UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Demand Response Compensation In Organized Wholesale Energy Markets	)	Docket No. RM10-17-003
FirstEnergy Service Company Complainant,	)	
v.	)	Docket No. EL14-55-000
PJM Interconnection L.L.C., Respondent.	)	

MOTION ON REMAND OF *EPSA v. FERC*
AND
COMMENTS IN OPPOSITION ON COMPLAINT

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] the NRG Companies[2] file these comments urging the Commission to promptly respond to the *Electric Power Supply Association v. FERC* ("*EPSA*"), Case No. 11-1486 (D.C. Circuit 2014) decision, and the related complaint filed by FirstEnergy Services Company against PJM Interconnection, Inc., on May 23, 2014, and amended September 9, 2014.

I. Recommendation on Remand.

The *EPSA* decision has injected an extreme level of uncertainty into the organized energy markets. This uncertainty comes as the reliability of the United States electrical infrastructure is already stressed by multiple environmental rule changes, uncertainty about future changes to

[1] 18 C.F.R. §§ 385.214 & 385.2008 (2012).

[2] The NRG Companies that are parties to this proceeding are NRG Power Marketing LLC and GenOn Energy Management, LLC.

those rules, rapid technology changes, and the rise of natural gas as a preferred electricity generation fuel. To limit the corrosive effects of this uncertainty on reliability and consumer costs, NRG urges the Commission to adopt a clear roadmap for how it intends to implement the *EPSA* decision as soon as possible. Specifically, NRG recommends that the Commission adopt a clear two- to three-year glide path for transitioning demand response from a supply-side resource to a state-policy driven modifier of peak load needs. The NRG Companies make these recommendations balancing the needs of our large wholesale, demand response and retail positions.[3]

NRG recommends that the Commission establish three separate "Tasks" within its Proceeding on Remand, each with its own timeline:

Task #1: Direct that DR resources should not assume new obligations in the upcoming forward capacity auctions for the 2018/2019 delivery year.

Task #2: Provide DR resources with existing capacity supply obligations clarity on their performance obligations before the next incremental auctions in early 2015.

Task #3: Require ISOs/RTOs to develop rules for reflecting retail demand response activity in setting capacity market requirements by no later than June 1, 2016.

NRG submits that the Commission should begin these efforts immediately and not wait until the ultimate conclusion of the *EPSA* litigation. Establishing a clear "contingency" path forward in the event that the *EPSA* decision stands is the best means of maintaining system reliability and containing ultimate consumer costs. If the Commission ultimately seeks *certiorari* at the expiration of the D.C. Circuit's stay and prevails before the Supreme Court, then it can reinstate the tariff provisions that are the subject of this proceeding. In the meantime,

[3] NRG owns over 50,000 MW of generation nation-wide, serves several million retail customers in Texas and in the competitive market, and through its affiliate, Energy Curtailment Specialists ("ECS"), manages several thousand megawatts of demand response in the organized markets.

however, the Commission should prepare for the possibility that demand response will become a State-policy driven product.

Specific recommendations regarding each task are laid out below.

Task #1: Clarify that DR Resources Should Not Assume New Forward Delivery Obligations.

The single most immediate source of uncertainty in the markets is whether the ISOs/RTOs should allow DR resources to take on *new* obligations in the 2015 forward capacity auctions. The Commission should prioritize answering this question first.[4] NRG recommends that the Commission direct that, in light of the Court's decision, demand response resources should not participate in the upcoming annual capacity auctions in PJM, NYISO and ISO-NE.

There are two main justifications for the Commission to take the conservative "no regrets" approach of assuming that demand response will not be eligible to participate as a supply-side resource in the 2018/2019 delivery year. *First*, system reliability needs make it critical that the Commission act promptly. As the Commission well knows, the soon-to-be implemented Mercury and Air Toxics Standards, the overlay of the Environmental Protection Agency's 111(d) proposal, and the societal move towards more environmentally sustainable generation technologies are driving major changes to our nation's generation portfolio. NRG (as well as other generation owners) needs market certainty *today* in order to determine where to deploy capital to keep plants online. Given the long lead-time associated with these investments, it is critical that the ISOs and RTOs procure resources today sufficient to meet peak load in 2018/2019. If demand response participates in the upcoming auction, but then is ruled ineligible

[4] Given the difficult situation the Commission finds itself in, the Commission should consider the old adage that "when in a hole, the first thing to do is stop digging." Here, ruling on whether demand response entities can take on an obligation in the 2018/2019 delivery year *prior* to the upcoming auctions will help avoid making a bigger problem later.

to deliver on those obligations, grid reliability could be compromised and ratepayers will be faced with expensive last-minute fixes to meet the system's reliability needs.

Second, demand response providers are right now subject to must-offer obligations into the capacity markets, and will remain subject to those obligations as long as the tariffs remain unchanged. This situation forces these providers to take on obligations over which the Court has determined FERC has no jurisdiction. Without further Commission guidance prior to the February 2015 ISO New England Forward Capacity Auction, the May 2015 PJM Base Residual Auction and the NYISO Six Month Strip Auction, which closes on March 31, NRG and all other market participants are faced with the untenable situation of having to potentially bid non-jurisdictional demand-side resource product into the 2015 auctions with an uncertain prospect of being able to meet their delivery year obligations.

To accomplish Task #1 on the most expedited schedule, NRG recommends that the Commission direct its jurisdictional utilities as follows:

> No less than 60 days prior to the next regularly scheduled annual capacity auction, each ISO/RTO with a demand response program shall file to temporarily suspend tariff provisions that allow demand-side resources to assume new capacity supply obligations for future delivery. That suspension shall remain in effect until such time as there is a final resolution of the *EPSA* case, including the expiration of the Stay.

Such a compliance obligation would provide each ISO/RTO the maximum amount of time and flexibility to develop and implement revised capacity market rules prior to their next auctions. Such timely action will allow the Commission to properly address the fallout of the *EPSA* decision, inform market participants of the rules, and put the entirety of the Commission's jurisdictional markets on more solid footing.

Task #2: Provide the Market with a Roadmap for Unwinding Existing DR Capacity Obligations.

The Commission's second priority should be to direct each ISO/RTO to put forward a plan to address the status of demand-side resources with supply obligations in the 2015/16, 2016/17 and 2017/18 delivery years.[5] NRG recommends that the Commission address Task #2 on a (slightly) longer timeframe by providing a recommended framework for the transition years and requiring each ISO and RTO to work with stakeholders and put forward a proposal for how to treat these units within 120 days of the issuance of an order.

If the Commission issues such a directive before December 1, 2014,[6] the status of demand-side resources with pre-existing obligations can be resolved prior to the start of the 2015/2016 delivery period, which starts on June 1, 2015. This compliance plan also allows the Commission to change course should the Supreme Court agree to hear any appeal of the *EPSA* case. Specifically, NRG recommends that the Commission require each ISO/RTO to take action as follows:

> Within 120 days of the issuance of this order, each ISO/RTO with a demand response program shall propose an up to three-year transition plan for demand-side resources with existing capacity market obligations in the 2015/2016, 2016/2017 and 2017/2018 delivery years.
>
> Each ISO/RTO shall work with demand response providers to develop a transitional mechanism for demand response resources to:
>
> 1. perform on their obligations (without any energy market payments),
> 2. buy out of their positions, or
> 3. eliminate the capacity supply obligation and all associated payments.
>
> That suspension shall remain in effect until such time as there is a final resolution of the *EPSA* case, including the expiration of the Stay.

[5] New York, with its monthly auction structure, will obviously have a slightly different compliance path.

[6] A December 1, 2014, order would give each ISO or RTO time to meet the 120-day compliance deadline, file its proposal, and allow 60 days for the proposal to go into effect before June 1, 2015.

While some parties will undoubtedly argue that three years to unwind existing positions is too long, such a period is reasonable due to the complexity of the challenge faced by the ISOs and the end date of pre-existing obligations in the markets with forward capacity auctions.

Task #3: Clarify Rules for Including State-Driven Demand Response Programs in Setting Peak Load Requirements.

The Commission should require each ISO and RTO to propose new provisions for recognizing state-jurisdictional demand response programs in their load forecasts within a year of the issuance of the Commission's Proceeding on Remand. Requiring each ISO/RTO to clarify its plan for reflecting retail demand response has twin benefits: *first*, it provides State regulators a framework for how to fill the jurisdictional vacuum left by the *EPSA* decision. *Second*, it provides each ISO and RTO up to a year to develop a comprehensive program to incorporate measurement and verification criteria for forecasting participation in those State-jurisdictional load modification programs, including how that forecasted reduction should be incorporated into each market's installed reserve margin calculations. We recommend that the Commission direct:

> Within 1 year of the issuance of this order, each ISO/RTO with a demand response program shall file a revised method of determining peak load contribution and Installed Reserve Margin, which shall expressly include verifiable and measurable demand response participating in a State-sponsored program.

Mandating that each ISO and RTO recognize the contribution of retail demand response programs in the setting of their installed reserve margin and peak load forecasts will preserve the participation of these important load-side modifiers, in a manner that is entirely consistent with the jurisdictional boundaries drawn by the *EPSA* Court.

II. Comments in Partial Opposition to FirstEnergy Complaint

At first blush, it seems difficult to argue with FirstEnergy's assertion that the existing PJM market rules are inconsistent with the *EPSA* ruling, and therefore, are no longer just and reasonable. However, NRG respectfully requests that while FirstEnergy has established a *prima facie* case that the existing PJM rules are no longer just and reasonable, the Commission has ample authority to fashion a remedy different from the remedy proposed by FirstEnergy. Two features of FirstEnergy's proposed relief bear special consideration.

A. The Commission Should Decline the Invitation to Resettle the 2014 Base Residual Auction.

For owners of generation in PJM, there may be appeal to FirstEnergy's request to resettle the 2014 BRA. Recalculating 2014 BRA prices to exclude the almost 14,000 MW of demand response resources that cleared in the original BRA would more closely reflect the true amount of supply available in the market. From a purely self-interested point of view, capacity suppliers, including NRG, would stand to substantially benefit from the higher prices and revenues due to all capacity suppliers in the 2017/2018 delivery year. While that has some seductive appeal, the fundamental harm to the market that would result from resettling settled capacity auction prices outweighs any short-term financial benefits.

One of the major criticisms of the wholesale markets is that they can be fraught with regulatory uncertainty, as ISO/RTOs, stakeholders and the Commission tinker on an annual basis with market designs to achieve reliability and efficiency objectives. Investors and market participants understand that rules for these future periods can, and likely will, change. What is entirely untenable, however, is the prospect that a market result that has already happened – prices established, obligations taken on, investments committed or deferred based on auction results – could be re-opened and changed.

Recalculating auction outcomes for the 2017/2018 market would create an untenable situation where resources that did not clear in May 2014 would suddenly find themselves with a capacity supply obligation. For many resources, including coal resources that bid environmental capital expenditure costs into their 2014 BRA offers, there is simply no longer time to meet a June 1, 2017 delivery obligation. New resources suddenly saddled with a capacity supply obligation likewise are unlikely to meet an unanticipated new obligation.

The Commission should be resolute in opposing any effort to re-open and re-settle market results that have already been completed. Adding additional uncertainty to settled capacity auctions – up or down – is simply corrosive to well-functioning capacity markets and should be avoided at all costs.

B. Timeline for Removing DR from the PJM Markets.

The relief that FirstEnergy requests – the immediate removal of all demand response resources from the PJM tariff and manuals – is too blunt an instrument to be used in the sophisticated and complex PJM capacity market. Instead, the Commission should adopt a two-to three-year deliberate process for unwinding DR from the jurisdictional markets, as discussed above. While NRG is sympathetic to FirstEnergy's desire to see the Commission come into compliance with the *EPSA* decision as quickly as possible, the Commission should instead clearly delineate a deliberate – but not rushed – glide path towards compliance with *EPSA*.

October 22, 2014

Respectfully submitted,

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October 22, 2014

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CERTIFICATE OF SERVICE

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

Dated at Princeton, New Jersey, this 22nd day of October 2014.

/s/ Kathryn Wig
Kathryn Wig