

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

FirstEnergy Services Company,

v.

Docket No. EL14-55-000

PJM Interconnection, L.L.C.

**PROTEST OF THE PENNSYLVANIA  
PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PAPUC) herein files a Protest pursuant to Rule 211 of the Rules of Practice and Procedure<sup>1</sup> to the Complaint of FirstEnergy Service Company (FirstEnergy) filed against PJM Interconnection, L.L.C. (“PJM”) on May 23, 2014, and amended on September 22, 2014. In its Amended Complaint, FirstEnergy requests that the Federal Energy Regulatory Commission (FERC) issue an order requiring the removal of all portions of the PJM Tariff which allow or require PJM to include demand response as a supply component to PJM’s capacity markets with a refund effective date of May 23, 2014.

**I. INTRODUCTION**

On May 23, 2014, the U. S. Court of Appeals for the D.C. Circuit in *Electric Power Supply Association v. Federal Energy Regulatory Commission et al.* (EPSA v. FERC) vacated and remanded FERC’s Order 745 governing demand response in the

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<sup>1</sup> 18 C.F.R. §385.211.

wholesale energy market as an invalid encroachment on the states' exclusive jurisdiction to regulate the retail market.<sup>2</sup>

On the same day, FirstEnergy filed its Complaint and requested that PJM be directed to remove all portions of its Tariff allowing or requiring the inclusion of demand response resources in PJM's capacity market as well as a request to delay the release of PJM's 2017-2018 Base Residual Auction (BRA) results pending rehearing of the D.C. Circuit Order.<sup>3</sup> First Energy requested a decision on the Complaint no later than thirty days from its filing. The FERC, in its Notice of this proceeding, established June 12, 2014 as the deadline for filing interventions and protests in this matter.

On June 5, 2014, FirstEnergy filed a Motion to extend the comment date to 30 days after its anticipated amended complaint is filed. The FERC, in a Notice issued June 11, 2014, extended the comment deadline to 30 days after the submission of an amended complaint.

On September 22, 2014, FirstEnergy filed its Amended Complaint, again requesting that PJM be directed to remove all provisions in PJM's tariff, agreements, and business manuals that authorize or require PJM to compensate demand resources as capacity suppliers. FirstEnergy also requests that PJM be directed to recalculate the results of PJM's May 2014 BRA for the 2017/2018 delivery year by (i) removing demand

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<sup>2</sup> 2014 U.S. LEXIS 9585.

<sup>3</sup> On September 17, 2014, the D.C. Circuit issued Orders denying all Petitions for rehearing *en banc*. Subsequently, on September 22, 2014, Motions to Stay the Issuance of Mandate were filed by the FERC and Intervenors in support of the FERC. On October 20, 2014, the D.C. Circuit issued an Order denying the Motion to stay the issuance of mandate filed by the Intervenors, but granting the FERC's motion to stay issuance of the mandate through December 16, 2014. This Order also directed the Clerk of the D.C. Circuit to withhold issuance of the mandate pending the Supreme Court's final disposition if the FERC petitions the Supreme Court for writ of certiorari.

response resources from the PJM capacity supply pool, (ii) leaving the offers of actual capacity suppliers unchanged, and then (iii) determining which capacity suppliers clear the auction on the basis of the offers submitted. FirstEnergy expressly states that it is not seeking to invalidate the results of capacity auctions that occurred prior to May 23, 2014, but reserving the right to redress those jurisdictional errors in other proceedings. The PAPUC herein files its Protest in this matter.

## II. SUMMARY OF THE PROTEST

FirstEnergy's Amended Complaint requests FERC to issue an order removing all tariff provisions that allow or require demand response to be included in the PJM capacity auction based on the recent holding in the *EPSA v. FERC* decision. FirstEnergy's requested relief is premature as the D.C. Circuit has issued an Order granting the FERC's motion to stay the issuance of the mandate through December 16, 2014, pending the FERC's petitioning for writ of certiorari from the United States Supreme Court to review the *EPSA v. FERC* decision. More significantly, granting FirstEnergy's Complaint misinterprets the *EPSA v. FERC* holding. The D.C. Circuit's opinion relied upon facts and law that are not present in the current proceeding. The D.C. Circuit found that demand response was not a sale of electricity at wholesale and therefore, did not fall within the FERC's authority to regulate such sales under § 201 of the Federal Power Act (FPA). On the contrary, the current proceeding involves the capacity market, which is designed to promote reliability, through the FERC's authority under § 215 of the FPA, and does not involve any sales of electricity. Thus, the current

proceeding is both legally and factually distinguishable from the *EPSA v. FERC* opinion FirstEnergy relies upon. Finally, on a more practical level, granting FirstEnergy's requested relief will undo the efforts of all parties in the PJM capacity market process that have resulted in the successful inclusion of demand resources into the capacity auction process with potentially disruptive results to the future functioning of those capacity markets.

### **III. PROTEST**

#### **A. FirstEnergy's Complaint Is Premature and Should Be Dismissed**

In its Amended Complaint, FirstEnergy requests that the Commission issue an order directing PJM to remove all Tariff provisions that allow or require demand response to be included in the PJM capacity market. In addition, FirstEnergy requests that the Commission issue an order directing PJM to recalculate the results of the 2017-2018 Base Residual Auction. FirstEnergy makes these demands based on the Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in the *EPSA V. FERC* matter. For the reasons expressed below, the PAPUC believes that FirstEnergy's demands and its reliance on the recent D.C. Circuit Opinion in *EPSA v. FERC* in support of its demands are inappropriate, premature and unfounded.

As FERC is well aware, the *EPSA v. FERC* matter involved the appeal of FERC's rulemaking at Docket No. RM10-17, where FERC required all Regional Transmission Organizations and Independent System Operators (RTOs/ISOs) to pay demand response

resources that participate in day-ahead and real-time wholesale energy markets the full locational marginal price for each megawatt-hour of demand response, provided that the demand response resource replaces a generation resource in a cost-effective manner. In its 2-1 Opinion, the D.C. Circuit held that Order 745 was an attempt by FERC to directly regulate the retail energy market and the Court vacated the rule in its entirety as unauthorized agency action. While the D.C. Circuit issued its Judgment on May 23, 2014, it also issued an Order that withheld the issuance of its mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc*.

The PAPUC contends that, from a strictly procedural perspective, FirstEnergy is clearly “jumping the gun” in requesting the FERC to require PJM to remove all tariff provisions related to demand response without the parties having the opportunity to exhaust their procedural options which include seeking a writ of certiorari from the United States Supreme Court. While the D.C. Circuit, on September 17, 2014, denied all Petitions for Rehearing, filed by the FERC, PAPUC and other Intervenors, the FERC and Intervenors in support of FERC filed on September 22, 2014, Motions to Stay the Issuance of the Mandate for 90 days, pending the filing of Petitions for Writ of Certiorari to the U.S. Supreme Court. A response to these Motions was filed by the Petitioners on September 30, 2014. On October 20, 2014, the D.C. Circuit granted the FERC’s motion to stay issuance of the mandate through December 16, 2014, and through the Supreme Court’s final disposition if the FERC files a petition for writ of certiorari with the Supreme Court. As such, the FERC’s Order No. 745 still stands and may yet be upheld by the Supreme Court and reliance on the rationale contained in the D.C. Circuit decision

in *EPSA v. FERC* is equally pre-mature as it may yet be reversed by the Supreme Court. Disruption of the already completed RPM BRA results now, only to be again disrupted if the D.C. Circuit decision is overturned, would cause unnecessary and irreparable harm to the capacity market and those who participate in and rely upon such an integral component of grid reliability.

As will be explained *infra*, the implications of removing demand response resources from PJM's capacity auction has the potential of disrupting the stability of the PJM capacity markets with additional detrimental impacts on system reliability in the event of future hot weather or polar vortex cold weather events, as well as during transmission and generation outages. The FERC should refrain from granting the extreme and unprecedented relief sought by FirstEnergy. FirstEnergy will have ample opportunity to file a separate complaint at the appropriate time following exhaustion of the appellate process. On this basis alone, the FirstEnergy Complaint should be dismissed.

**B. FirstEnergy's Complaint Misinterprets the Scope of the *EPSA* Decision**

In addition, the PAPUC contends that the *EPSA* opinion only applies to the Commission's rulemaking relating to the day-ahead and real-time wholesale energy market, a market that involves the actual sale of electric energy at the wholesale level. The facts and issues before the D.C. Circuit were limited in scope to the rulemaking at issue and its impact on the day-ahead and real-time wholesale energy markets. By contrast, FirstEnergy requests that the Commission apply the reasoning and ruling in the D.C. Circuit majority opinion to the PJM wholesale capacity market, which does not

involve the sale of any electric energy, but simply an obligation to offer electric energy or demand response. On this basis alone, FirstEnergy's Complaint should be dismissed. However, the PAPUC believes that FirstEnergy's Complaint has even broader negative ramifications for the PJM capacity market.

The primary purpose of the capacity market is to ensure system reliability of the bulk power system. The application of the D.C. Circuit Court's reasoning in *EPSA*, which was based on facts and issues limited to electric sales at wholesale, to the much broader issue and circumstances surrounding the reliability of the entire bulk power system is contrary to prior D.C. Circuit decisions, is inappropriate, and irrational. There are many factual and legal issues that differentiate the capacity market from the wholesale energy market.

One key difference is that, under the Reliability Pricing Model (RPM) rules, demand response is not required to offer demand reductions in either the day-ahead or real-time wholesale energy markets. Demand response, however, under the RPM rules, must be available to respond to system conditions that threaten system reliability during certain times of the year and day. The Commission has express authority under Section 215 of the FPA, 16 U.S.C. § 824o, to ensure the reliability of the bulk power system. The D.C. Circuit was not presented with these facts nor the legal authority in the case relied upon by FirstEnergy. Thus, one cannot apply that opinion's holding and reasoning to require elimination of all demand response resources from the PJM capacity market.

In point of fact, if the Commission were to apply the reasoning in the majority opinion as FirstEnergy proposes, a far broader and comprehensive review and result

would flow from that reasoning. In reaching its conclusion, the Court determined that demand response is part of the retail market because it involves retail customers deciding whether to purchase electricity at retail and their levels of retail electric consumption. The D.C. Circuit found that States retain exclusive authority to regulate the retail market and concluded that, without a clear and specific grant of jurisdiction, FERC cannot regulate areas left to the states.

The D.C. Circuit was not persuaded by FERC's argument that it has jurisdiction over all participants in the wholesale market, pursuant to Sections 205 and 206 of the FPA, because such participation affects the rates generators receive for the sale of their electricity at the wholesale level and further held that the "direct participation theory" proffered by the Commission assumes the Commission can lure non-jurisdictional resources into the wholesale market in the first place to create jurisdiction. The majority believed that such an interpretation could authorize FERC to regulate any number of areas, such as steel, fuel and labor markets, as all of these markets can affect the price paid to generators for the sale of their electricity at wholesale.<sup>4</sup> The Court further determined that direct participation in the wholesale market was not an adequate limit on FERC's authority as such participation can be induced with the appropriate incentives and concluded that, in Order 745, FERC was doing indirectly what it could not do directly. For as the Court stated, "[t]he broad affecting language of §§ 205 and 206 does not erase the specific limits of § 201."<sup>5</sup>

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<sup>4</sup> *EPSA v. FERC*, No. 11-1486, slip op. at 8 (D.C. Cir., May 23, 2014).

<sup>5</sup> *Id.* at 9.

The capacity market in PJM, as currently constructed, uses capacity payments to induce the production of new generation and to induce existing generation to offer their generation into the day-ahead and real-time wholesale energy market during the energy year. Under the capacity market rules, those entities that clear the market receive a payment for each megawatt of capacity they offer at the market clearing price, regardless of what that entity bid in the capacity market, for each day of the year. Under this construct, the FERC can be said to be establishing rates through the capacity market, similar to how rates are set in the day-ahead and real-time energy markets, to induce or lure generation into the market.

The FERC, however, has no authority to order the construction of generation facilities. In fact, Section 215(i)(2) of the FPA, 16 U.S.C. § 824o(i)(2), specifically states that “[t]his section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity....” As such, if the reasoning in the D.C. Circuit majority opinion is applied to the capacity market as FirstEnergy requests, the FERC’s sanctioning of the capacity market itself, is *ultra vires* agency action, and must be vacated insofar as the FERC would be using the capacity market payments, as it did in the rulemaking, to do indirectly what it cannot do directly, namely luring entities to build new generation or offer their existing generation capacity into the energy markets.

Nevertheless, the D.C. Circuit, in *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978) and *Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009), has already ruled that the FERC did not exceed its jurisdiction in

establishing the capacity market. In *Municipalities of Groton*, the D.C. Circuit found that a deficiency charge imposed by NEPOOL to incent the construction of generation where it is needed was within the FERC's authority as it "affects the fee that a participant pays for power and reserve service," even though FERC is prohibited under Section 201 of the FPA from regulating generation facilities. *Municipalities of Groton*, 587 F.2d at 1302. Likewise, in *Connecticut Dep't of Pub. Util. Control*, the D.C. Circuit held that the FERC's "[d]etermination of the [Installed Capacity Requirement ("ICR")] affects rates within the Commission's jurisdiction and, in evaluating whether that determination is just and reasonable, the Commission neither regulates generation facilities in violation of Section 201 nor runs afoul of any other provision of the [FPA]." 569 F.3d at 485.

The D.C. Circuit in *Connecticut Dep't of Pub. Util. Control* further noted that "[Load Serving Entities ("LSEs")] have various means of responding to the incentives produced by increasing the ICR short of building new capacity," such as seeking "capacity from interconnected utilities outside the New England power system or 'demand response' contracts where users are compensated for committing to use less electricity during shortages." 569 F.3d at 482. The D.C. Circuit went on to find that as the ICR affects what the ISO charges member utilities, the FERC is simply ensuring that those rates are just and reasonable, which is within the FERC's authority under Section 206 of the FPA. 569 F.3d at 483. Accordingly, the PAPUC asserts that the D.C. Circuit, through these two decisions, has already determined that the PJM capacity market, as constructed, with demand response, is permitted under the FPA.

The PAPUC believes that the reasoning relied upon by the D.C. Circuit majority to vacate the FERC Order 745 rulemaking and the facts of that case are distinguishable from the law and facts presented in the instant FirstEnergy complaint. The PAPUC contends that the FERC and PJM have attempted to appropriately balance the ability of supply and demand to participate in the capacity market to promote and ensure system reliability and that the FERC did so within its authority under Section 215 of the FPA, 16 U.S.C. § 824o. As pointed-out above, the D.C. Circuit has already determined that the FERC is acting within its authority when it established such a capacity market.

The PAPUC also notes that the capacity market does not in any way involve the sale of electricity at wholesale or retail nor does it directly regulate an area subject to exclusive state control that was the D.C. Circuits overarching basis for vacating Order 745. These facts clearly distinguish this complaint from the *EPSA v. FERC* case and make that cases reasoning inapplicable to this proceeding. Significantly, as pointed out previously, demand response that clears the capacity market is not required to bid into the energy market and is only required to be available to respond to system conditions that threaten system reliability during certain times of the year and day, which is well within the FERC's authority granted under Section 215 of the FPA. Thus, it does not violate the Section 201 prohibitions whereas, the *EPSA* case relied upon by FirstEnergy addressed the wholesale energy market, which directly involves the sale of energy and the price paid for wholesale energy, and did not implicate the reliability of the bulk power system.

Based on the fact that the issues raised by FirstEnergy in its instant complaint are distinguishable from those addressed in the *EPSA* decision relied upon by FirstEnergy,

and the fact that the D.C. Circuit has previously reviewed and upheld the FERC's authority to establish a capacity market, the PAPUC requests that the FERC deny and dismiss FirstEnergy's Amended Complaint.

The PAPUC additionally requests that FirstEnergy's requested relief, removal of all demand resource-related provisions from its tariffs, be denied due to the sheer impracticality and market disruptive effects of granting such relief. The presence of demand response resources in the capacity market auction process has been the result of a lengthy and complex process beginning at the PJM committee level with the input of many stakeholders and culminating with tariff filings at FERC where a multitude of parties have the opportunity to provide further input into the specific details of inclusion of demand resources in the capacity market process. Additionally, since the original inclusion of these resources, PJM has proposed and the FERC has implemented a number of measures designed to fine-tune the operation of demand resources in the capacity market.

FirstEnergy's requested relief would, in one step, undo all of the careful efforts of PJM, the stakeholders and FERC to incorporate a fundamentally valuable component of the capacity market portfolio. FirstEnergy's reckless and ill-considered request presents an unprecedented and wholly unnecessary disruption of the capacity market auction process before the judicial process has been completed. On this basis as well, FirstEnergy's Amended Complaint should be dismissed.

#### IV. CONCLUSION

For the foregoing reasons, the PAPUC respectfully requests that FERC grant its Protest in this proceeding and dismiss the FirstEnergy's Amended Complaint in this matter.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served in accordance with 18 C.F.R. Sec. 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ James P. Melia  
James P. Melia

Dated at Harrisburg, PA this 22<sup>nd</sup> of October, 2014.