⁶

A. Notice of the Filing and Responsive Pleadings

12. Notice of the proposed Tariff changes was published in the *Federal Register*, 80 Fed. Reg. 3230-01 (2015), with comments, interventions, and protests due on or before February 4, 2015. The Commission later extended that date to February 13, 2015, upon request of American Electric Power Service Corporation (AEP) and others.¹⁷

13. Timely and untimely motions to intervene were submitted by the parties in the attached appendix.

14. Timely protests were filed by: AEMA, the PJM Utilities Coalition,¹⁸ Joint Consumer Representatives,¹⁹ EMC Development Company, Public Interest Organizations, PSEG Companies, Maryland Commission, Steel Producers, NRG Companies, P3, PPL Companies, Direct Energy, Pennsylvania Commission and Public Utilities Commission of Ohio. Timely comments were filed by: Microgrid Resources Coalition,²⁰ the Illinois Commission, Pepco Holdings, Inc. (PHI), American Municipal

¹⁶ *Id.* at 11-12 (“[I]f the Supreme Court has not acted on *EPSA* before the Commission issues its order on this filing, PJM requests that the Commission accept PJM’s tariff revisions, but suspend their effectiveness for a period of five days, until April 6, 2015. This nominal suspension will allow PJM to submit a motion to continue the suspension and further defer the effectiveness of this proposal as needed to provide additional time to await the Supreme Court’s order. In the event the Supreme Court has not yet acted as the BRA approaches, PJM expects to proceed with the auction under existing rules governing demand response”).

¹⁷ Notice of Extension of Time, Docket No. ER15-852-000 (January 29, 2015).

¹⁸ The PJM Utilities Coalition consists of: American Electric Power Service Corporation, The Dayton Power and Light Company, FirstEnergy Service Company, Buckeye Power, Inc., and East Kentucky Power Cooperative, Inc., all of which have intervened in this docket.

¹⁹ Joint Consumer Representatives include: the PJM Industrial Customer Coalition, the West Virginia Consumer Advocate Division, Maryland Office of People's Counsel, the Pennsylvania Office of Consumer Advocate, the Illinois Citizens Utility Board, and the Delaware Division of the Public Advocate, all of which have intervened in this docket, and the New Jersey Division of Rate Counsel.

²⁰ Microgrid Resources Coalition did not move to intervene in this docket.

Power, Inc. (AMP), IMEA, EPSA, Rockland Electric Company, Exelon, America's Natural Gas Alliance, and the IMM.

15. PJM and Joint Consumer Representatives filed answers to the protests and comments. AMEA, First Energy Service Company, and jointly, PSEG Companies and NRG Companies, filed answers to PJM's answer.

B. Issues Raised in Comments and Protests

16. AEMA, Maryland Commission, Public Interest Organizations, Illinois Commission, EMC, P3, and PPL oppose PJM's filing. AEMA asserts that PJM's filing would guarantee substantial loss of participation by demand response resources in the capacity market, substantial increases in capacity prices that would be borne by consumers, decreased reliability, decreased competition and irreparable harm to Curtailment Service Providers (CSPs) and their customers.²¹ Maryland Commission, Public Interest Organizations, Illinois Commission, EMC, P3, PPL, AEMA and other protesters assert that acceptance of PJM's filing will lead to unjust and unreasonable rates.

17. By contrast, Exelon, PHI, AMP, Rockland, Direct Energy, ANGA and PJM Utilities generally support PJM's filing. They largely reiterate PJM's justification that PJM's proposal is a temporary solution in light of uncertainty arising from the *EPSA* decision, that will enable demand response to continue to participate in the capacity markets.

1. Timeliness of PJM's Proposal

18. AEMA contends that, for it to be necessary for PJM to rerun the 2015 BRA, all of the following would need to take place: (1) the Supreme Court would have to deny the petitions for *certiorari* in *EPSA*; (2) the Supreme Court would have to decide the pending case of *ONEOK, Inc. v. Learjet, Inc.*²² in such a way as to preclude the Commission's exercise of jurisdiction over demand response participation in the capacity market under FPA sections 205 and 206; (3) the Commission would have to rule on both the *EPSA* remand (assuming that *certiorari* is denied) and the FirstEnergy and NEPGA complaints by determining that *EPSA* applies to the participation of demand response in capacity markets and necessitates elimination of third party-supplied demand response; and (4) the Commission would have to decide that it is unable to provide for a rational transition so as to apply its new findings prospectively to the next BRA which has not yet cleared as of

²¹ AEMA Protest at 3.

²² *Id.* at 3 (citing *ONEOK, Inc. v. Learjet, Inc.*, 134 S. Ct. 2899 (2014) (granting *certiorari*)).

the time of its decision on how to proceed.²³ AEMA contends that the Commission should reject PJM's filing as it has no basis for adopting changes predicated on a lack of jurisdiction until it has ruled on the issues raised in the FirstEnergy and NEPGA complaints. Moreover, according to AEMA, if the *EP*SA mandate is issued, the Commission will have the opportunity to provide for a rational transition to a post-*EP*SA world. AEMA argues that it would be unjust and unreasonable to prejudge the outcome of those proceedings before the Commission has had the opportunity to consider the issues presented in those dockets.²⁴ Joint Consumer Representatives, Pennsylvania Commission, Maryland Commission, Ohio Consumers' Counsel, Ohio Commission made similar arguments.²⁵

19. Illinois Commission and Steel Producers agree with PJM that there is a level of risk in procuring demand response for the upcoming auction, but state that the current proposal creates unnecessary confusion and uncertainties and thus undermines its potential benefits.²⁶ PPL argues that the Commission's acceptance of this proposal would amount to a denial of the First Energy complaint.²⁷ *EP*SA asserts that the *EP*SA decision will provide a forum for interested parties to explore methods by which reductions in consumption may be appropriately accounted for on the demand side, while respecting the jurisdictional boundaries of the Commission and the states, and those discussions should not be constrained by PJM's proposal.²⁸

20. In its answer, PJM reiterates that if the Supreme Court grants *certiorari* of the *EP*SA decision before the BRA, it will conduct the auction under its existing demand response rules. Nevertheless, PJM asks the Commission to accept these "stop-gap" rules to govern participation of demand response in its capacity market, in the event the Supreme Court denies *certiorari*, until the Commission develops a more considered alternative.²⁹ PJM asserts that its filing is not premature; rather, its purpose is simply to

²³ *Id.* at 3-4, 6.

²⁴ *Id.* at 4-5, 10-11.

²⁵ Joint Consumer Representatives Protest at 5, Pennsylvania Commission Protest at 14-15, Maryland Commission Protest at 1-2, Ohio Consumers' Counsel Protest at 3-4, Ohio Commission Protest at 3, 5-7.

²⁶ Illinois Commerce Commission Comments at 4-12; Steel Producers at 2.

²⁷ PPL Protest at 11-12.

²⁸ *EP*SA Comments 12-13.

²⁹ PJM Answer at 1-2.

address the uncertainty inherent in the unresolved status of the *EPSA* decision. PJM expresses concern running the BRA under its existing rules could lead to extended litigation and the need ultimately to rerun the auction. Such results run counter to the goal of providing revenue certainty to encourage investment, according to PJM. In addition, running the auction under current rules could result in capacity prices for the 2018/2019 Delivery Year that would not reflect any of the region's known demand response capability.³⁰ PJM contends that its proposal is consistent with the Commission's long-recognized authority under the FPA to approve system operators' Tariff terms regarding wholesale capacity obligations, capacity deficiency charges, and other terms of administering markets to ensure resource adequacy at just and reasonable prices.³¹

2. Implications of *EPSA* for PJM's Capacity Market

21. Public Interest Organizations argue that it is improper to remove demand response and energy efficiency from the RPM, because *EPSA* applies only to the energy market, and removal of demand response resources will result in unjust and unreasonable rates. Public Interest Organizations, AEMA, Joint Consumer Representatives, Pennsylvania Commission, NRG Companies, and Steel Producers state that *EPSA* does not govern demand response participation in the capacity market and only addresses the participation of demand response in the energy markets, specifically the day-ahead and real-time markets.³²

22. Joint Consumer Representatives assert that the logic of the *EPSA* decision does not apply to capacity products, because *EPSA* found that entities were improperly "luring" customers to stop consuming by paying them to do so, while simultaneously allowing those customers to avoid making energy payments. Joint Customers argue that, in the capacity construct, such a "lure" does not exist, because a given customer is only compensated once, either by avoiding a capacity obligation, or by maintaining its capacity obligation and offsetting it with a performance obligation.³³ By contrast, NRG

³⁰ *Id.* at 9-11. PJM also reiterates its view that, contrary to protesters' arguments, there is likely to be significant demand response participation in the auction under the WLR program, *id.* at 13-16.

³¹ *Id.* at 19-20.

³² Public Interest Organizations Protest at 4-10; AEMA Protest at 11-16, Joint Consumer Representatives Protest at 5-6, Pennsylvania Commission Protest at 13-14, Steel Producers Protest at 4-5, 7.

³³ Joint Consumer Representatives Protest at 5-7.

and PSEG argue that PJM's proposal violates *EPSA* by maintaining the "lure" of the capacity credit, because the credit has the same economic impact as a capacity payment.³⁴ PJM emphasizes that, contrary to these arguments, its proposal includes no compensation in any form to any retail consumer, and therefore does not contravene the holding of *EPSA*.³⁵

23. EPSCA contends that the *EPSA* decision does apply to the capacity market, because, as the court stated, "Congress left regulation of this aspect of retail demand up to the states, rather than to the federal government."³⁶ PSEG argues that demand response has a role to play in the procurement of capacity, but to be jurisdictionally compliant with *EPSA*, demand response and energy efficiency must be completely severed from the RPM auctions. According to PSEG, when demand response and energy efficiency reliably reduce load over peak periods, these impacts on customer usage will be recognized in future load forecasts.³⁷ Joint Consumer Representatives, on the other hand, argue that the Commission recently upheld *expansion* of demand response in certain New England wholesale markets, including the forward capacity market, while declining to engage arguments that it had no jurisdiction to proceed.³⁸ PJM Utilities assert that the Commission should recognize the impact of *EPSA* on its jurisdictional reach and not delay in preventing demand response from participating as supply-side resources in RPM auctions.³⁹

3. Timing Considerations

24. AEMA contends that PJM's filing cannot be implemented for the 2015 BRA because LSEs, CSPs and demand response owners would be required to create and implement entirely new business strategies in a short time period, including entering into complex contractual arrangements with numerous counterparties. AEMA, Ohio Commission, Pennsylvania Commission, Maryland Commission, and

³⁴ NRG Comments at 6-7; PSEG Protest at 4.

³⁵ PJM Answer at 22.

³⁶ EPSCA Comments at 6-7 (citing *EPSA*, 753 F.3d at 224).

³⁷ PSEG Protest at 6.

³⁸ Joint Consumer Representatives Protest at 10-11 (citing *ISO New England Inc.*, 150 FERC ¶ 61,007, at P 32 (2015) (declining to address arguments raised by protesters that the Commission lacks jurisdiction to set rates for supply-side demand response resources in light of *EPSA*)).

³⁹ PJM Utilities Coalition Protest at 16-18.

Illinois Commission also point out that in some jurisdictions, state legislatures and/or regulators will likely need to enact changes to accomplish this purpose.⁴⁰ AEMA further argues that rational market participants will not make the necessary investments in the short-term because of ongoing uncertainty about the reach of the *EPSA* decision, particularly at a time when LSEs have no obligation and incentives to offer WLR.⁴¹ Steel Producers state that “PJM’s proposal to carve out its current demand response rules and replace them [in a few months prior to the 2015 BRA] is radical surgery that is not warranted by any Commission or court order and the risks far outweigh the possible benefits.”⁴²

25. PSEG asserts that, assuming that the Commission determines that PJM’s filing is just and reasonable and comports with *EPSA*, the Commission should not allow PJM to withdraw its proposal if the Supreme Court grants *certiorari*, because such uncertainty would pose unnecessary risk for suppliers in the 2015 BRA as to the finality of the auction results.⁴³

4. Additional Issues

26. Protesters also raise concerns relating to: (1) the potential anti-competitive nature of PJM’s proposal; (2) potential market power concerns with respect to LSEs’ incentives and conflicts of interest; (3) the likely negative impacts of the proposal on states’ demand response, energy efficiency, and retail programs; (4) negative impacts on prices and markets; (5) the applicability of *EPSA* to energy efficiency; (6) non-participation of demand resources in incremental auctions; (7) provisions regarding participation of third-party agents such as CSPs; (8) the lack of a stakeholder process in developing and vetting PJM’s filing; (9) utilizing the already existing Price Responsive Demand (PRD) program as an alternative to PJM’s proposal; and (10) the lack of a sunset date to ensure that the provisions are temporary. Because we are rejecting PJM’s proposal on the grounds that it is premature, as discussed below, we will not discuss further these and other issues raised by protesters at this time.

⁴⁰ AEMA Protest at 31; Ohio Commission Protest at 7-8; Pennsylvania Commission Protest at 12-13, 15-19, 22-23, 28-29; Maryland Commission Protest at 5; Illinois Commission Comments at 4-12.

⁴¹ AEMA Protest at 5, 28, 30-31, 34.

⁴² Steel Producers Protest at 6-7.

⁴³ PSEG Protest at 7.

III. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely-filed unopposed motions to intervene serve to make the entities filing them parties to the proceeding.

28. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), we will grant the late-filed motions to intervene and the notice of intervention, given the parties' interests in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers in this case because they have provided information that has assisted us in our decision-making process.

B. Substantive Matters

30. For the reasons discussed below, we reject PJM's proposal as premature.

31. We recognize the uncertainty that PJM faces in its markets in the wake of the D.C. Circuit's decision in *EPSA*, and we appreciate PJM's efforts to proactively address that uncertainty. Although PJM acknowledges that its proposed tariff revisions are not directly required by the D.C. Circuit's decision in *EPSA*, it nonetheless argues that the Commission should find its proposed tariff revisions to be just and reasonable, so that PJM could apply those tariff revisions to its upcoming BRA in the event that the Supreme Court denies the petitions for *certiorari* of *EPSA* between PJM's requested April 1, 2015 effective date for its proposal and the commencement of the auction. PJM further indicates that its proposed "stop-gap" provisions are not intended to preclude any subsequent Commission action in connection with the *EPSA* decision.

32. However, having considered the record, we find that approval of PJM's proposal at this time is premature and would necessarily impact options the Commission could undertake in response to the *EPSA* decision. While we recognize that PJM's goal is to reduce uncertainty surrounding demand response participation in its upcoming BRA, in the present circumstances, it is unavoidable that some uncertainty is inherent in the current stance of the *EPSA* case. Moreover, we are concerned that PJM's proposal introduces uncertainties that may exceed those it seeks to avoid, particularly with respect to potential unanticipated spillover effects on state programs and private sector arrangements. We find that, on balance, PJM's filing is premature and therefore reject it.

33. Because we are rejecting PJM's filing as premature, we need not address arguments challenging the merits of PJM's proposal.

The Commission orders:

The Commission hereby rejects PJM's filing, as discussed above.

By the Commission. Commissioner Clark is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

The following parties filed timely motions to intervene:

Achieving Equilibrium, LLC
Advanced Energy Management Alliance (AEMA)
American Electric Power Service Corporation (AEP)
American Municipal Power, Inc. (AMP)
American Public Power Association
America's Natural Gas Alliance (ANGA)
Buckeye Power, Inc.
Calpine Corporation
Comverge, Inc. (Comverge)
CPower Corporation (CPower)
CPV Power Development, Inc. (CPV)
Dayton Power and Light Company;
Delaware Division of the Public Advocate
Delaware Public Service Commission
Direct Energy Business Marketing, LLC (Direct Energy)
Dominion Resources Services, Inc.
Duke Energy Corporation
Duquesne Light Company
Dynergy Marketing and Trade, LLC
East Kentucky Power Cooperative, Inc.
Electric Power Supply Association (EPSA)
Electricity Consumers Resource Council
EnerNOC, Inc.
Environmental Law and Policy Center
Essential Power, LLC
Exelon Corporation (Exelon)
FirstEnergy Solutions Corp. (FirstEnergy)
Independent Market Monitor for PJM (IMM)
Illinois Citizens Utility Board
Illinois Commerce Commission (Illinois Commission)
Illinois Municipal Electric Agency (IMEA)
LS Power Associates, L.P.
Maryland Office of People's Counsel
Maryland Public Service Commission (Maryland Commission)
New Jersey Board of Public Utilities
North Carolina Electric Membership Corporation
NRG Companies (NRG)
Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)
Old Dominion Electric Cooperative
Opower

Organization of PJM States, Inc. (OPSI)
Pennsylvania Office of the Consumer Advocate
Pennsylvania Public Utility Commission (Pennsylvania Commission)
Pepco Holdings, Inc. (PHI)⁴⁴
PJM Industrial Customer Coalition (PJMICC)
PPL Companies (PPL)
PSEG Companies (PSEG)
Public Utilities Commission of Ohio (Ohio Commission)
Retail Energy Supply Association
Rockland Electric Company
Sierra Club
Southern Maryland Electric Cooperative, Inc.
Steel Producers
Sustainable FERC Project (Public Interest Organizations)
United States Department of Defense and all other Federal Executive Agencies
West Virginia Consumer Advocate Division

The following parties filed motions to intervene out of time:

EnergyConnect, Inc.
IPKeys Technologies LLC

⁴⁴ Pepco Holdings, Inc. includes the Potomac Electric Power Company, Delmarva Power & Light Company, and Atlantic City Electric Company.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket No. ER15-852-000

(Issued March 31, 2015)

CLARK, Commissioner, *dissenting*:

Today's order unnecessarily delays action and perpetuates system inefficiencies created by the overcompensation of demand response products in wholesale electricity markets. Rather than sidestepping PJM Interconnection, L.L.C.'s (PJM) filing, the Commission should address it on the merits and seize the opportunity to provide guidance on a functional demand-side product to the betterment of the PJM markets.

On May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit vacated Order No. 745 and found that demand response is outside of the Commission's jurisdiction.¹ As it stands today, the U.S. Supreme Court may reject the pending petitions for writ of *certiorari* of *EPSA*, thereby upholding the D.C. Circuit's jurisdictional finding.² Yet, today's order comes to the conclusion that PJM's filing is premature. I disagree and believe that rejecting PJM's proposal without considering the merits fails to recognize the limited, "no regrets" nature of PJM's filing.

As designed, PJM's proposal would "establish a jurisdictionally sound basis to realize the operational and market efficiencies of demand response in the PJM Region,"³ and would have become effective "only in the event the United States Supreme Court denies the

¹ *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (*EPSA*). On September 17, 2014, the D.C. Circuit denied the Commission's petition for rehearing *en banc*. On December 15, 2014, the D.C. Circuit granted a motion to stay the issuance of the court's mandate pending the Supreme Court's final disposition on petitions for writ of *certiorari*.

² *FERC v. Electric Power Supply Ass'n*, 753 F.3d 216 (D.C. Cir. 2014), *petition for cert. filed*, 2015 WL 217293 (U.S. Jan. 15, 2015) (No. 14-840) and *EnerNOC, Inc. v. Electric Power Supply Ass'n*, *petition for cert. filed*, 2015 WL 217294 (U.S. Jan. 15, 2015) (No. 14-841).

³ PJM Transmittal at 2.

[Commission's and other parties'] petitions for *certiorari* seeking review of [EPSA]."⁴ In this respect, PJM's filing comports with responsible contingency planning, and the Commission should not so easily dismiss PJM's filing without guidance.

The PJM region has much at stake in the outcome of this proceeding. PJM is a regional transmission organization tasked with ensuring reliability for more than 61 million people across 13 states and the District of Columbia. Through its capacity market, the Reliability Pricing Model (RPM), PJM has historically cleared tens of thousands of megawatts of demand response. In the upcoming 2015/2016 Delivery Year, for instance, PJM cleared over 164,500 megawatts of resources, including close to 15,000 megawatts of demand response.⁵

While the D.C. Circuit's decision was focused on Order No. 745 and compensation in energy markets, the capacity market provides the majority of wholesale payments to demand response resources in the PJM region,⁶ and capacity demand response resources are eligible for full locational marginal price (LMP) for their demand reductions in the delivery year.⁷

With the weight of *EPSA* hanging in the balance, PJM emphasizes in its January 14, 2015 filing, and subsequently in its March 4, 2015 answer, that its filing is not premature. The purpose is to address inherent uncertainty in a pending court case, and to avoid having to rerun the upcoming capacity auction in the event the Supreme Court denies the petitions for *certiorari*. PJM states that rejecting the filing could compromise the goal of revenue certainty that is needed to encourage investment, and could result in capacity prices that do not reflect the region's known demand response capability.⁸ In addition, PJM acknowledges that the uncertainty in the interim period could have a significant chilling

⁴ *Id.* at 1.

⁵ See PJM "Auction Results for All Incremental Auctions & Base Residual Auction," at <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2015-2016-third-incremental-auction-results.ashx>.

⁶ See PJM "2014 Demand Response Operations Market Activity Report: March 2015," at page 14, which can be found at: <http://www.pjm.com/~media/markets-ops/dsr/2014-demand-response-activity-report.ashx>.

⁷ [PJM's Tariff, Attachment K-Appendix, Section 8.8 \(Market Settlements\)](#).

⁸ PJM March 4, 2015 Answer at 3.

impact on needed investment decisions during a critical period as the PJM region adapts to major changes in emissions regulations.⁹

While PJM's intentions are laudable and should have been considered on the merits, PJM's filing may not have gone far enough and may have failed to recognize the significant role that its existing Price Responsive Demand (PRD) product could serve at this time. PJM states that its filing "is premised on a simple proposition: a functional market should accurately reflect demand, as well as supply."¹⁰ Taking this concept one step further, *EPSC* presents this Commission with an opportunity to take a second look at the placement of demand response in the wholesale markets and to recognize that the regulation of retail electricity consumption is within the purview of the States. I continue to believe that calling a "nega-watt" the equivalent of a "mega-watt" is clever rhetoric, but it defies common sense. One supplies energy, the other is a retail/demand-side decision about whether to consume the energy. The Commission must recognize the problems created by its attempt to redefine "demand" as "supply."¹¹

Enabling functioning price-responsive demand is the right answer to the conundrum in which we now find ourselves, and it is where the Commission should expend the bulk of its efforts. Price-responsive demand provides all of the proper price-forming benefits the Commission seeks, but without concocting bureaucratically complex schemes to pay consumers not to consume power. In a world of robust price-responsive demand, end-use customers would be aided by advanced demand side management devices. This would allow them to signal their willingness to pay for energy, thereby fulfilling their role on the demand side of the equation. The result would be a properly functioning, efficient, and competitive marketplace.

Rededicating ourselves to this effort by refining PJM's existing PRD product is exactly what is needed at this time. The Commission's efforts would promote active participation of the States because only they have the retail rate setting authority needed to align retail rates in such a way that enables price-responsive demand. The Commission's prior impatience with the pace of price-responsive demand has led us to the position in which we now find ourselves—jurisdictionally uncertain and

⁹ PJM March 4, 2015 Answer at note 4.

¹⁰ PJM Transmittal at 3.

¹¹ Commissioner Tony Clark, *The DC Circuit Court Decision on Order No. 745* (June 2014), available at <http://www.ferc.gov/media/statements-speeches/clark/2014/06-11-14-clark.asp>.

compromised from the standpoint of sound economics.

Given that PJM has already developed the PRD product, it is arguably better situated than most regional transmission operators to move forward as an example of a more advanced marketplace. As the PJM Independent Market Monitor states in this proceeding, “[i]f PJM wants to prepare for the future, regardless of the Supreme Court decision in the *EPSA* case, it should dismantle the current obsolete and flawed approach to demand response as a supply side product and implement an approach consistent with the principles underlying the [PRD] rules that became effective May 15, 2012.”¹²

While the existing PRD product is a rational way for demand response to be recognized in the wholesale market, the current market rules have left PRD under-utilized in the PJM region. The wholesale capacity and energy market designs overcompensate and subsidize demand response as a supply resource, and not surprisingly, developers are being lured toward that unsustainable compensation scheme. The Commission should work with the States to promote more accurate demand-side signals, and the PRD product is a good start.

Today’s order takes a gamble that PJM’s concerns about system reliability and efficiency will not come to light. This gamble carries with it the risk of a self-fulfilling prophecy. By rejecting the PJM filing and not proactively addressing a fallible demand response product, the Commission’s assertion in its petition for *certiorari* might unnecessarily be proven correct; that *EPSA* “is likely to have deleterious consequences for the Nation’s electricity system in a number of areas.”¹³ The Commission created Order No. 745, and it is the Commission that should explore ways to transition demand response from the supply-side to the demand-side where it properly belongs. PJM has presented us with an open door to begin to pare back on the “deleterious consequences,” and I believe it is time to address the broader issue on the merits and remedy the effects of prior regulatory overreach.

For these reasons, I respectfully dissent from this order.

Tony Clark
Commissioner

¹² Monitoring Analytics February 13, 2015 Comments at 2.

¹³ FERC’s Petition for Cert. at 31.