

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

**FirstEnergy Service Company,
Complainant,**

Docket No. EL14-55-000

v.

**PJM Interconnection, L.L.C.,
Respondent.**

**COMMENTS OF
THE PJM POWER PROVIDERS GROUP**

Pursuant to the notice issued by the Federal Energy Regulatory Commission (the “Commission” or “FERC”) on June 11, 2014,¹ the PJM Power Providers Group (“P3”)² respectfully submits these comments in support of the amended complaint of FirstEnergy Service Company (“FirstEnergy”)³ in the above-captioned proceeding.⁴ The Amended Complaint relies

¹ Notice Extending Due Date for Answers, Interventions, and Protests, Docket No. EL14-55-000 (June 11, 2014) (unreported).

² P3 is a nonprofit corporation dedicated to promoting policies that will allow the PJM region to fulfill the promise of its competitive wholesale electricity markets. P3 strongly believes that properly designed and well-functioning competitive markets are the most effective means of ensuring a reliable supply of power to the PJM region, facilitating investments in alternative energy and demand response technology, and promoting prices that will allow consumers to enjoy the benefits of competitive electricity markets. Combined, P3 members own over 87,000 megawatts of generation assets, own over 51,000 miles of transmission lines, serve nearly 12.2 million customers and employ over 55,000 people in the PJM region – encompassing 13 states and the District of Columbia. The comments contained herein represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, visit www.p3powergroup.com.

³ Amended Complaint of FirstEnergy Service Company, Docket No. EL14-55-000 (filed Sept. 22, 2014) (the “Amended Complaint”). *See also* Emergency Complaint of FirstEnergy Service Company and Request for Fast Track Processing, Docket No. EL14-55-000 (filed May 23, 2014) (the “Complaint”).

⁴ P3 has separately filed a timely motion to intervene in this proceeding. *See* (doc-less) Motion to Intervene of the PJM Power Providers Group, Docket No. EL14-55-000 (filed June 11, 2014).

upon the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit” or “Court”) in *Electric Power Supply Association v. FERC*⁵ to substantiate its originally-filed Complaint that the Commission lacks jurisdiction to regulate demand response under the Federal Power Act (“FPA”) section 201, 16 U.S.C. §824, because “demand response is not a wholesale sale of electricity; in fact, it is not a sale at all.”⁶ FirstEnergy correctly notes, in part, that the D.C. Circuit also held that the Commission lacks jurisdiction to regulate demand response as a practice “affecting” rates under FPA section 205, 16. U.S.C. §824d, or FPA section 206, 16 U.S.C. §824e.⁷

On October 20, 2014, the D.C. Circuit granted FERC’s request to stay the issuance of the Court’s mandate through December 16, 2014.⁸ If the Solicitor General determines that he will seek a writ of certiorari for review by the United States Supreme Court, the stay will remain in effect until such time as the Supreme Court ultimately disposes of the matter.

In light of the significance of the D.C. Circuit’s decisions and the issuance of the stay, P3 respectfully submits comments, as further explained below:

- The *EPSA* decision applies equally to energy and capacity markets.
- The Commission should provide clarity to the PJM market post-*EPSA*.

I. COMMENTS

A. The *EPSA* decision applies equally to energy and capacity markets.

⁵ *Electric Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (“*EPSA*”).

⁶ *EPSA*, *supra*, at p.221.

⁷ *EPSA*, *supra*, at p.221-223.

⁸ *EPSA*, *supra*, Order dated October 20, 2014.

In vacating FERC Order 745, which applied to compensation in the energy market, the D.C. Circuit ruled that FERC does not have jurisdiction to regulate demand response at all. As the Court succinctly stated, “[d]emand response – simply put – is part of the retail market. It involves retail customers, their decision whether to purchase at retail, and the levels of retail electricity consumption.” The Court went on to explain that FERC may “not directly regulat[e] a matter subject to state control, such as the retail market.”

Given the Court’s decision, P3 agrees with FirstEnergy and PJM that the Commission is precluded from allowing further supply-side participation by demand response resources in the Reliability Pricing Model (“RPM”)⁹ capacity market administered by PJM. As PJM stated, “(t)he (EPSA) decision vacated FERC Order No. 745, which was confined only to the payment of demand resources in the wholesale energy market. However, the jurisdictional analysis applied by the majority to reach the *vacatur* suggests a precedent that could apply, when litigated, to PJM’s Reliability Pricing Model capacity market.”¹⁰

It follows that PJM should be directed to revise the Tariff to make clear that supply-side demand response may no longer participate as supply in RPM auctions. P3 further urges the Commission to act expeditiously to ensure that demand response resources are not allowed to participate as capacity suppliers in future RPM auctions, including the Third Incremental Auction for the 2015/2016 Delivery Year, which is scheduled to commence on *February 23*,

⁹ This and other capitalized terms not otherwise defined herein have the meaning set forth in the PJM Interconnection L.L.C. (“PJM”) Open Access Transmission Tariff (the “Tariff”).

¹⁰ The Evolution of Demand Response in the PJM Wholesale Market, PJM Interconnection, October 7, 2014 (“PJM Whitepaper”), at p.4.

2015, and even more critically, the BRA for the 2018/2019 Delivery Year, which is scheduled to commence on *May 11, 2015* (the “May 2015 BRA”).¹¹

Although P3 firmly supports FirstEnergy’s view of the EPSA decision that supply-side demand response is legally barred from participating in the capacity market as a capacity resource, P3 is encouraged by PJM’s attempt to find the proper balance for demand response on the demand-side for continued participation in PJM’s markets. In part, PJM has stated that:

“Wholesale demand response would bid into the capacity auction as a commitment to curtail by wholesale market entities (load serving entities, including competitive retail providers). This alternative would enable wholesale (load-serving entity-based) load to participate on the demand side of the capacity market as “demand response” and would be modeled as a reduction in capacity obligation.”¹²

P3 is still reviewing PJM’s Whitepaper and has some concerns regarding the details of PJM’s initial, proposed “road map.” Nonetheless, P3 appreciates PJM’s attempt to separate the supply- and demand-side of demand’s participation in the PJM’s market, as well as the stated goal of meeting various objectives “without exposing PJM and its members to unacceptable litigation risk and uncertainty as to settled market outcomes.”¹³ P3 looks forward to further conversations at PJM and the Commission regarding the details of the PJM Whitepaper.

B. The Commission should provide clarity to the PJM market post *EPSA*.

There is little doubt that the *EPSA* decision, if it stands, fundamentally alters several long-standing assumptions regarding wholesale power markets. Removing demand response from wholesale energy and capacity markets is a significant challenge, but it must be done in

¹¹ See PJM, *RPM Schedule* (Aug. 22, 2014), available at [http:// learn.pjm.com/~media/markets-ops/rpm/rpm-auction-info/rpm-auction-schedule.ashx](http://learn.pjm.com/~media/markets-ops/rpm/rpm-auction-info/rpm-auction-schedule.ashx). Note that while P3 agrees with First Energy that the *EPSA v. FERC* decision requires the removal for demand response from PJM’s wholesale capacity market, P3 does not take a position on First Energy’s request to recalculate the results of the May 2014 BRA.

¹² Whitepaper, *supra*, at p.6

¹³ Whitepaper, *supra*, p.3.

order to comply with the law of the land. The Commission has a duty to uphold the law and, in the wake of this decision, fulfilling that duty requires affirmative and thoughtful leadership.

As a result of the stay issued on October 20, 2014, PJM and the Commission have been granted a small window to prepare for this significant change. PJM has indicated that it intends to follow its Tariff unless directed otherwise by the Commission. PJM's current Tariff not only allows, but requires, PJM to compensate demand response in both the energy and capacity markets. PJM's current Tariff also compensates demand response in the energy market consistent with FERC Order 745, which the court specifically vacated. Moreover, as discussed above, the participation of demand response on the wholesale capacity market must also end following the issuing of the court's mandate.

Allowing PJM to continue to follow unlawful tariffs should be a very unsettling proposition for the Commission given the tremendous legal exposure that such an approach places on PJM and other RTOs. Firm leadership from the Commission that articulates a legally viable vision for demand response moving forward will allow PJM and other markets to confidently alter their practices to respond to the EPSA decision. Absent firm leadership from the Commission, all RTO markets are at great risk. If certain questions are not answered, and if certain tariff provisions are not changed, additional market-stifling litigation is likely. Pursuing a creative or risky regulatory/legal response to the *EPSA* decision only increases the likelihood of litigation and prolongs the corrosive market uncertainty.

In addition, the risk of having to undo previously settled market outcomes is very real. The Commission is on notice as to the court's view of the law. If the Commission allows RTOs to continue to enforce unlawful tariff provisions, the courts will likely be put in the position of enforcing the law that the Commission is unwilling to uphold, leading to untenable market

dynamics and the possible imposition of refunds that will certainly lead to market default. The Commission should avoid going down this road at all costs.

Accordingly, P3 urges the Commission to use the extra time afforded by the court's stay to articulate a clear, viable and legal path forward. Among other things, the Commission should work with PJM to develop an orderly plan to:

1. Identify all tariff provisions that compensate demand response for reductions in the energy market so they can be immediately suspended following the issuance of the court's mandate.
2. Identify and prepare changes for all tariff provisions that address demand response participation in the capacity market in future incremental and base residual auctions so that changes may be in place prior to PJM's February 2015 Incremental Auction for the 2015/16 delivery year.
3. Provide clear direction on matters related to demand response participation in prior capacity auctions for delivery years that have yet to occur.
4. Require all RTOs, including PJM, to take appropriate steps to protect its market participants from financial harm. These steps could include putting all prospective payments due demand response providers into escrow, or demanding additional credit support from demand response providers.

II. CONCLUSION

For the foregoing reasons, P3 requests that the Commission consider its comments and provide the immediate, requisite clarity for demand response participation in the PJM energy and capacity markets.

Respectfully submitted,

On behalf of the PJM Power Providers
Group

By:

/s/ Glen Thomas

Glen Thomas

Laura Chappelle

GT Power Group

1060 First Avenue, Suite 400

King of Prussia, PA 19406

gthomas@gtpowergroup.com

610-768-8080

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