

those circumstances limited to the 2015/2016 Delivery Year. That said, it is vitally important that the waiver is limited to the Third IA for the 2015/2016 Delivery Year, and not set a precedent or expectation that the tariff rules dictating both RPM and IA procurement and release parameters are fungible based on varying resource conditions year to year.

I. BACKGROUND

As outlined in the PJM Filing, recent developments have raised concerns for the RTO regarding the level of secured capacity resource commitments procured for the 2015/2016 Delivery Year (“2015/2016 Delivery Year”). In part, PJM’s concerns are based on the level of capacity consisting of Demand Response resources (“DR”) due to risks posed by the recent federal appellate decision in *Electric Power Supply Association v FERC*³ (“*EPSA v FERC*” or “*EPSA*”) and pending complaints and proposals related to that decision, which precludes the participation of supply-side DR in the wholesale energy market because DR is a retail product that is outside of FERC’s jurisdiction over wholesale markets as discussed below. PJM emphasizes that the possible outcomes from the ongoing litigation in the least create uncertainty in the market on the status of DR and whether and how DR resources may be treated as Capacity Resources during the 2015/2016 Delivery Year. As explained in the filing by Mr. Michael J. Kormos, PJM Executive Vice President – Operations, “Given where we are today, the potential adverse impacts of *EPSA* on Demand Resources simply falls in the category of foreseeable risk,”⁴ explaining that whether PJM or others agree with whether or how the *EPSA* decision may be implemented, it raises foreseeable risks that

³ 753 F.3d 216 (D.C. Cir. 2014) (“*EPSA*” or “*EPSA v FERC*”).

⁴ PJM Waiver Filing at P 3 quoting Kormos Affidavit at ¶ 10.

PJM must address. Kormos estimates that over 11,000 MW of DR capacity resources would be effectively nullified before the start of the 2015/2016 Delivery Year,⁵ which begins June 1, 2015.

Exacerbating PJM's concerns over a potential loss of DR are expectations of a "record level" of generation retirements "mostly related to environmental requirements that take effect in spring 2015."⁶ These retirements compound the concern that it will be challenging if not difficult to replace committed capacity DR resources that may not be available for the 2015/2016 Delivery Year. With the overall reduction in available capacity resources, the filing states that "the PJM Region would have a negative reserve margin, i.e., a loss of load."⁷

Therefore, in light of resource adequacy uncertainties for the 2015/2016 Delivery Year, PJM seeks a waiver to apply only to the Third Incremental Auction for the 2015/2016 Delivery Year. That waiver would allow PJM to suspend its tariff provision that requires it to offer to release previously committed capacity because the final peak load forecast for the 2015/2016 Delivery Year decreased from the prior forecast, thereby reducing the Reliability Requirement for the PJM region. In this instance, PJM would be required to offer in to the Third IA approximately 2,000 MWs of previously committed capacity for release of that commitment.

PJM states that prudent planning requires it to develop a contingency allowing for the retention of all currently committed capacity, explaining,

The release of 2,000 megawatts of previously committed capacity would indeed make the region's resource adequacy markedly worse, under a scenario where PJM also loses the ability to compensate and retain the over 11,000 megawatts of Demand Resources that are committed for

⁵ *Id.* at P 2.

⁶ *Id.* at P 4.

⁷ *Id.* at P 4.

summer 2015. Similarly, release of that capacity also would make a scenario like that seen last winter even worse if it recurred next winter, given the high level of generation retirements already expected for the 2015/2016 Delivery Year. Releasing that capacity in the face of these risks would be imprudent; PJM therefore urges the Commission to waive the tariff rule that compels PJM to offer that release.⁸

To support its request, PJM explains that the waiver is of limited scope, applying to only one Incremental Auction, addresses a concrete problem that requires a remedy, and does not harm third parties.

II. COMMENTS

The proposed waiver requested by PJM presents concerns for market participants that such a tool could be precedential, or utilized beyond the limited proposal in the instant proceeding. In light of stated resource adequacy concerns and the clear risk posed by the *EPSA v FERC* decision as discussed below, EPSC does not oppose PJM's request for a waiver to address this specific set of concerns which will persist for a limited duration – the 2015/2016 Delivery Year. The factors cited by PJM pose uncertainties for the PJM Region, and a limited, one-time waiver to retain capacity which has *already been committed* through a market mechanism (RPM) poses fewer market distorting affects than other approaches to maintain an adequate level of resource adequacy. Additionally, as Mr. Kormos notes, it is prudent for the RTO to avoid worsening the situation and associated risk, and instead find ways to minimize or mitigate that risk and any consequences of such.⁹

⁸ *Id.* at P 4.

⁹ *Id.* at P 14.

As has been addressed in several recent proceedings before the Commission, the *EPSA v FERC* decision vacates Order No. 745,¹⁰ a rule that requires independent system operators and regional transmission operators to pay demand response providers for energy at the full locational marginal price (“LMP”), with no offset for the avoided cost of the retail energy purchase. Based on the reasoning in the D.C. Circuit for the U.S. Court of Appeals’ *EPSA v FERC* decision,¹¹ FirstEnergy Service Company filed a complaint with the Commission arguing that the decision applies with equal force to RPM and other capacity markets as it does to energy markets.¹² In this context, and without presuming or prejudging the outcome of either the pending litigation of *EPSA v FERC* or the disposition of the related FirstEnergy Complaint, PJM has acknowledged the “foreseeable” risk that DR resources going forward will be required to play a different role in wholesale energy and capacity markets. As that role is currently undefined, unknowable and uncertain, PJM has thoughtfully attempted to develop contingency measures and approaches to account for possible or foreseeable changes

¹⁰ *Demand Response Compensation in Organized Wholesale Energy Mkts.*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (“Order No. 745”), *on reh’g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012).

¹¹ In relevant part, the decision found that the Commission lacks jurisdiction to regulate “demand response.” (*EPSA*, 753 F.3d at 220) Noting that the Commission’s regulations set forth just a “single definition of ‘demand response’” (*Id.* citing 18 C.F.R. § 35.28(b)(4) (2012)), the D.C. Circuit rejected the notion that reductions in consumption can be considered “wholesale sales” and thus subject to the Commission’s jurisdiction (*Id.* at 220-224). The D.C. Circuit held that “[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.” (*Id.* at 223 (emphasis in original)) While the Commission enjoys broad discretion to regulate “practices affecting the wholesale market,” the D.C. Circuit explained, it may “not directly regulat[e] a matter subject to state control, such as the retail market.” (*Id.* at 222. *See also id.* at 224 (“Because [Order No. 745] entails direct regulation of the retail market – a matter exclusively within state control – it exceeds the Commission’s authority.”))

¹² *See FirstEnergy Service Co. v. PJM Interconnection, L.L.C.*, Docket No. EL14-55-000, Complaint of FirstEnergy Service Company, (May 23, 2014); Amended Complaint of FirstEnergy Service Company, (September 22, 2014) (filed in the same proceeding) (“FirstEnergy Complaint”).

to their DR resource commitments.¹³ EPSA views the instant waiver request as one of the contingency methods allowing PJM to address *short term* resource adequacy uncertainties.

Important to the context of EPSA's view of the instant waiver request is the fact that PJM submitted a separate, related filing to the Commission on the same day. That filing seeks to revise the RTO's tariff pursuant to FPA Section 205 ("Tariff Revision Filing") to allow it to enter into and recover the costs of capacity agreements secured outside of its RPM.¹⁴ In that proceeding, PJM explains that it needs to utilize the proposed out-of-market contracting approach, one that is akin to Reliability Must Run ("RMR") arrangements, for the same underlying resource adequacy concerns as those cited in the instant proceeding. These out-of-market contracts would be paid through uplift payments recovered from LSEs; each contract will be filed for FERC approval on a case-by-case basis; and the tariff provisions which allow for these contracts cover the 2015/2016 Delivery Year only.

In light of the concurrent Tariff Revision Filing, the waiver request is a more reasonable way to address the stated resource adequacy concerns. In contrast, the proposed tariff revisions supporting out-of-market contracts represent a clear departure from competitive market approaches to ensure reliability for PJM. While unique situations may arise, it is *imperative* that the system operator of the nation's largest competitive wholesale power market explore and exhaust all market approaches at its disposal. While the waiver request does not represent a robust market tool to address

¹³ See for example PJM white paper "The Evolution of Demand Response in the PJM Wholesale Market," issued October 6, 2014, available: <http://www.pjm.com/~media/documents/reports/20141007-pjm-whitepaper-on-the-evolution-of-demand-response-in-the-pjm-wholesale-market.ashx>. Additionally,

¹⁴ *PJM Interconnection, L.L.C.*, Docket No. ER15-739-000 (filed December 24, 2014) ("PJM Tariff Revision Filing").

resource adequacy, in light of other proposed approaches it is a one that relatively minimizes distortion of the market as the capacity which would not be released for 15/16 Delivery Year has already been committed through a market mechanism for the 2015/2016 Delivery Year.

Therefore, the waiver request may be viewed as a contingency tool to address the foreseeable risk to the role of DR in PJM's markets and related resource adequacy concerns in light of generation retirement expectations. That said, should it be approved, it is vitally important that the waiver is limited to the Third IA for the 2015/2016 Delivery Year, and not set a precedent or expectation that the tariff rules dictating both RPM and IA procurement and release parameters are fungible based on varying resource conditions year to year.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully requests that the Commission consider these comments in developing its Order on the PJM Filing.

Respectfully submitted,



Nancy Bagot, Vice President of Regulatory Affairs
Sharon Theodore, Director of Regulatory Affairs
Electric Power Supply Association
1401 New York Avenue, NW, 12th Floor
Washington, DC 20005
(202) 628-8200
NancyB@epsa.org

Dated: January 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., January 14, 2015.

A handwritten signature in cursive script, appearing to read "N. Bagot", positioned above a horizontal line.

Nancy Bagot, VP of Regulatory Affairs