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

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| **FirstEnergy Service Company** | **)** | |
| **v.** | **)** | **Docket No. EL14-55-000** |
| **PJM Interconnection, L.L.C.** | **)** | |

# PROTEST OF ADVANCED ENERGY MANAGEMENT ALLIANCE

October 22, 2014

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# PROTEST OF ADVANCED ENERGY MANAGEMENT ALLIANCE

Advanced Energy Management Alliance ("AEMA")[1] respectfully submits the following protest[2] in response to FirstEnergy Service Company's ("FirstEnergy") complaint against PJM Interconnection, L.L.C. ("PJM").[3] FirstEnergy requests that the Commission require PJM to (i) remove "all provisions in PJM's tariff, agreements and business manuals that authorize or require PJM to compensate demand resources as capacity suppliers"[4] and (ii) recalculate the results of the May 2014 Base Residual Auction ("BRA") for capacity in the 2017/2018 Delivery Year by "removing demand response resources from the supply side of the auction and then

[1] AEMA is a trade association that was formed by leading demand response providers and their customers. Members of AEMA have intervened in this proceeding individually and hereby reserve their rights to participate both individually and as members of AEMA. For purposes of the filing, the members of AEMA are: Alcoa, Inc. ("Alcoa"); Comverge, Inc.; Electricity Consumers Resource Council; EnerNOC, Inc.; IP Keys Technologies; Johnson Controls, Inc. ("JCI"); and Wal-Mart Stores, Inc. Alcoa is a member of AEMA and fully supports this Protest of the Complaint. However, unlike most AEMA members, because a major part of its manufacturing business uses electricity as an input to its industrial process, Alcoa has multidimensional interests in demand response in areas outside of the PJM footprint that require explanation in Alcoa's own separate submission. JCI has intervened in this proceeding through its wholly owned subsidiary EnergyConnect, Inc.

[2] AEMA submits this filing pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.212 and 385.214 (2013).

[3] Complaint of FirstEnergy Service Company, Docket No. EL14-55-000 (May 23, 2014) ("Initial Complaint"), as amended on September 22, 2014 ("Complaint").

[4] *Id*. at 4.

running the offers already submitted by other resources to PJM during the auction."[5] AEMA urges the Commission to deny the Complaint for the reasons described below.

## I. EXECUTIVE SUMMARY

Although the Complaint is against PJM, the relief requested is a direct attack on PJM consumers as it would result in approximately $9 billion of additional costs to PJM consumers in the 2017/2018 Delivery Year alone, as estimated by PJM's independent market monitor ("IMM"),[6] and unjustly impact Curtailment Service Providers ("CSPs") that include AEMA members, industrial and commercial businesses that participate in demand response, and consumer.

In its rush to eliminate over 10,000 MW of cost-effective, reliable competition from the PJM capacity market, FirstEnergy completely ignores the far-reaching negative consequences of its requested remedies. FirstEnergy is certainly aware of these consequences, as it cited the benefits of wholesale demand response when making its filing for American Transmission Systems, Inc. to join PJM.[7] CSPs as well as commercial and industrial customers,[8] including AEMA members, have invested hundreds of millions of dollars to develop demand response capabilities and resources in response to the Commission's policies and orders, resulting in more competitive capacity prices. The resulting competitive capacity prices represent the appropriate efficient market outcome at just and reasonable rates.

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[5] *Id*.

[6] *See* Monitoring Analytics, Analysis of the 2017/2018 RPM Base Residual Auction at 2 and 6 (Oct. 6, 2014), *available at* http://www.monitoringanalytics.com/reports/Reports/2014/IMM_Analysis_of_the_2017_2018_RPM_Base_Residual_Auction_20141006.pdf.

[7] *See* Section V.A.1, *infra*.

[8] For ease of reference, depending on the context, the use of "CSP" is intended to capture CSPs which are aggregators of curtailment services, commercial and industrial provider of curtailment services and their intermediaries which offer curtailment service to PJM to participate in the PJM capacity market.

If FirstEnergy had its way, AEMA members' investments, customer investments and the resulting PJM capacity market benefits would be lost, and consumers would be forced to pay billions of dollars per year more in unjust and unreasonable capacity rates while diminishing system reliability. Many demand response providers and consumers use revenues realized from capacity market participation to invest in added demand response and energy efficiency improvements. Elimination of curtailment service participation in capacity auctions will slow down, if not end, such practices.

Moreover, demand response in wholesale markets saves end-use customers billions of dollars per year in costs, representing approximately $500 per household in PJM this past year alone, or $11.8 billion in aggregate. Removing demand response from the wholesale market would place a significant economic burden on many families. Businesses, manufacturers, schools,[9] hospitals, local governments, and other demand response customers have come to rely on demand response payments. Payments received as at least equivalent to the annual salary for over 13,000 teachers, over 10,000 industrial production managers, over 22,000 health care technicians and technologists.[10]

The requested relief would also stymie technological innovations. Billions of dollars have been invested by both private companies and the federal government to enable a smarter electric power grid. Those costs were incurred with an expected set of benefits that will largely evaporate if demand response is removed from wholesale markets. In order to solve our nation's energy challenges, investors need to have confidence that regulatory and legal expectations will be met. Removing demand response from the PJM capacity market would send the opposite message. It

[9] One school district was recently able to restore Advanced Placement classes with their demand response payments.

[10] *See* U.S. Department of Labor, Bureau of Labor Statistics, May 2013 National Occupational Employment and Wage Estimates United States, *available at* http://www.bls.gov/oes/current/oes_nat.htm.

would stifle the growth of nascent technologies like energy storage that depend on monetizing the value such technologies provide through demand response in wholesale capacity markets.

FirstEnergy's requested relief would also cause negative environmental impacts as more fossil fuel would be burned to provide supply where demand response exists today.

Finally, a wide range of states, market operators, and market participants have indicated their desire for the Commission to regulate demand response in restructured markets. [11] Nearly a dozen states supported the Commission's petition for rehearing *en banc* of filed requests for rehearing *en banc* of *Elec. Power Supply Assoc. v. Fed. Energy Reg. Comm'n*, 753 F.3d 216 (D.C. Cir. 2014) ("*EPSA*"), with not one state opposing.

AEMA urges the Commission to stand up for the capacity markets it has nurtured and the investment AEMA members have made in good faith to deliver the promise of curtailment service the Commission and States sought when creating such markets.

While the Complaint should be denied for all of these reasons, the Complaint also is legally and substantively deficient. The sole basis of the Complaint is *EPSA* a two-one split decision in which the court issued a stay of the mandate pending a petition for certiorari and

[11] The Pennsylvania Public Service Commission, Maryland Public Service Commission, California Public Utility Commission, PJM and California Independent System Operator, Inc. American Forest & Paper Association; Coalition of MISO Transmission Customers; EnerNOC, Inc.; EnergyConnect, Inc.; PJM Industrial Customer Coalition; Steel Producers; Viridity Energy Inc.; Wal-Mart Stores, *In* all filed requests for rehearing *en banc* of *Elec. Power Supply Assoc. v. Fed. Energy Reg. Comm'n*, 753 F.3d 216 (D.C. Cir. 2014) ("*EPSA*"). The following parties supported the Commission's petition for rehearing *en banc* of *EPSA*: ISO-NE, New England Conference of Public Utility Commissioners (NECPUC), New England Clean Energy Council, the Massachusetts Attorney General, the Maine Public Advocate, Connecticut Office of Consumer Counsel, New Hampshire Office of Consumer Advocate, Rhode Island Attorney General, New York Public Service Commission, Industrial Energy Consumers Group, National Grid, Northeast Utilities, Pennsylvania Office of Consumer Advocate, New Jersey Division of Rate Counsel, Maryland Office of People's Counsel, Indiana Office of Utility Consumer Counselor, Public Service Commission of West Virginia Office of Consumer Advocate, Delaware Department of Public Advocate in Department of State, Office of the People's Counsel for the District of Columbia, Delaware Public Service Commission, National Electric Manufacturers Association, ELCON, Industrial Energy Consumers of America, Advanced Energy Economy. Finally, the following parties filed as amici in support of the Commission's petition for rehearing *en banc*: Citizens Utility Board; Environmental Defense Fund; Natural Resources Defense Council.

ultimate resolution by the Supreme Court.[12] Given that the sole basis of the Complaint may never be the subject of a mandate, the Complaint is premature and should be dismissed before it consumes vastly more resources than it already has.

Even if the Complaint were not defectively premature, it should be dismissed. In this protest, AEMA demonstrates that the Commission is acting responsibly within its jurisdiction when it regulates the rates, terms and conditions pursuant to which capacity in the form of curtailment service is offered to PJM in the reliability pricing model ("RPM"). Based on the facts and analysis presented in this case, it is clear that this capacity market regulation does not violate the plain language of the section 201(b) of the Federal Power Act ("FPA").[13] The "State Savings Clause" preserves for the states the regulation of local distribution, retail sales of electric energy and generation. Regulation of capacity sales into the RPM from CSPs does not constitute regulation of any one of the three fields reserved for the states.

Moreover, were the State Savings Clause ambiguous, and it is not, then the legislative history of the FPA supports the Commission's exercise of this authority.

*EPSA* was based on a finding that certain demand response services fell within the State Savings Clause because the Commission was regulating activity in "the retail market." AEMA strongly disagrees with the opinion of the two-judge panel and believes that the Supreme Court will reverse *EPSA*. Were *EPSA* the law, however, the Commission should reject the Complaint based on FirstEnergy's superficial claim that sales into the PJM capacity market by CSPs constitute retail market activity subject to the State Savings Clause. The capacity sales that are the subject of this case are unequivocally "wholesale" sales as that term is defined by the FPA.

[12] Order Granting Motion to Stay, Case No. 11-1486 (D.C. Cir. Oct. 20, 2014) ("Order Granting Motion to Stay").

[13] 16 U.S.C. § 824.

Additionally, sales of electric capacity are fundamentally different than the "non-sales" which were the subject of *EPSA*. FirstEnergy assumes *EPSA* applies to all curtailment services without any analysis or factual discussion of the attributes of the capacity product and the nature of the wholesale market for it. FirstEnergy fails its burden of proof.

The U.S. Courts of Appeals have upheld the Commission's exercise of jurisdiction over electric capacity markets. The integral and inseparable nature of curtailment service in the PJM RPM, renders the Commission's regulation of this participation well within the Commission's jurisdiction under FPA sections 205 and 206.[14]

Even if the Complaint were not premature (and it is), statutorily flawed (and it is), and devoid of supporting evidence (and it is), the relief requested in the Complaint must be denied because FirstEnergy fails to satisfy its burden of proving that its proposed remedy would be just and reasonable (it is not).

For the reasons discussed more fully below, AEMA respectfully requests that the Commission reject the Complaint and deny the relief requested therein.

## II. BACKGROUND

Several parties representing the interests of generators petitioned the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "Court") for review of Order No. 745, [15] challenging the Commission's ultimate selection of locational marginal price

[14] 16 U.S.C. §§ 824d & 824e.

[15] *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, III FERC Stats. & Regs., Regs. Preambles ¶ 31,322, *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated and remanded*, *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014). Mandate is being stayed. Order Granting Motion to Stay, No. 11-1486 (D.C. Cir. Oct. 20, 2014).In Order No. 745, the Commission required, among other things, that economic demand response resources participating in the organized wholesale energy markets administered by regional transmission organizations ("RTOs") and independent system operators ("ISOs") be paid the LMP of energy when (1) the demand response resource is capable of replacing a generation resource and (2) dispatch of the resource is deemed to be cost-effective through the application of a "net benefits test." The Commission made clear in Order No. 745, and other orders directing reforms to market rules governing demand response, that its focus was on wholesale

("LMP") as a just and reasonable price as well as the Commission's jurisdiction to enact the reforms set forth therein. The petitioners contended that the FPA reserves to the States exclusive jurisdiction to regulate transactions involving demand response resources.

In *EPSA*, two judges of the three-judge D.C. Circuit panel found that the Commission exceeded its statutory authority in issuing Order No. 745. The Court rejected the Commission's arguments that FPA sections 205 and 206, which require the Commission to ensure that "all rules and regulations *affecting* . . . rates in connection with the wholesale sale of electric energy are 'just and reasonable,'"[16] give the Commission jurisdiction to establish compensation for demand response in wholesale energy markets. Instead, the Court found that the Commission's jurisdiction to regulate practices "affecting" rates does not "trump[] the express limitation on its authority to regulate non-wholesale sales,'"[17] that the Commission's jurisdiction under the FPA is limited to regulation of "the sale of electric energy at *wholesale* in interstate commerce,"[18] and found that Order No. 745 was a "direct regulation of the retail market" and that it therefore exceeded the Commission's statutory authority under the FPA.[19] The Court thus vacated Order No. 745 in its entirety and remanded the proceeding to the Commission.[20] Several parties, including the Commission and AEMA members, petitioned for rehearing *en banc* of the *EPSA* decision, arguing that the majority's opinion departs from Supreme Court and appellate court precedent providing guidance to the Commission on the dividing line, set forth in the FPA,

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demand response, *i.e.*, demand-side resources that participate directly in organized wholesale markets, and that states remain free to authorize and oversee retail demand response programs. *See* Order No. 745 at P 9.

[16] *EPSA* at 220.

[17] *Id*. at 221.

[18] *Id*. at 227 citing 16 U.S.C. § 824(b)(1).

[19] *Id*. at 221.

[20] *Id*. at 225.

between federal and state authority over electricity regulation.[21] On September 17, 2014, the Court denied the petitions for rehearing *en banc*.

On the same day that the Court issued its opinion in *EPSA*, FirstEnergy filed the Initial Complaint in which it acknowledged that Order No. 745 "involved energy markets," but nonetheless maintained that "the Court's rationale necessarily extends to include capacity markets as well."[22] On June 5, 2014, FirstEnergy filed a motion seeking to extend the date for answers, interventions, and protests. The Commission granted FirstEnergy's motion for extension on June 11, 2014.

FirstEnergy filed the amended Complaint on September 22, 2014. The sole basis for the amended Complaint is FirstEnergy's contention that the rationale the majority relied upon in *EPSA* to vacate Order No. 745 "appl[ies] with equal force to the provisions in PJM's tariff, agreements, and business manuals concerning the participation of demand response in PJM's capacity markets."[23]

Also on September 22, 2014, the Commission filed a motion to stay the issuance of the mandate in *EPSA*.[24] The Commission argued that the Court should grant its motion "to preserve the status quo, while the Commission and the Solicitor General, individually and collectively, consider whether to file a petition for a writ of certiorari."[25]

On October 20, 2014, the D.C. Circuit issued an order granting the Motion to Stay. The Court directed the clerk to withhold the mandate through December 16, 2014, and stated that

[21] A wide range of states, market operators and market participants have indicated their desire for the Commission to regulate demand response in restructured markets. *See supra* n.11.

[22] Initial Complaint at 2.

[23] Complaint at 3.

[24] Motion of Federal Energy Regulatory Commission to Stay Issuance of Mandate, No. 11-1486 (D.C. Cir. Sept. 22, 2014) ("Motion to Stay").

[25] *Id*. at 3.

"[i]f, within the period of the stay, [the Commission] notifies the Clerk in writing that a petition for writ of certiorari has been filed, the Clerk is directed to withhold the issuance of the mandate pending the Supreme Court's final disposition."[26]

## III. THE COMPLAINT IS PREMATURE AND SHOULD BE DISMISSED

As discussed above, on October, 20, 2014, the D.C. Circuit granted the Commission's Motion to Stay the issuance of the mandate in *EPSA*. The D.C. Circuit made clear that the mandate cannot be issued prior to December 16, 2014, and stated that if the Commission notifies the clerk that a petition for writ of certiorari has been filed, the mandate will not be issued until the Supreme Court acts on any such petition.

Because the mandate has not yet been issued, the *EPSA* decision - the sole basis for the Complaint - is not yet in effect.[27] The Commission and intervenors in support of respondent articulated valid reasons supporting the Commission's exercise of jurisdiction over demand response resources participating in wholesale electricity markets. If a party petitions for a writ of certiorari, a step AEMA vigorously supports, it is possible that the Supreme Court will grant any such petition, in which case the sole basis of the Complaint would remain ineffective until the Court rules on the merits of the case and then may vanish. Even if the Supreme Court denies any such petition and the mandate is issued, then the Commission will respond to the *EPSA* Court's remand. The Commission's deliberations on how to implement *EPSA* may be highly relevant to the scope of the holding in ways that could affect the outcome of the Commission's consideration of the Complaint.

[26] Order Granting Motion to Stay .

[27] *See, e.g., Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988); *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991); *Finberg v. Sullivan*, 658 F.2d 93, 99 (3d Cir. 1980); *Questar Pipeline Co.*, 60 FERC ¶ 61,182 (1992).

The Complaint presupposes how the *EPSA* decision will be implemented before it is even final. It would be premature for the Commission to act on the Complaint before the Supreme Court has had the opportunity to consider any potential petitions for certiorari or before the Commission has an opportunity to implement *EPSA* if the mandate does issue. The Commission should either reject the Complaint or defer action on it until the Supreme Court has the opportunity to consider any petition for certiorari that will be filed and issues the mandate.[28]

## IV. THE COMPLAINT MUST BE DENIED BECAUSE FIRSTENERGY ERRONEOUSLY ATTEMPTS TO EXTEND THE COURT'S HOLDING IN *EPSA* TO CAPACITY MARKETS

In its rush to eliminate over 10,000 MW of cost effective, reliable competition from the PJM capacity market, FirstEnergy completely ignores the far-reaching and negative consequences of its requested remedies. CSPs as well as commercial and industrial customers, including AEMA members, have invested hundreds of millions of dollars to develop demand response capabilities and resources in response to the Commission's policies and orders, resulting in more competitive capacity prices. The resulting competitive capacity prices represent the appropriate efficient market outcome at just and reasonable rates.

If FirstEnergy had its way, AEMA members' investments, customer investments and the resulting PJM capacity market benefits would be lost, and consumers would be forced to pay billions of dollars per year more in unjust and unreasonable capacity rates while diminishing system reliability benefits associated with capacity from CSPs. Many demand response providers use revenues realized from capacity market participation to invest in added demand response and energy efficiency improvements. Elimination of curtailment service participation in capacity auctions will slow down, if not end, such practices.

[28] AEMA has reviewed the Protest of the PJM Consumer Representatives that will be filed in this docket, and hereby incorporates by reference Section II.A.2 of that protest, in which the PJM Consumer Representatives demonstrate that there is no legal basis for the Complaint because the D.C. Circuit's mandate has not been issued.

Moreover, demand response in wholesale markets saves end-use customers billions of dollars per year in costs, representing approximately $500 per household in PJM this past year alone, or $11.8 billion in aggregate. Removing demand response from the wholesale market would place a significant economic burden on families. For businesses deciding to locate in the United States or overseas, these increased costs would make the United States less competitive. Furthermore, businesses, manufacturers, schools,[29] hospitals, local governments, and other demand response customers have come to rely on demand response payments. Payments received are equivalent to the annual salary for over 13,000 teachers, over 10,000 industrial production managers, over 22,000 health care technicians and technologists.[30]

The requested relief would also stymie technological innovations. Billions of dollars have been invested by both private companies and the federal government to enable a smarter electric power grid. Those costs were incurred with an expected set of benefits that will largely evaporate if demand response is removed from wholesale markets. In order to solve our nation's energy challenges, investors need to have confidence that regulatory and legal expectations will be met. Removing demand response from the PJM capacity market would send the opposite message. It would stifle the growth of nascent technologies like energy storage that depend on monetizing the value such technologies provide through demand response in wholesale markets Through its demand response policies, the Commission has turned the electric grid into the equivalent of the smart phone. If demand response is removed from wholesale markets, the electric grid is back to the rotary phone.

[29] One school district was recently able to restore Advanced Placement classes with their demand response payments.

[30] *See* U.S. Department of Labor, Bureau of Labor Statistics, May 2013 National Occupational Employment and Wage Estimates United States, *available at* http://www.bls.gov/oes/current/oes_nat.htm.

FirstEnergy's requested relief would also cause significant environmental impacts as well. In order to replace the 10,000 MW of demand response that FirstEnergy seeks to remove, 100 fossil fueled peaking power plants would be needed. This would increase emissions by tens of thousands of tonnes of $CO_2$ and directly contradicts our nation's climate goals.

Finally, a wide range of States, market operators and market participants have indicated their desire for the Commission to regulate demand response in restructured markets.[31] Nearly a dozen states supported the Commission's petition for rehearing *en banc* of *EPSA*, with not one state opposing.

AEMA urges the Commission to stand up for the capacity markets it has nurtured and the investment AEMA members have made in good faith to deliver the promise of curtailment service the Commission and States sought when creating such markets.

FirstEnergy erroneously alleges that the Court's rationale for vacating Order No. 745 "appl[ies] with equal force to wholesale capacity markets."[32] Specifically, among other things, FirstEnergy maintains that: (i) wholesale capacity markets "cannot pay for a *sale for resale* of demand response because demand response 'is not a sale at all;'"[33] and (ii) "the principle that FPA section 201 limits FERC's jurisdiction over matters that 'affect rates' also applies to capacity markets."[34]

As demonstrated below, the Commission's exercise of jurisdiction over capacity in the form of curtailment service does not violate the FPA. Moreover, as discussed below, the D.C. Circuit has previously distinguished capacity markets from energy markets, and affirmed the

[31] *See supra* n.11.

[32] Complaint at 21.

[33] *Id*.

[34] *Id*. at 22.

Commission's jurisdiction over the capacity markets in accordance with the FPA, while recognizing that curtailment service participates in PJM's capacity market. [35]

Accordingly, the Commission should reject the Complaint because it seeks inappropriately to extend the Court's limited holding in *EPSA*[36] to the Commission's jurisdiction over capacity in the form of curtailment service.

### A. Capacity in the Form of Curtailment Service is Not Subject to the State Savings Clause

Any analysis of the Commission's jurisdiction must begin with the statute itself. As set forth in FPA section 201(b), the Commission has jurisdiction over "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."[37] FPA sections 205 and 206 further provide the Commission with jurisdiction over rules, regulations, practices, and contracts affecting any Commission-jurisdictional rate, charge, or classification.[38] The Commission does not, however, have jurisdiction over "any other sale of electric energy" or "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."[39] Rather, the regulation of retail sales of electric energy, generation, and local distribution are expressly reserved to the states.[40]

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[35] *See* Section IV.B, *infra*.

[36] *See* Petitioners' Response to Respondents' Motions to Stay Issuance of Mandate at 7, No. 11-1486 (D.C. Cir. Sept. 30, 2014) ("The Commission's final rule applies only to the energy markets.").

[37] 16 U.S.C. § 824(b)(1).

[38] *See* 16 U.S.C. §§ 824d and 824e. The jurisdiction provided to the Commission in FPA sections 205 and 206 is referred to herein as the Commission's "Affecting Jurisdiction."

[39] *See* 16 U.S.C. § 824(b)(1).

[40] FPA section 201(b)s reservation to the states to regulate retail sales of electric energy, generation, and local distribution is referred to herein as the "State Savings Clause."

The *EPSA* majority found that the Commission's Affecting Jurisdiction does not apply to matters subject to the State Savings Clause.[41] Sales for resale of electric capacity in the form of curtailment service in interstate commerce do not fall within the State Savings Clause, however, and the Commission's regulation of sales for resale of curtailment service in interstate commerce is lawful under the Commission's Affecting Jurisdiction.

### 1. The Plain Language of the State Savings Clause Applies to Local Distribution, Retail Sales of Electricity and Generation; Capacity in the Form of Curtailment Service is None of These

The State Savings Clause preserves for the states the regulation of generation, local distribution of electric energy and retail sales of electric energy. The *EPSA* majority found that the Commission could not use its Affecting Jurisdiction to regulate matters falling within the State Savings Clause.[42] The Commission must decide in this case whether its regulation of the rates, terms and conditions under which capacity in the form of curtailment service participates in PJM's capacity market violates the State Savings Clause.

Based on the plain text of the FPA, the Commission's regulation of sales for resale of electric capacity in the form of curtailment service in interstate commerce is not prohibited by the State Savings Clause because it is not the regulation of: (i) electric generation; (ii) the local distribution of electric energy; or (iii) retail sales of electric energy.

First, the Commission's regulation of capacity sales in the form of curtailment service cannot, under any plausible interpretation of the FPA, constitute regulation of generation within the State Savings Clause, and FirstEnergy does not suggest otherwise.

Second, the Commission's regulation of capacity sales for resale in the form of curtailment service in interstate commerce is not the regulation of the local distribution of

[41] *See EPSA* at 222 ("The broad "affecting" language of §§ 205 and 206 does not erase the specific limits of § 201").

[42] *EPSA* at 218, 221.

electric energy within the State Savings Clause. Local distribution of electric energy means the local transportation of electric energy on local distribution facilities to deliver electric energy to end users.[43] Local distribution of electric energy also means the bundled transmission, distribution and retail sale of electric energy by the franchised utility serving the end use customer.[44] The Commission's regulation of curtailment service participation in the PJM capacity market does not constitute regulation of a bundled retail service or regulation of the local transportation of electric energy on local distribution facilities. There is no local delivery or bundled sale of electric energy in the provision of curtailment service in the RPM. Capacity itself, after being sold by PJM to load serving entities ("LSEs"), is eventually bundled when sold to customers, but the sale of curtailment service by CSPs or customers to PJM is not a part of the bundled service giving rise to the State Savings Clause. If it were, then the sale of all capacity resources would be subject to the State Savings Clause.

Third, the Commission's regulation of curtailment service participating in the PJM capacity market does not constitute regulation of retail sales of electric energy, sales which would be subject to state jurisdiction. The *EPSA* majority found that demand response does not constitute a sale of electric energy even though the demand response was offered in the

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[43] *See, e.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036, at 31,781 (1996), *order on reh'g*, Order No. 888-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *reh'g denied*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS v. FERC*"), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("*New York v. FERC*"). The dissent in *New York v. FERC* explained that at local distribution facilities "the power flow is split to send power to a number of primary feeder lines that lead to other transformers that again step down and feed the power to secondary service lines that in turn deliver the power to the utility's customers." *New York v. FERC* at 30 (Dissent).

[44] In Order No. 888, the Commission declined to extend an open access requirement to the transmission component of bundled retail sales, concluding that unbundling such transmissions was unnecessary and would raise difficult jurisdictional issues that could be more appropriately considered in other proceedings. *See* Order No. 888 at 31,699-700. With respect to distinguishing "Commission-jurisdictional facilities used for transmission in interstate commerce" from "state-jurisdictional local distribution facilities," the Commission identified a seven-factor test (*See* Order No. 888 at 31,771, 31,783), which was upheld by the U.S. Supreme Court. *New York v. FERC* at 26.

wholesale energy market.[45] In *Connecticut*, the D.C. Circuit found that sales of electric capacity were not sales of electric energy.[46] The sale of capacity in the form of curtailment service is not a sale of electric energy and, consequently, cannot be a retail sale of electric energy.[47] Accordingly, the Commission's regulation of sales of capacity in the form of curtailment service in the PJM capacity market does not violate the State Savings Clause's prohibition of Commission regulation of retail sales of electric energy.

In sum, the plain and unambiguous language of the FPA does not support the Complaint; the Commission's regulation of the PJM capacity market, including specifically sales for resale of curtailment service, does not reasonably support a finding that the Commission violated the State Savings Clause.

### 2. The Legislative History does not Conflict with the Plain Text of the Federal Power Act

Under the canons of statutory construction, when the plain text of a statute is clear on its face, the legislative history is not consulted to discern congressional intent.[48] When a statute is ambiguous, however, then the legislative history should be consulted.[49]

As discussed above, the plain text of the State Savings Clause is clear and unambiguous, and the Commission's regulation of curtailment service in the PJM market does not violate the

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[45] *EPSA* at 221.

[46] *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) ("*Connecticut*") ("'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties--generally, generators--who can either produce more or consume less ***when required***") (emphasis added).

[47] If the sale of capacity in the form of curtailment service in PJM's capacity market were deemed to be a sale of electric energy, it would unequivocally constitute a wholesale sale of electric energy subject to the Commission's exclusive jurisdiction. *See* Section IV.A.3, *infra*.

[48] *See, e.g., Overseas Educ. Ass'n v. Fed. Labor Relations Auth.*, 876 F.2d 960(D.C. Cir. 1989). Courts have generally held that a statute is ambiguous when reasonably well-informed persons could understand the language in either of two or more senses. *See, e.g., State ex rel. Neelen v. Lucas*, 24 Wis. 2d 262, 128 N.W.2d 425 (1964).

[49] *See, e.g., Gomez v. United States*, 490 U.S. 858 (1989)*; Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19 (1988).

State Savings Clause. If, however, one were to find ambiguity in the statute, the legislative history would be relevant.

Even the legislative history, however, does not support a finding that the Commission's regulation of unbundled sales of capacity in the form of curtailment service constitutes regulation of generation, local distribution or retail sales of electric energy. To the contrary, the Senate Report discussing the purpose of the FPA states: "The decision of the Supreme Court in [*Attleboro*[50]] placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States. Other features of this interstate utility business are equally immune from state control either legally or practically."[51]

Congress explicitly recognized the need to have Federal regulation of interstate wholesale electricity markets:

> The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in [Attleboro] to be beyond the reach of the States. Jurisdiction is asserted also over all interstate transmission lines whether or not there is sale of the energy carried by those lines and over the generating facilities which produce energy for interstate transmission and sale. ***It is obvious that no steps can be taken to secure the planned coordination of this industry on a regional scale unless all of the facilities, other than those used solely for retail distribution, are made subject to the jurisdiction of the Commission. Facilities used only for intrastate commerce or local distribution are expressly excluded from the operation of the act.***[52]

As the RTO, PJM is charged with the obligation to plan for and secure the resources necessary to reliably meet the peak needs of the regional system. That planned coordination cannot be

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[50] *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) ("*Attleboro*"). In *Attleboro*, the Supreme Court invalidated an attempt by Rhode Island to regulate the rates charged by a Rhode Island utility selling electricity to a Massachusetts company, which resold the electricity to the city of Attleboro, Massachusetts, finding that the regulation imposed a "direct burden upon interstate commerce." *Id*. at 89. Because the Court held that the interstate transaction was not subject to regulation by either state, a jurisdictional gap, referred to as the "Attleboro gap" was created. In response, Congress enacted the FPA in 1935, and authorized federal regulation of electricity in areas beyond the reach of state power, such as the gap identified in *Attleboro*, but it also extended federal coverage to some areas that previously had been state regulated.

[51] S. Rep. No. 74-621, at 17 (1935) ("Senate Report").

[52] *Id*. at 48 (emphasis added).

accomplished without properly accounting for the existing curtailment service resources available across the region.

In addition to indicating Congress's intent to give the Commission the tools it needed to provide for the "planned coordination of this industry on a regional scale,"[53] the legislative history explicitly recognized that facilities could be used for both local distribution and FERC-jurisdictional wholesale activity. Relying on the legislative history of the FPA, the Commission concluded in Appendix G to Order No. 888 that "[a] public utility's facilities used to deliver electric energy to a wholesale purchaser whether labeled 'transmission,' 'distribution,' or 'local distribution' are subject to the Commission's exclusive jurisdiction under sections 205 and 206 of the FPA and that a public utility's facilities used to deliver electric energy from the wholesale purchaser to the ultimate consumer are 'local distribution' facilities subject to the rate jurisdiction of the state. [54]

A retail end user can purchase electric energy at retail subject to state jurisdiction and engage in wholesale transactions in interstate commerce subject to the Commission's jurisdiction. *EPSA* must be interpreted consistent with the FPA and must not invite one state to regulate sales for resale of electric capacity in interstate commerce. To the extent of any ambiguity in the FPA, it should not be interpreted in a manner which would interfere with "***the planned coordination of this industry on a regional scale***." [55] Moreover, it is clear that Congress intended that "***all of the facilities, other than those used solely for retail distribution,***" would be "***subject to the jurisdiction of the Commission.***"[56] The legislative history would not support an

[53] Senate Report at 48.

[54] Order No. 888, Appendix G at 31,969.

[55] Senate Report at 48 (emphasis added).

[56] *Id*. (emphasis added).

interpretation of the FPA which would provide for state jurisdiction over facilities used for wholesale energy transactions.

The Congressional intent behind the FPA does not support a conclusion that sales for resale of capacity in the form of curtailment service in the PJM market are subject to the State Savings Clause. Such wholesale sales of capacity in RPM are unequivocally in interstate commerce as they are necessary for the planned coordination and operation of the regional PJM transmission system. Such sales are also sales for resale as discussed in the next section. Such sales are not subject to the State Savings Clause.

### 3. The Commission's Regulation of the Rates, Terms and Conditions Pursuant to Which Curtailment Service Participates in the PJM Capacity Market is within the Commission's Jurisdiction

As demonstrated above, the Commission's regulation of the sales of electric capacity, including curtailment service, for resale in the RPM does not violate the State Savings Clause and the Commission's regulation of capacity sales in the form of curtailment service is within the Commission's Affecting Jurisdiction. In this case, the Commission has before it analyses and facts that were not presented to the *EPSA* Court, and the Commission must make its decisions based upon the particular facts and analysis unique to this case. In *EnergyConnect, Inc.*,[57] the Commission affirmed that it did not have to regulate CSPs and curtailment sources as public utilities to satisfy its obligation to exercise its Affecting Jurisdiction. Rather, the Commission decided it was sufficient to focus regulation on the rates, terms and conditions pursuant to which curtailment service was offered to PJM in the RPM and the rates, terms and conditions pursuant to which PJM would accept capacity which clears each BRA to adequately protect the

[57] *EnergyConnect, Inc.*, 130 FERC ¶ 61,031, at P 30 (2010) ("*EnergyConnect*").

Commission-jurisdictional wholesale electric capacity market.[58] There is no basis to retreat from the Commission's responsible regulation of capacity markets.

#### 4. Sales of Curtailment Service Are Sales for Resale in the Wholesale Capacity Market, Not Retail Sales

The *EPSA* majority found that sales of demand response into the *energy* market were not sales at all and occurred in the retail market. As demonstrated below, however, sales into the electric *capacity* market in the form of curtailment service are sales of capacity[59] and are wholesale sales, not retail sales, thus rendering *EPSA* inapplicable to the facts in the record of this case.

The predominant form of curtailment service capacity sales begins with an end-user contracting to deliver curtailment service through a CSP.[60]

As set forth in the Campbell Affidavit, in order for curtailment service to participate in the PJM RPM, several transactions take place:

First, an end-user contracts to offer curtailment service through a CSP.[61] As Mr. Campbell explains, the end-user and the CSP enter into an agreement "pursuant to which curtailment service participants agree to provide curtailment capability to meet PJM RPM capacity requirements...."[62] Mr. Campbell further explains that "[t]he terms of service are closely

[58] *Id*. at P 32.

[59] Several U.S. courts of appeals have upheld the Commission's jurisdiction over sales for resale of electric capacity, and, as discussed in detail, *infra*, U.S. courts of appeals and the Commission have also recognized that curtailment service is a capacity product. *See, e.g., Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) ("*Connecticut*"); *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2009) ("*Maine*").

[60] *See* Attachment A, Affidavit of Bruce Campbell at P 4 ("Campbell Affidavit"). As set forth in the Campbell Affidavit, approximately 77% of the curtailment service which cleared the most recent PJM BRA was from CSPs. *Id*. citing 2014 Demand Response Operations Markets Activity Report: September 2014 by James McAnany, at 9 (Sept. 10, 2014), *available at* http://www.pjm.com/~/media/markets-ops/dsr/2014-dsr-activity-report-20140914.ashx. CSPs may also be LSEs or electric distribution companies ("EDCs"). In some cases, some large end users also function as their own CSP or LSE.

[61] *See* Campbell Affidavit at P 4.

[62] *Id*.

aligned with the PJM tariff requirements because this defines what PJM will buy."[63]

Second, the CSP offers the curtailment service to PJM, the RTO and market administrator, as capacity for the BRA.[64] The CSP offers are typically on a transmission zone basis with all of the CSP's registered sources of curtailment service within a zone aggregated in the zonal capacity offer.[65] PJM compensates the curtailment service based on the zone-based resource offerings which clear each auction. As Mr. Campbell explains, this "illustrates that the CSP is providing a wholesale, zone-based offer of capacity to PJM and that compensation is zone-based and aggregated as well."[66]

Third, PJM runs each BRA taking into account all capacity resources duly offered into the BRA by market participants, including generators, marketers that aggregate generation resources and CSPs that aggregate curtailment service capacity.[67] PJM's RPM rules ensure that both generation capacity resources and curtailment service capacity resources satisfy performance criteria in order for PJM to maintain system reliability.[68] PJM stacks the capacity offers and determines the least cost solution to ensure enough capacity clears each auction to satisfy PJM reliability, load and reserve requirements.[69] Accordingly, only generation and curtailment service which is economic and which is sufficient from a resource adequacy

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[63] *See id.*

[64] *See id.*

[65] *See id.*at P 5. *See also* PJM Tariff, Attachment DD, Section 5.6.1. The entire PJM Tariff is *available at* http://www.pjm.com/~/media/documents/agreements/tariff.ashx.

[66] *See id.*

[67] *See* PJM Tariff, Attachment DD, Sections 3.2, 5.2.

[68] *See* PJM Reliability Assurance Agreement, Section 1.8, *available at* http://www.pjm.com/~/media/documents/agreements/raa.ashx. *See also* PJM Manual 18: PJM Capacity Market, Section 8: Resource Performance Assessments (July 31, 2014), *available at* http://www.pjm.com/~/media/documents/manuals/m18.ashx.

[69] *See* PJM Tariff, Attachment DD, Sections 5.10 and 5.12.

perspective clears each auction,[70] resulting in commitments for the resources which clear the auction. In the case of each annual BRA, the commitments resulting from PJM's cleared and posted results apply for the delivery year commencing approximately three years after the auction (e.g., the May 2011 BRA results require the cleared resources to be available June 1, 2014 through May 31, 2015).

In some PJM auctions, the capacity is procured while recognizing transmission constraints within regions called "Locational Deliverability Areas" or "LDAs." In such situations, PJM considers capacity within the LDAs to be sufficient to satisfy LSE obligations anywhere within that LDA.[71] This is true irrespective of whether the capacity is from generation or a curtailment service (cumulatively, "PJM Capacity").

Fourth, PJM uses the PJM Capacity to satisfy the obligations of all LSEs within PJM on a zonal basis as provided for in the PJM Tariff.[72] PJM charges the LSEs for capacity PJM procured on each LSE's behalf.

Based on the foregoing facts, it is clear that CSPs offer electric capacity into the PJM BRAs. The sales of electric capacity are not retail sales or retail market transactions. FPA section 201(d) provides that "the term 'sale of electric energy at wholesale' when used in this Part, means a sale of electric energy to any person for resale." While sales of capacity, including curtailment service, are not sales of electric energy,[73] section 201(d) is instructive on exactly what Congress meant by the term "wholesale" – it means a sale for "resale" as opposed to an end use sale.

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[70] *See* Campbell Affidavit at P 6 and Exhibit BC-1.

[71] *See* Campbell Affidavit at P 6.

[72] *See id*. at P 7. *See also* PJM Tariff, Attachment DD, Section 6.

[73] *See Connecticut* at 479.

In the electric capacity transactions described above, the CSP does not sell electric energy or provide local distribution service to the end use customer. Rather, the CSP secures curtailment service to offer into the BRAs. Although PJM compensates the capacity suppliers, including CSPs, PJM is not an end user of the curtailment service that PJM clears through the RPM auctions. Rather, PJM procures the capacity on behalf of the LSEs in PJM and charges the LSEs for this capacity. LSEs in their capacity as LSEs are not end users of electric energy. The LSEs provide the electric commodity to end users through bundled retail sales of electric energy. The sales of capacity from customers providing curtailment service to the CSPs to PJM to the LSEs are not end use sales of capacity. They are sales for resale of capacity which is the FPA definition of wholesale sales.

A single entity can at times purchase electric energy at retail subject to state jurisdiction and at other times sell capacity which is not subject to state jurisdiction. For example, when an electric generator goes off-line, it has no electric output to keep the generating station energized (buildings, lights, equipment, etc. at the generating station). This consumption is often at retail (it is an end user), but this does not impart state jurisdiction over the generator when it engages in wholesale capacity sales.

The fact that the source of curtailment service makes retail purchases of electric energy does not make the sale of electric capacity by the curtailment source to a CSP a retail transaction. The service is sold for resale by the customer to the CSP for resale to the RTO for resale to the LSE, and none of these steps in the chain of RTO capacity is “retail.”

Section IV.A.3 above demonstrates that the sales of capacity in the form of curtailment service in the PJM BRAs are wholesale sales of electric capacity and not retail sales or sales in the retail market. Section III demonstrates that there is no basis in this proceeding upon which to conclude that the Commission’s regulation of sales of capacity in the PJM RPM in the form of

curtailment service constitutes regulation of the retail market or violates the State Savings Clause - it is regulation of the wholesale market and is not regulation of generation, local distribution of electricity or retail sales of electricity.

### 5. Capacity and Energy are Fundamentally Different

At issue in *EPSA* was Commission Order No. 745, which was limited to demand response's participation in PJM's energy market when demand response was economic. The majority did not consider the Commission's jurisdiction over capacity markets, which the U.S. Courts of Appeals have affirmed as discussed in Section IV.B.1, below.

A sale of electric capacity is different from a sale of electric energy. A sale of electric energy is a sale of electricity that is actually generated and sold at wholesale, and resold at retail for consumption by a retail customer. Setting aside transmission and distribution losses, there is essentially a 1:1 correlation between energy sold and produced. In contrast, a sale of electric capacity is a forward option contract that does not stipulate a specific amount of energy to be sold or purchased; some capacity resources may sell thousands of MWhs in a year and others sell millions. Generator capacity is a forward call option to supply energy in the future if and when dispatched by PJM. Similar to generator capacity, curtailment service capacity is a forward call option committing a customer, or a portfolio of a CSP's customers, to adjust their behavior to modify consumption so as meet the reliability needs of the PJM system if and when dispatched by PJM. Both types of capacity, generation and curtailment service, are aimed at ensuring resource adequacy rather than specific electric energy sales or purchases; capacity resources are forward option contracts uniquely encountered in the interstate wholesale market to ensure that reliability can be preserved across a 14 state transmission system.

PJM annually procures sufficient capacity supplies for future years in the form of forward option contracts from electric generating capacity and curtailment service to satisfy PJM's forecast peak load plus a reserve margin necessary to maintain reliability.

Electric capacity which clears in an annual BRA makes a forward commitment to help PJM maintain a reliable system and to balance load and supply over a full Delivery Year (each June 1 - May 31).[74] The annual capacity auctions (BRAs) are held in May of each year and commit resources to a full year commencing approximately three years following the auction. One megawatt of capacity from generation and one megawatt of capacity from curtailment service which clears a BRA are equally effective in satisfying the capacity obligations of the LSEs on behalf of whom PJM procures capacity in each BRA in order to plan for the peak needs of the system. In contrast, the demand response which was the subject of *EPSA* did not constitute a product which represents a long-term commitment up to four years after the time a PJM BRA occurs. As such, the commitment is fundamentally different than a decision merely not to consume as much electric energy on a day-ahead or real-time basis. Accordingly, capacity and electric energy products have different characteristics, and payments for capacity in the capacity market are distinctly different from payments for energy in the energy market. While the *EPSA* majority found that such short-term, energy-related curtailment decisions were integral to the retail market (and that this was sufficient for the State Savings Clause to apply), there is no basis to find that BRAs and curtailment service participating in the BRAs are subject to the State Savings Clause.

*EPSA* was predicated on the notion that the benefits of demand response participating in the economic energy market could be sufficiently realized by avoided energy costs.[75]

[74] Complaint at 22.

[75] *See EPSA*, at 221.

Specifically, the *EPSA* majority relied on the characterization that "[d]emand response does not involve a sale, and the resources 'participate' only by declining to act" to reach its holding.[76] This would not be the case with respect to the PJM capacity market, were curtailment service to be precluded from participating as FirstEnergy requests, since, as discussed, a capacity resource's commitment is established three years in advance.

PJM establishes capacity obligations for each LSE based on its share of the PJM system-wide coincident peak load averaged over the top five hours occurring on separate days. This is driven by system conditions, not price. The energy price signals during these peak hours are irrelevant to the dispatch of demand response, which is instead driven by physical system conditions. Further, capacity prices produced by the BRAs would not be just and reasonable to the extent they do not reflect all physical and cost efficient capacity resources available to the wholesale market to meet the peak needs of the system when operational needs are triggered. The price signals that the RPM would generate would stimulate new generating capacity even when it is uneconomic due to a failure to recognize curtailment service that was available.

A state demand response program cannot establish the rules governing the wholesale capacity market or a mechanism to ensure that the value of all curtailment service that exists from customer and CSP investments is reflected in the wholesale capacity market clearing prices. These characteristics of the wholesale capacity market are fundamentally different than the *EPSA* majority's understanding of demand response in the energy market.

PJM has extensive rules governing the performance of demand response which clears the RPM. These rules are an integral part of ensuring that curtailment service participating in the RPM is sufficiently operationally flexible for PJM dispatch operators in maintaining the

[76] *See id.*

reliability of the Bulk Power System. Long-term commitments to PJM are necessary in the capacity market. It would be very difficult for states to regulate the rules governing curtailment service in the capacity market because it is clearly an interstate market with rules which must be integrated with supply and reliability requirements across a regionally integrated system. For example, in order to qualify as a PJM capacity resource, CSPs must deliver to PJM capacity which is subject to performance requirements and measurement and verification by PJM.

Furthermore, energy and capacity markets and products serve two entirely different purposes; one meeting the instant operational needs of the system, and the other planning for system reliability. Energy markets, day ahead and real time, function to meet the day ahead forecasted and real-time existing electricity needs of the system respectively. It is an immediate balancing of the sale of supply and the consumption of demand to ensure the system remains in balance at the required frequency level. A capacity market, on the other hand, is a planning tool used to ensure sufficient resources are procured on behalf of LSEs to maintain reliable operations during peak load conditions. PJM's RPM capacity market plans for and procures to these reliability needs three years in advance of the delivery year, lining up a diverse portfolio of the most cost efficient resources available, including demand response.

It would not be feasible to replace one set of uniform capacity market rules with those of 14 state regulators and many dozens more municipal and cooperative systems in PJM that are self-regulating at retail or whose retail regulation is by a local board or governing body rather than the state regulator. None of them can set rules that would apply to the interstate capacity market in a manner that would realize the full value of the capacity resource in the RPM, the appropriate mechanism for valuing capacity. Reliability would suffer, as all of the efficiencies gained from having a wholesale operator dispatch demand response when needed for bulk-level reliability would be lost. Federal courts have shown great deference over the Commission's

authority to establish wholesale capacity prices and have been very sensitive to state regulatory actions which could impede the Commission's regulation of the PJM capacity market.[77]

Moreover, under the RPM rules, capacity in one state may satisfy LSE obligations in another within the same LDA. It is an interstate market. It would be inappropriate for one state to establish the rules governing the sale of capacity in another state. As discussed below, the U.S. Courts of Appeals have upheld FERC jurisdiction over sales of electric capacity in interstate commerce. There is no rational basis upon this record to determine that sales of capacity in the form of curtailment service are any different. The FPA was enacted precisely to provide for Federal regulation of wholesale transactions in interstate commerce.

In *Attleboro,* the Court held that the Public Utility Commission of Rhode Island could not regulate the rates a Rhode Island utility would charge a utility in Massachusetts for all of its electric supply requirements. The Court found that the Rhode Island Commission's regulations was not "a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company [in Rhode Island] for the interstate service to the Attleboro Company [in Massachusetts], which places a direct burden upon interstate commerce."[78]

Once the state utility regulation was invalidated, the wholesale transactions in interstate commerce went unregulated. Congress enacted the FPA to fill this jurisdictional gap (referred to as the "*Attleboro* Gap") and to give the Commission's predecessor, the Federal Power Commission, jurisdiction and authority over the wholesale electric markets in interstate commerce, including sales for resale of electric energy in interstate commerce.

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[77] *See, e.g.*, *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014); *N. England Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) ("*Nazarian*"); *N.J. Board of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014).

[78] *Attleboro*, 273 U.S. at 89.

If the Commission did not have jurisdiction to regulate sales for resale of electric capacity from curtailment service, then states would not be permitted to regulate capacity sales by curtailment sources when the sales are not local in nature. Absent a state ban on sales for resale of curtailment service capacity into the RPM, the sale of such capacity is not a sale to local consumers, but rather is a sale in interstate commerce. The FPA, which drew the jurisdictional lines, was born to fill the *Attleboro* Gap, and this case should not create a new one by inviting state regulation of capacity sales in interstate commerce.

*EPSA* did not consider capacity market participation by demand response. The PJM Bulk Power System is unequivocally interstate in nature. Capacity transactions in interstate commerce are subject to Commission regulation, a point upheld by the courts.[79]

### B. The Participation of Curtailment Service in the Capacity Market is Subject to the Commission's Affecting Jurisdiction

Having established that the Commission's regulation of sales of capacity into the PJM RPM in the form of curtailment service does not violate the State Savings Clause, there is no question the Commission's "Affecting Jurisdiction" is a sufficient predicate to regulate sales of curtailment service in PJM's RPM.[80]

#### 1. The Courts Have Affirmed the Commission's Regulation of Capacity Markets and Have Recognized Demand Response as Capacity

Sections 205(a)[81] and 206(a)[82] of the FPA provide the statutory underpinnings of the Commission's jurisdiction over the capacity markets.

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[79] *See* Section IV.B.1, *infra*.

[80] The *EPSA* majority found that the Commission's Affecting Jurisdiction must yield to matters which fall within the State Savings Clause. This issue may be the subject of an appeal to the Supreme Court, but for purposes of this answer, AEMA assumes the *EPSA* majority's holding to be valid law without waiving any rights.

[81] 16 U.S.C. § 824d.

[82] 16 U.S.C. § 824e.

FPA section 205(a) confers jurisdiction on the Commission to regulate the rates and charges affecting or pertaining to the sale of electric energy in interstate commerce:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

FPA section 206(a) grants power to the Commission to play a proactive role in maintaining just and reasonable rates:

> Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. …

Reading these provisions together, it is clear that the FPA confers on the Commission the authority and responsibility to ensure that the rates and charges for, in connection with or affecting the wholesale sales of electric energy, including in the capacity markets, are just and reasonable. As discussed below, the D.C. Circuit and other federal courts have examined and affirmed the Commission's authority to regulate the capacity markets, and have recognized demand response as a capacity product that is integral to yielding efficient and competitive market outcomes.[83]

In *Maine,* the D.C. Circuit commenced its opinion by distinguishing a capacity market from a wholesale electricity [energy] market:

[83] *See, e.g., Connecticut*; *Maine*"); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1542, (D.C. Cir. 1987) (while capacity allocation costs "do not fix wholesale rates, their terms do directly and significantly affect the wholesale rates at which the operating companies exchange energy"); *Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (capacity deficiency charge, just as the capacity adjustment charge "must be deemed to be within the Commission's jurisdiction because it too represents a charge for the power and service the overloaded participant receives or it is at least a rule or practice affecting the charge for these services").

> In a "capacity" market—as opposed to a wholesale electricity [energy] market—"the [ISO] compensates the generator for the option of buying a specified quantity of power irrespective of whether it ultimately buys the electricity."[84]

The court rejected the petitioners' challenge to the Commission's jurisdiction to approve ISO New England's Forward Capacity Market under FPA section 201(b).[85] In rejecting this argument, the court found that the Commission's jurisdiction over the Forward Capacity Market did not exceed the broad authority over the "sale of electric energy at wholesale in interstate commerce" granted to it by the FPA.[86] The Court noted that the Forward Capacity Market auction established "a mechanism and market structure for the purchase and sale of installed capacity at wholesale…[and] determine the prices for those sales."[87]

The Court further explained that although the Forward Capacity Market would serve to incentivize the creation of new infrastructure, this incentive was not an encroachment on the jurisdiction of the states to regulate generation, accordingly recognizing the Commission's jurisdiction to regulate capacity markets:

> Indeed, one of the primary purposes of the new market mechanism is to "provide[ ] incentives to attract new infrastructure where needed." But an incentive is not a mandate. The mere fact that the Forward Market will encourage new supply does not mean that it *regulates* "facilities used for the generation of electric energy." Rather, the Forward Market is designed to address pricing issues, which fall comfortably within FERC's statutory authority over "the sale of electric energy at wholesale in interstate commerce."[88]

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[84] )*Maine* (citing *Keyspan–Ravenswood, LLC v. FERC*, 474 F.3d 804, 806 (D.C.Cir.2007).This definition is parallel to the explanation provided by the Supreme Court in *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010), where it stated that "[i]n a capacity market, in contrast to a wholesale-energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." Note that *Maine* was overturned with respect to a question of whether transition payments and final prices from the Forward Capacity Market would be reviewed under the "public interest" standard or the "just and reasonable" standard or review, an issue which is not relevant to the court's discussion of the Commission's jurisdictional authority over the capacity markets.

[85] *Maine* at 479.

[86] *Id*.

[87] *Id*. at 479 (quoting *Devon Power LLC,* 115 FERC ¶ 61,340, at P 201 (2006)).

[88] *Id*. at 479 (citations omitted).

In *Connecticut*, the D.C. Circuit recognized demand response as a capacity product.[89] In its decision, the Court also defined capacity, explaining that:

> "Capacity" is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties--generally, generators--who can either produce more ***or consume less when required***.[90]

The D.C. Circuit also quoted the Commission with favor as follows:

> 'capacity' . . . is the product, and electrical generating capacity is one means, but not the only means, of producing that product. [An] LSE could fulfill its capacity obligation to ISO-NE by constructing new electrical generating capacity **but it could also add 50 MW of demand response and 50 MW of capacity contracts** (from inside or outside the state), or any mix of the above. If a state wishes to place controls on the amount or type of electrical generating capacity built within that state, or at particular locations within that state, the Commission's regulation of ISO-NE's calculation of ICR does not prevent it from doing so. The capacity requirement that ISO-NE places on an individual LSE may be a factor in a state's ultimate determination as to how much electrical generating capacity is built, and where and by whom. These are not, however, the same determinations….[91]

The cases described above demonstrate that federal courts have affirmed the Commission's jurisdiction over and authority to regulate the capacity markets and have explicitly recognized that curtailment service is a capacity product in those markets.

The *EPSA* decision does not change the Commission's clearly established jurisdiction over capacity markets, including demand response as a capacity product. As FirstEnergy has acknowledged, in *EPSA*, the majority was focused on demand response in the day-ahead and real-time **energy** markets, **not** the wholesale **capacity** markets,[92] because as the Court explained, "Order [No.] 745 establishes uniform compensation levels for suppliers of demand response

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[89] *Connecticut* at 482.

[90] *Id*. at 479 (emphasis added).

[91] *Id*. at 483 (citing *ISO New England*, 120 FERC ¶ 61,234 at P 28 (2007) (emphasis added).

[92] *See* Petitioners' Response to Respondents' Motions to Stay Issuance of Mandate at 7, *EPSA* (No. 11-1486) ("The Commission's final rule applies only to the energy markets.").

resources who participate in the "day-ahead and real-time energy markets."[93] As explained in Section IV.A.4, *supra*, the wholesale capacity markets are distinct from the energy markets and provide the forum for the sale and purchase of a completely separate product, capacity.

In footnote 2 of *EPSA*, the majority recognized that in the capacity markets, the Commission is well within its jurisdiction to incentivize the construction of more generation, *i.e.*, more capacity. But the majority ignored in its footnote that based on the D.C. Circuit's own definition of capacity in *Connecticut*, the Commission could also incentivize additional demand response through the capacity markets, because both the construction of more generation as well as the reduction in demand, including demand response, are "capacity" as recognized by the courts. In fact, PJM has specifically cited incentivizing the development of demand response as a driver for implementing the RPM, and has credited the RPM in being successful at doing so.[94]

Accordingly, electric capacity in the form of demand response in a wholesale capacity market is within the Commission's jurisdiction.

**2. Curtailment Service Cleared in the RPM Directly Affects the Wholesale Capacity Market and Falls Within the Commission's Affecting Jurisdiction**

**a) Curtailment Service Directly Affects Rates in the RPM**

As the Commission reported to Congress, curtailment service has aided in providing "greater grid reliability, [the] mitigation of generation market power, and an overall decline in fuel-adjusted power prices in organized wholesale markets."[95] In the 2014 PJM BRA, nearly 11,000 MW of curtailment service capacity cleared the auction. Over the last four years, over

[93] *EPSA* at 219.

[94] *See* Statement of PJM Executive Vice President Andrew Ott, Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators, Docket No. AD13-7-000 (Sept. 9, 2013) (*see* discussion of "Goal 3: Promoting Innovation: Treating Demand Response as a Comparable Capacity Resource").

[95] National Action Plan on Demand Response, Federal Energy Regulatory Commission Staff, at 7 (June 17, 2010), *available at* http://www.ferc.gov/legal/staff- reports/06-17-10-demand-response.pdf.

10,000 MW of curtailment service capacity cleared each of the PJM BRAs.[96] According to PJM's IMM, without curtailment service in the 2014 BRA, PJM capacity costs would have been approximately $9 billion higher for one Delivery Year (June 1, 2017 - May 31, 2018).[97]

**b) Curtailment Service Directly Affects Reliability**

Capacity from curtailment service has contributed significantly and integrally to PJM's reliable operation of the Bulk Power System.

For instance, with respect to the "Polar Vortex" event in January 2014, PJM indicated demand response capacity "performed very well…This combination of emergency procedures and PJM market responses helped PJM successfully meet an all-time record winter peak…with no reliability issues."[98]

Similarly, during July and September of 2013, curtailment service "made significant contributions to balancing supply and demand" when heat waves "drove demand for electricity to record levels."[99] In describing the manner in which curtailment service contributed to reliability, the Commission Staff observed that curtailment service "helped address the imbalance between supply and demand caused by unusually hot weather and local equipment problems which created emergency conditions in four states," further describing the contributions as "vital."[100]

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[96] PJM Interconnection, L.L.C., 2017/2018 Base Residual Auction Results, at 2 (June 17, 2014), *available at* http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2017-2018-base-residual-auction-report.ashx.

[97] *See supra* n.6.

[98] PJM Interconnection, L.L.C., Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events, at 20-21 (May 8, 2014),*available at* http://www.pjm.com/~/media/documents/reports/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx.

[99] FERC, Assessment of Demand Response and Advanced metering, Staff Report, at 12-13 (Oct. 18, 2013), *available at* http://www.ferc.gov/legal/staff-reports/2013/oct-demand-response.pdf.

[100] *Id.*

Curtailment service participating in the PJM capacity market has proven to be an integral part of the market, yielding just and reasonable prices for electric capacity and the maintenance of reliability of the Bulk Power System. Curtailment service in the capacity market unequivocally is subject to Commission regulation under FPA sections 205 and 206.

## V. EVEN IF THE COMMISSION DOES NOT DENY THE COMPLAINT, IT MUST DENY THE RELIEF REQUESTED

While the Commission should deny this Complaint in its entirety because FirstEnergy has not demonstrated that the existing rules are just and reasonable, FirstEnergy also fails to satisfy its burden of proving that its alternative to the current tariff and rerunning the 2014 BRA without demand response would be just and reasonable. Even if the Commission must modify certain capacity market provisions of PJM's tariff, it does not mean that removing all of them without taking other measures would satisfy the Commission's duty to establish just and reasonable and not unduly discriminatory rates, terms and conditions of service. This is not a binary decision – in or out. Yet by treating it this way, FirstEnergy operated under the erroneous premise that it did not have to satisfy its burden of demonstrating rates, terms and conditions of service would be just and reasonable under its proposal. This was erroneous.

Moreover, the relief requested in the Complaint is overbroad to the extent that FirstEnergy would have the Commission require PJM to remove all capacity in the form of curtailment service from the May 2014 BRA, along with all provisions for service from, and compensation to, demand response wholesalers for the capacity commitments that even FirstEnergy would leave in place.

Further, as discussed below, the Commission should follow its precedent and refuse to resettle auction results where, as here: (i) doing so would be inconsistent with the Commission's goal of ensuring market certainty, (ii) resettling would require the Commission to predict the changes in behavior that those market participants would have made if they could be certain of

the rate the Commission would ultimately adopt and (iii) market participants undertook commitments in reliance on Commission-approved tariff provisions.

For all of these reasons, and as discussed further below, even if the Commission were to determine that it does not have jurisdiction to regulate capacity in the form of curtailment service, which it does, FirstEnergy's requested relief should be denied.

### A. FirstEnergy Fails to Satisfy its Burden of Proving that its Proposal is Just and Reasonable

Even if one were to assume that the majority's findings in *EPSA* apply to the PJM capacity market, FirstEnergy has failed to demonstrate that its proposed tariff modifications are just and reasonable. FirstEnergy asks the Commission to direct PJM to (i) remove all demand response-related provisions from PJM's tariffs, manuals, and agreements, including all provisions that authorize or require PJM to compensate curtailment service providers as capacity suppliers[101] and (ii) recalculate the May 2014 BRA by excluding demand response.[102]

FirstEnergy has not satisfied the burden of proof imposed by FPA section 206 on complainants. That is, in order to prevail on the Complaint, FirstEnergy must demonstrate that PJM's currently-effective Tariff is unjust and unreasonable and that FirstEnergy's proposed alternative - removing all references to demand response from PJM's Tariff, business practices manuals and agreements, and requiring PJM to recalculate the results of the May 2014 BRA by excluding capacity in the form of curtailment service is just and reasonable.[103] FirstEnergy fails to make such a showing.

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[101] Complaint at 4.

[102] *Id*. at 22-24.

[103] *See e.g.* 16 U.S.C. § 824e; *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,274, at P 33 (2009) ("In bringing a section 206 complaint, RPM Buyers have the burden to show both that the rates are unjust and unreasonable and that their proposed replacement rate is just and reasonable"); *Cal. Indep. Sys. Operator Corp.*, 106 FERC ¶ 63,026, at P 42 n.19 (2004) ("In a Section 206 matter, the party seeking to change the rate, charge or classification has a dual burden - it must first provide substantial evidence that the existing rate is unjust,

To the contrary, FirstEnergy fails to (i) offer any evidence whatsoever to address prior Commission holdings that demand response plays an important role in achieving just and reasonable prices in the ISO/RTO capacity markets, (ii) refute evidence demonstrating that demand response significantly contributes to operational reliability of bulk power systems; or (iii) consider the impacts its proposal would have on Commission-jurisdictional markets. FirstEnergy's requested remedy is not just and reasonable, and should be denied.

#### 1. FirstEnergy Fails to Address Prior Commission Orders Finding that Inclusion of Demand Response in Wholesale Markets is Vital to Ensuring the Justness and Reasonableness of Wholesale Rates

Although it admits that removing capacity in the form of curtailment service from the May 2014 BRA "will cause the auction to clear at a significantly higher price,"[104] (in excess of $9 billion for the 2017/2018 Delivery Year alone according to the IMM) FirstEnergy maintains this result is just and reasonable because increased prices will be below the PJM reference unit net cost of new entry ("Net CONE") and will reflect better price signals than the auction's original results.[105] FirstEnergy fails to substantiate its claim that that these increased prices would be just and reasonable.

Contrary to FirstEnergy's requested relief, the Commission has previously determined that the inclusion of demand response in wholesale markets is vital to ensuring the justness and reasonableness of wholesale rates, as well as to ensuring reliability and fostering the

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unreasonable or unduly discriminatory, and then demonstrate through substantial evidence that the new rate is just, reasonable and not unduly discriminatory"); *N. England Conf. of Pub. Util. Comm'rs, Inc. v. Bangor Hydro-Elec. Co.*, 124 FERC ¶ 61,291, at P 46 (2008); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112, at P 11 (2004); *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,275, at P 18 (2003); *S. Cal. Edison Co*., 41 FERC ¶ 61,188, at 61,492 (1987).

[104] Complaint at 27.

[105] *Id*. at 28.

development of new technologies. For instance, in Order No. 719,[106] the Commission explained that the "[d]evelopment of demand response resources provides benefits to consumers by providing competitive pressure to reduce wholesale power prices, providing for the more efficient operation of organized markets, helping to mitigate market power and enhance system reliability, and encouraging development and implementation of new technologies, including renewable energy and energy efficiency resources, distributed generation and advanced metering."[107] In Order No. 719-A, the Commission further stated that "[d]emand response affects public utility wholesale rates because decreasing demand will tend to result in lower prices and less price volatility."[108] The Commission further clarified that:

> [D]emand response has both a direct and an indirect effect on wholesale prices. The direct effect occurs when demand response is bid directly into the wholesale market: lower demand means a lower wholesale price. Demand response at the retail level affects the wholesale market indirectly because it reduces a load-serving entity's need to purchase power from the wholesale market. Demand response tends to flatten an area's load profile, which in turn may reduce the need to construct and use more costly resources during periods of high demand; the overall effect is to lower the average cost of producing energy. Demand response can help reduce generator market power: the more demand response is able to reduce peak prices, the more downward pressure it places on generator bidding strategies by increasing the risk to a supplier that it will not be dispatched if it bids a price that is too high. Moreover, demand response enhances system reliability.[109]

The Commission concluded that the participation of curtailment service in wholesale markets "helps the Commission to fulfill its responsibility … for ensuring that those rates are just and reasonable."[110]

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[106] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, III FERC Stats. & Regs., Regs. Preambles ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, III FERC Stats. & Regs., Regs. Preambles ¶ 31,292, *order denying reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[107] Order No. 719 at P 48.

[108] Order No. 719-A at P 47.

[109] *Id*. at P 47.

[110] *Id*.

In approving the settlement that created the RPM, the Commission stated that "[a]s the energy needs of participants in competitive markets subject to [the Commission's] jurisdiction continue to grow, the Commission must ensure just and reasonable rates by requiring that the energy supply continues to meet these growing needs."[111] To accomplish this mandate, the Commission acknowledged that it "must approve market designs and rate policies that elicit sufficient investment in energy, transmission***, and demand response***," [112] since, in the Commission's words, demand response participation would "engender a more robust competitive capacity market."[113] The Commission further found that the "rules for demand response participation in RPM are an integral part of the new capacity construct."[114]

Thus, the Commission has consistently found that wholesale rates were just and reasonable in part due to the participation of curtailment service. Ironically, even FirstEnergy has acknowledged the importance of demand response in its filing requesting that American Transmission Systems, Incorporated ("ATSI") be incorporated into PJM.[115] There, FirstEnergy cited the many aspects of PJM's market design and market rules, including the "robust participation by loads in demand response programs" in RPM as a reason for its proposed realignment.[116] Similarly, in the Public Utilities Commission of Ohio proceeding that also addressed FirstEnergy's RTO realignment, FirstEnergy noted among the benefits of joining PJM

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[111] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 1 (2006) ("*PJM RPM Order*").

[112] *Id*. at P 1 (emphasis added).

[113] *Id*. at P 31.

[114] *Id*.

[115] Filing of FirstEnergy Service Company, Docket No. ER09-1589-000 (Aug. 17, 2009) ("FE/ATSI Filing"). In the FE/ATSI Filing, FirstEnergy explained that it was acting on behalf of six of its affiliates, including ATSI. *Id*. at n.3. FirstEnergy explained that, prior to its filing, FirstEnergy's operations were split between two RTOs, PJM and MISO, but that it sought to realign FirstEnergy's operations solely within PJM. *Id*. at 2.

[116] FE/ATSI Filing at 15-16. In approving FirstEnergy's request, the Commission found "that proposed realignment will allow ATSI's customers in Ohio and Pennsylvania to take advantage of PJM's programs that offer market-based opportunities, ***including demand response opportunities relating to PJM's RPM auctions***." *FirstEnergy Serv. Co.*, 129 FERC ¶ 61,249 (2009) (emphasis added).

were PJM's "[w]holesale capacity markets where generators and demand response compete head-to-head based solely on price."[117] FirstEnergy further stated that because "PJM offers new opportunities for participation of demand response and energy efficiency on an equal footing with generation resources," it believed that "realignment into PJM will benefit its customers and ensure continued reliability of service in Ohio."[118]

In short, the Commission has found that curtailment service participation in RPM is necessary to ensure the justness and reasonableness of PJM's rates. Even if the Commission determines that the *EPSA* finding regarding the Commission's jurisdiction over demand response extends to the PJM capacity market (which it should not for the reasons set forth above), the Commission cannot simply recalculate the results of the RPM by removing curtailment service capacity as FirstEnergy requests. Doing so would raise the fundamental question of whether the market could be, or would be, competitive and whether that market could be or would be just and reasonable.

FirstEnergy has failed to sustain its burden to show that removing demand response capacity from the RPM is just and reasonable. Given the substantial Commission record on the important role that demand response plays in providing for competitive markets that are just and reasonable, the Commission would need to first reverse its prior findings that demand response is essential to the competitiveness of markets and the justness and reasonableness of rates in order to grant FirstEnergy's requested relief. There is no record in this proceeding upon which the Commission could make such a finding. Rather, the Commission must engage in reasoned

[117] *In the Matter of the Proposal of FirstEnergy Service Company to Modify its RTO Participation*, Response of FirstEnergy Service Company at 2, Pub. Utils. Comm'n of Ohio, Case No. 09-778-EL-UNC (Oct. 13, 2009) ("FirstEnergy RTO Response").

[118] *Id*. at 20.

decision making on how to satisfy the perceived requirements of *EPSA* in a way which satisfies the statutory standards the Commission is charged with enforcing.

### 2. FirstEnergy Fails to Substantiate its Claim that Removing Capacity in the Form of Curtailment Service from the RPM Will Provide Greater Reliability Benefits

Citing to studies by PJM's Market Monitor, FirstEnergy states that "removing demand response will not harm reliability—and actually retains a level of superior capacity resources in excess of PJM's targeted installed reserve margin—because there are more than enough existing resources that failed to clear the auction to cover the removal of demand response products."[119] Without citing to any supporting evidence, FirstEnergy also states that "the replacement of unlawful demand resources with actual generation resources will cause system reliability to improve."[120]

Notwithstanding FirstEnergy's allegation of alleged superior and surplus capacity from generation resources, PJM relied heavily on demand response in several recent weather-related events. For instance, in mid-September 2013, "[u]nusually hot weather … created two of the highest electricity use days of the year" in PJM.[121] An estimated 5,949 MW of demand response resources were called during the September 2013 event, "comparable to five nuclear plants or generators."[122] PJM acknowledged both generation performance and demand response "played significant roles in balancing the supply and demand on the grid during [the] unusual

[119] Complaint at 27.

[120] *Id*.

[121] PJM Meets High Electricity Demand During Unusual Heat Wave (Sept. 12, 2013) ("September 2013 Press Release"), *available at* http://www.pjm.com/~/media/about-pjm/newsroom/2013-releases/20130912-pjm-meets-high-electricity-demand-during-unusual-heat-wave.ashx .

[122] *Id*. at 1.

conditions," [123] and that "PJM continues to see the value and success of demand response participating in PJM markets."[124]

Subsequently, during the "Polar Vortex" in January 2014, PJM broke a prior record for peak load when it hit 141,846 MW while "dealing with higher than normal generation outages."[125] Specifically, during the peak demand hour, 22% of generation capacity, including coal, gas and nuclear, was out of service.[126] In fact, the performance of cleared generation was so poor that PJM is currently considering sweeping reforms to RPM rules to incentive better performance from generation. PJM called on demand response three times during the Polar Vortex.

Following the Polar Vortex, a second series of winter storms and extremely cold weather hit the region January 17 through January 29, 2014 ("Winter Storms").[127] PJM reported that, during the Winter Storms, PJM called on demand response four times to handle issues with transfers, transmission limits and generating units shutting down.[128] PJM stated that "[d]emand response's availability and response" exceeded PJM's expectations.[129]

Contrary to FirstEnergy's unsupported claims, demand response has demonstrated its superiority in reliability emergency situations. In fact, it was the failure of an unprecedented amount of generation resources, as evidenced by the 22% forced outage rate during the Polar

[123] September 2013 Press Release at 1.

[124] *Id*.

[125] PJM Interconnection, L.L.C., Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events, at 4 (May 8, 2014) ("PJM Weather Events Analysis"), *available at* http://www.pjm.com/~/media/documents/reports/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx.

[126] *Id*. at 4.

[127] *Id*. at 5.

[128] *Id*. at 37.

[129] *Id*.

Vortex events, that forced PJM to dispatch voluntary demand response. FirstEnergy fails to refute the proven reliability of demand response and simply fails to substantiate its claim that removing capacity in the form of curtailment service from the May 2014 BRA will provide greater reliability benefits.

### 3. FirstEnergy Fails to Demonstrate that its Requested Remedy is Just and Reasonable

If granted, FirstEnergy's request to remove the tariff provisions governing demand response's participation in the PJM capacity market and re-clear the May 2014 BRA would cause consumers to incur approximately $9 billion dollars in additional capacity costs in the 2017/2018 Delivery Year alone. The economic waste and harm to customers from such an arbitrary, unjust, and unreasonable capacity rate determination from the 2014 BRA without demand response would similarly raise capacity rates in every Delivery Year thereafter. FirstEnergy does not even attempt to explain or consider the impacts its requested relief will have on FERC-jurisdictional markets. Rather, FirstEnergy essentially asks the Commission to act like a horse with blinders on, rather than giving the Commission an opportunity to explore the effects that removing demand response from capacity markets would have on other aspects of the wholesale market.

The Commission has a statutory obligation to ensure that rates in FERC-jurisdictional markets are just, reasonable and not unduly discriminatory.[130] Granting FirstEnergy's requested relief would eliminate competition that has lowered capacity prices by billions of dollars annually. Even if the jurisdictional findings in *EPSA* should be applied to the capacity market, which they cannot be for the reasons set forth herein, it cannot simply be assumed that increased capacity prices to the tune of billions of dollars annually are just and reasonable. Nor would it be

[130] *See* 16 U.S.C. §§ 824d and 824e.

just or reasonable to ignore the value of thousands of MWs of proven reliable demand response resources by denying them access to PJM market and denying customers of their reliability and economic benefit. Rather, the Commission would have to engage in a deliberate and thoughtful review of all rules, markets and programs, including, for example, whether market-based rates are still just and reasonable without the inclusion or consideration of demand response capacity in market power determinations.

FirstEnergy and opponents of demand response participation in PJM's capacity market have an interest in seeing capacity market prices increase, not decrease. Rather than resulting in just and reasonable rates, FirstEnergy's proposed remedy would cause capacity rates to increase through the stifling of competition. FirstEnergy has failed to show that the Tariff and other modifications it requests would be just and reasonable because those anticompetitive proposals are not just and reasonable.

### B. The Relief Requested in the Complaint is Overbroad to the Extent that FirstEnergy Seeks to Remove (i) All Tariff, Manual and Agreement Provisions Addressing Demand Response Participation in Capacity Markets and (ii) All Capacity in the Form of Curtailment Service from the May 2014 BRA

Even if one were to assume that the majority's findings in *EPSA* apply to the PJM capacity market, FirstEnergy's request that the Commission direct PJM to (i) remove all demand response-related provisions from PJM's tariffs, manuals, and agreements related to CSPs' participation as capacity suppliers[131] and (ii) recalculate the May 2014 BRA by excluding demand response[132] is overbroad. FirstEnergy's proposal would have the effect of throwing out types of demand response that are not even addressed in *EPSA*. For instance, there are

[131] Complaint at 4.

[132] *Id*. at 22-24.

curtailment service providers whose load is served by subsidiary utilities at the wholesale level. The subsidiaries own generation and discrete transmission/distribution to serve that load.

There are also a variety of state-approved demand response programs that would be in jeopardy under FirstEnergy's requested relief. Virginia Power, for example, offers a number of programs approved by the Virginia State Corporation Commission that provides for credits to customers for curtailment service. For instance, Virginia Power has a Distributed Generation / Load Curtailment Pilot that compensates behind-the-meter generation as demand response directly on the basis of RPM auction results. Several other curtailment service riders are also in place for both residential and business customers.[133] The curtailment service can be resold to PJM as capacity from demand resources. Many utilities offer residential demand response programs that are funded wholly or in part by participation in PJM programs. Under the FirstEnergy proposal even these state jurisdictional offerings would be rejected.

FirstEnergy's requested relief is overbroad and should be denied.

### C. The Commission Should Deny the Relief Requested Based on Precedent

If granted, the relief requested by FirstEnergy would void the commitments that CSPs have already made with reasonable reliance on completed BRAs. This is true for commitments already undertaken for the Delivery Year that commenced on June 1, 2014, as FirstEnergy would have the Commission remove all tariff provisions governing demand response participation in capacity markets.[134]

As discussed below, the Commission has consistently refused to resettle auction results where, as here: market participants undertook commitments in reliance on Commission-

[133] Virginia Elec. and Power Co., Customer Rates and Tariffs, *available at* https://www.dom.com/dominion-virginia-power/customer-service/rates-and-tariffs/pdf/entire_filing.pdf.

[134] Complaint at 4.

approved tariff provisions; doing so would be inconsistent with the Commission's goal of ensuring market certainty and resettling would require the Commission to predict the changes in behavior that those market participants would have made if they had known the rate the Commission would ultimately adopt. Accordingly, the Commission should apply its precedent here, and deny the Complaint.

### 1. The Commission Should Follow its Precedent Rejecting Requests to Resettle Auction Results

The Commission consistently declines to resettle auction results "out of concern over the creation of market uncertainty and the possible inequities that could arise from retroactively resettling the market."[135] Specifically, based on the Commission's recognition of the critical role that regulatory certainty plays in the marketplace, the Commission has repeatedly exercised its discretion to refuse to resettle markets outcomes that would disrupt market participants' expectations.[136]

For example, in a proceeding addressing the New York Independent System Operator, Inc.'s ("NYISO") implementation of its buyer-side mitigation rules, the Commission denied requests to re-run settled auctions because doing so would be inconsistent with the Commission's goal of ensuring market certainty.[137] There, the Commission determined that the NYISO had improperly calculated the unit Net CONE determinations for two new entrants and directed the NYISO to re-do the unit Net CONE determinations and assess whether the new

[135] *See N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 147 ("NYISO"), citing *N.Y. Indep. Sys. Operator,* 92 FERC ¶ 61,073 at 61,307 (2000), *order on reh'g*, 124 FERC ¶ 61,301 (2008); *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71 (1st Cir. 2002) ("*Sithe*"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 95 (2006) ("*MISO*"), *order on reh'g*, 118 FERC ¶ 61,212, *order on reh'g*, 121 FERC ¶ 61,131 (2007).

[136] *See supra* n.140.

[137] *Astoria Generating Co. L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 (2012), *reh'g pending* ("*Astoria v. NYISO*").

entrants should be subject to an offer floor.[138] The Commission stated, however, that "even if NYISO finds that either [new entrant] is subject to an offer floor, we will not require NYISO to re-run the auctions occurring in the past based on such offer floors."[139] The Commission continued:

> Re-running past auctions would create market uncertainty for market participants and require resolving complex questions. For example, if any resources that cleared the original auction (and actually provided capacity services) did not clear the re-run auction, the question would arise whether such a resource should be paid, and if so, how much. Conversely, if any resources failing to clear the original auction (and thus, not providing capacity services in that past period) would clear in the re-run auction, the question would arise whether such a resource should be paid (despite not providing capacity services in the past period), and if so, how much. We conclude that it is preferable not to re-run these past auctions, in order to provide greater certainty for market participants, and to avoid the need to resolve these complex issues.[140]

In another proceeding involving NYISO's capacity markets, the Commission similarly stated:

> On numerous occasions, the Commission has denied refunds out of concern over the creation of market uncertainty and the possible inequities that could arise from retroactively resettling the market. We find that granting refunds here would create substantial uncertainty in the market and undermine confidence in them. Further, given the impossibility of predicting and restoring what might have happened in the market under an alternative set of circumstances, and as market participants can neither revisit economic decisions nor retroactively alter their conduct, refunds should not be granted in this instance. Ordering refunds would require the Commission to speculate as to the extent to which both mitigated and non-mitigated market resources would have participated in the market, and how they would have behaved.[141]

Similarly, the Commission was confronted with the issue of whether to order the re-run of auctions and require refunds when it initially implemented the PJM RPM after finding that the

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[138] *Astoria v. NYISO* at P 141.

[139] *Id*.

[140] *Id*.

[141] *See* supra n.135.

then-effective capacity market construct was unjust and unreasonable.[142] The Commission determined that "refunds would not be appropriate in [that] case because PJM fully complied with the terms of its tariff in operating its capacity market" for the relevant period, and that "[u]ndoing that determination would … upset the settled expectations of the parties based on past auctions as well as contractual commitments made on the basis of those allocations."[143] The Commission emphasized that it would not require refunds for capacity prices resulting from the capacity market construct, because "PJM followed its existing tariff in determining capacity prices ..., parties had every reason to rely upon those prices in making contractual commitments, undoing the allocation would upset these contractual relationships, and no reasonable method exists for retroactively determining just and reasonable prices."[144]

The Commission should follow its precedent and decline to order the re-running of auctions that have already cleared. FirstEnergy claims that it "does not seek in this proceeding to invalidate the results of capacity auctions that occurred prior to May 23, 2014."[145] Yet, its request that PJM be required to remove "all provisions in PJM's tariff, agreements, and business manuals that authorize or require PJM to compensate demand resources as capacity suppliers"[146] would have precisely this effect. The 2014/2015 Delivery Year commenced on June 1, 2014. CSPs, including some of the AEMA members, cleared commitments for the 2014/2015 Delivery Year in a BRA that closed in May 2011. If existing commitments from demand resources were no longer valid, then PJM could not call on these resources during system emergencies since, effective May 23, 2014, there would be no Tariff rules that would allow for their continued

[142] *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 242 (2008).

[143] *Id*. at P 241.

[144] *Id*. at P 244.

[145] Complaint at 4.

[146] *Id*.

participation in capacity markets. Attempting to determine which resources PJM could no longer call on would require the Commission to resettle several cleared auctions and raise major reliability problems and significant, complex issues. The Commission would be forced to guess how other market participants would have bid if demand response resources had not participated in the BRAs.

Moreover, re-running the cleared auctions would be inequitable. Like the parties in *PJM Interconnection*, the parties who participated in the 2014 BRA did so with "settled expectations . . . based on past auctions as well as contractual commitments made on the basis of those allocations."[147] Re-running the auctions would compound the inequity by replacing legitimate contractual relationships based upon settled expectations with new, unexpected and perhaps unpredictable arrangements that "would require the Commission to speculate as to the extent to which both mitigated and non-mitigated market resources would have participated in the market, and how they would have behaved."[148] For these reasons, the Commission should follow its precedent and decline to "re-run these past auctions, in order to provide greater certainty for market participants, and to avoid the need to resolve these complex issues."[149]

### 2. The Commission Should Follow Its Precedent Rejecting Requests for Refunds Where Parties Cannot Undo Their Commercial Decisions or Relied on Tariffs/Market Rules

The Commission has a long-standing policy of avoiding retroactive implementation of rates where, as here, customers could neither effectively revisit their economic decisions nor retroactively alter their conduct.[150] These "revisiting decisions" generally stand for the

[147] *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 at P 241.

[148] *NYISO* at P 147 citing *N.Y. Indep. Sys. Operator*, 92 FERC ¶61,073, at 61,307.

[149] *Astoria v. NYISO* at P 141.

[150] *See, e.g., NYISO* at P 147 (denying requests for refunds where "customers cannot effectively revisit their economic decisions" and "cannot retroactively alter their conduct"); *Cal. Indep. Sys. Operator Corp.*, 84 FERC ¶ 61,121, at 61,664 (1998) (declining to require refunds where parties "cannot retroactively change their behavior in

proposition that the Commission should allow changes in rate design to be effective prospectively only because market participants cannot revisit their economic decisions. The Commission has previously refused to impose refunds because doing so would interfere after-the-fact with the commercial and economic decisions of market participants that cannot undo their transactions.[151]

The Commission is also reluctant to enforce a tariff retroactively - even in the presence of a tariff violation - where a market participant relied upon an effective, Commission-approved tariff provision or on an ISO/RTO's interpretation thereof.[152] Here, there has been no tariff violation. If the Commission is hesitant to enforce a tariff retroactively even where there was a tariff violation, it should be even more hesitant in the present circumstances. Parties that cleared positions in the completed BRAs voluntarily secured physical positions that created economic liability based upon the terms of the PJM tariffs and the terms of the auction and prompted the need to dedicate resources and investments in complying with the obligations to deliver those physical options.

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response to penalties that they now understand to apply"); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (finding that since "customers cannot revisit their economic decisions … the only reasonable solution is to implement the rate design change prospectively"); *Conn. Light & Power Co.*, 15 FERC ¶ 61,056, at 61,124 (1981) (finding "a rate design affects, to some degree, customers' consumption patterns. A change in that design by Commission order cannot affect that pattern retroactively since the customers' energy usage was based on the rate design in effect during the period.").

[151] *See, e.g., MISO* at P 95 (finding that refunds "would ... be an unfair and inequitable remedy, because market participants cannot revisit economic decisions"); *NYISO* at P 130 ("ordering refunds and changing market outcomes after bids and offers in the voluntary [New York City Installed Capacity] auctions have been made may lead to regulatory uncertainty and harm market credibility"); *id.* at P 147 (rejecting requests for refunds upon finding that "granting refunds … would create substantial uncertainty in the market and undermine confidence in them"); *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, at PP 155, 157 (2009) ("*Ameren Rehearing Order*") (reversing refund directive upon finding that "it was unreasonable … to expect market participants to adjust their economic decisions to correctly accommodate the eventual rate change" and stating that the Commission "hesitate[s] to retroactively undo the decisions of market participants," and that any refunds would "necessarily be inaccurate because they cannot take into account the changes in behavior that those market participants would have made if they could be certain of the rate the Commission would ultimately adopt").

[152] *See, e.g., MISO*; *PPL EnergyPlus, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,383 (2006).

While investments in delivering physical obligations are wide and diverse across market participants AEMA offers a few examples universally applicable to CSPs. For instance, effective June 1, 2014, PJM required CSPs to have the capability to retrieve electronic messages from PJM notifying them of demand response events. CSPs had to invest in IT systems and develop electronic dispatch systems to allow for automated notifications to end-use customers.[153] Absent commitments in PJM's BRA, CSPs and customers would not have made such investments. Similarly, the Commission recently approved PJM's proposed 30-minute default notification period, which is voluntary for the 2014/2015 Delivery Year and will be mandatory in the 2015/2016 Delivery Year.[154] The reduced default notification period changed the process by which CSPs confirm that customers can comply with their elected lead time, causing an operational expense related to the CSP's existing portfolio.

Notwithstanding any esoteric legal question of the Commission's jurisdictional authority to issue rules related to demand response, these market participants intended to and did enter business relationships based upon the PJM tariff and the terms of the auction. It would be unjust and unreasonable *not* to honor the results. For the foregoing reasons, the Commission should follow its precedent in which it declines to order retroactive relief where parties can demonstrate that they relied on a Commission-approved tariff provision.

### D. In the Alternative, the Commission Must Provide for an Orderly Transition Process

The Commission cannot direct PJM to remove (i) the provisions of PJM's tariff, agreements and manuals authorizing or requiring PJM to compensate demand response resources as capacity suppliers or (ii) curtailment in the form of capacity from the 2014 BRA for the

[153] *See PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,165, at P 28 (2012).

[154] *See PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103 (2014).

reasons set forth above. If, however, the Commission determines that it must grant the relief requested, it must only do so in a fair, orderly process.

If it is determined that states can regulate demand response participation in wholesale markets, it is not clear how RTO/ISOs would implement overlapping jurisdictional requirements. The only thoughtful and fair way to proceed would be for the Commission to set a deadline after which it would re-run the BRA with capacity from state demand response programs. The 14 state retail regulatory authorities and dozens of municipal and cooperative utilities within PJM's jurisdiction would have until that date certain to establish state demand response programs that would govern demand response participation in wholesale markets. States could act later, but if they did so, they would be on notice they would miss the next BRA. The Commission could consider a voluntary process of interested stakeholders to see if there might be standard terms and conditions in a state program that would achieve the capacity reduction treatment and preserve other important principles such as the value of aggregation and the role of third party curtailment service providers constituting the overwhelming market share today through state programs.

In such a circumstance, the Commission would not be directing the states to act - rather, the Commission would be directing PJM to re-run its auction with capacity from state demand response programs. As described above, it is indisputable that the Commission has jurisdiction over wholesale capacity markets and the rates, terms and conditions governing wholesale capacity transactions. Under this concept, the Commission would validly be exercising jurisdiction over setting capacity obligations.

### E. The Commission Should Set the Latest Possible Refund Effective Date, and then Decline To Order Refunds

FirstEnergy requests a refund effective date of May 23, 2014, the date of the Initial Complaint.[155] In the amended Complaint filed four months later, FirstEnergy maintains that while it provides more detail in support of its requested relief, it does not change the relief requested.[156] Under the circumstances of this case, however, the Commission should establish the latest possible refund effective date, and then decline to require refunds in any event.

While the Commission is required under FPA section 206(b) to establish a refund effective date, [157] Commission precedent makes clear that the Commission is not required to order refunds.[158] Nor does the FPA prevent the Commission from dismissing the Complaint or denying refunds just because it set a refund effective date. Rather, Courts have found that the Commission's discretion is at its "zenith" under the FPA when it is determining whether to order refunds.[159] Here, the Commission should exercise its discretion and decline to order refunds.

As described above, CSPs, and industrial and commercial customers, including some AEMA members, have invested hundreds of millions of dollars in recent years to develop demand response capabilities and resources in response to the Commission's policies and orders.

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[155] *See* Complaint at 33.

[156] *See id*.

[157] The refund effective date that the Commission is required to set must be no earlier than the date of the filing of a complaint, nor later than five months after the filing of the complaint *See Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc*. 121 FERC ¶ 61,205, at P 107 (2007). The Commission has previously explained that the establishment of a refund effective date is a requirement set out by section 206 of the FPA that is a predicate for refunds in the event the Commission ultimately determines a refund is warranted; it does not mandate the refunds be ordered.

[158] The Commission has previously explained that the establishment of a refund effective date is a requirement set out by section 206 of the FPA that is a predicate for refunds in the event the Commission ultimately determines a refund is warranted; it does not mandate the refunds be ordered. *NYISO* at P 144. The Commission has held that "[t]he establishment of a refund effective date does not constitute a determination that refunds will be ordered or how such refund amounts and refund period will be determined." *Id.* citing *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc*. 121 FERC ¶61,205 at P 107.

[159] *See, e.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (1967); *Towns of Concord*, 955 F.2d 67, 75-76 (D.C. Cir. 1992); *NYISO* at P 144.

This investment was encouraged by the Commission's policies in support of demand response and curtailment services and fostered effective innovation in the PJM and other electric markets. These efforts have resulted in more competitive capacity prices with approximately 10,000 to 15,000 MW of cleared demand response in PJM's annual electric capacity auctions (known as "BRAs") since the 2011 BRA for the 2013/2014 Delivery Year. It would be unfair to grant the relief requested by FirstEnergy, as doing so would cause AEMA members' investments, customer investments and the resulting PJM capacity market benefits to be lost, and would cause consumers to pay billions of dollars per year more in unjust and unreasonable capacity rates.

Moreover, FirstEnergy and opponents of demand response participation in PJM's capacity market have an interest in seeing capacity market prices increase, not decrease. FirstEnergy's attempt to use a refund effective date is not to protect consumers from excessive charges. Rather, FirstEnergy seeks to re-run auctions so that competitive demand response capacity will be removed from the BRA and prices increase. FirstEnergy does not want a refund effective date, it wants a rate increase achieved through the stifling of competition. A refund effective date should not be contorted in this way.

As discussed above, parties have acted in reliance on the tariff provisions in effect at the time they made their commercial decisions. It would be manifestly unfair to require refunds in this circumstance.

## VI. THE COMMISSION SHOULD DECLINE TO ADDRESS PJM'S PROPOSAL IN THIS PROCEEDING

On October 7, 2014, PJM simultaneously posted on its website and filed in this docket a whitepaper titled, "The Evolution of Demand Response in the PJM Wholesale Market."[160] PJM's proposal confirms the ongoing need for and vital role of demand response and sets forth one

[160] The Evolution of Demand Response in the PJM Wholesale Market, Docket No. EL14-55-000 (Oct. 7, 2014) ("Whitepaper Proposal").

potential alternative by which demand response can continue to participate in its capacity market should PJM be forced to consider such alternatives. AEMA very much agrees with PJM's steadfast commitment to preserving the vital role demand response plays in its markets which is driven by the competitive and efficient market outcomes demand response makes possible, as well as the crucial role demand response has played in maintaining a reliable system. However, the Whitepaper Proposal is preliminary and incomplete, and PJM admits that it is not ready for serious consideration. Accordingly, the Commission should decline to address the Whitepaper Proposal at this time.

At a high level, PJM proposes to have demand participate in its markets: (i) as demand response that would no longer be separately compensated as a supply-side resource; and (ii) through LSEs. With respect to this latter category, PJM states that it envisions that CSPs "will serve a continuing and important function by partnering with [LSEs] to provide their customer management expertise."[161] In addition to not being ripe for the Commission's consideration, as discussed in more detail below, AEMA also has significant concerns regarding the negative consequences of the terms of this preliminary proposal.

If the Commission denies the Complaint on jurisdictional grounds, then the Whitepaper Proposal would not be relevant to the PJM capacity market and would not warrant further consideration in this proceeding. Were the Commission to find that it must refine its regulation of capacity in the form of curtailment service, then FirstEnergy has the burden of proof to demonstrate that its proposal is just and reasonable. As discussed above, FirstEnergy has failed this burden. Accordingly, the Whitepaper Proposal may be useful for consideration in the

[161] *Id*. at 6.

stakeholder process as PJM itself proposes, but does not yet rise to the level of an FPA section 205 or 206 filing worthy of a notice and comment period.

In order for the Whitepaper Proposal to be considered in this docket, PJM would have to show under FPA section 206 that the current rate is unjust and unreasonable, and that the Whitepaper Proposal is just and reasonable. Particularly given that the D.C. Circuit stayed the issuance of the *EPSA* mandate, it is incorrect to base any claims that the current market structure is unjust and unreasonable on the in flux opinion of that Court. Furthermore, any attempt to extend the currently-uncertain status of the *EPSA* opinion, which addressed energy markets to capacity markets is inappropriate. Additionally, in numerous filings over just the past year and a half, PJM has discussed and sought refinements to rules impacting demand response rules in its capacity market, touting the vital role of demand response and the need for improvements and refinements so as to enhance the already valuable role of demand response. Nothing has changed that would suggest those changes, approved by the Commission, are now unjust or unreasonable.

Furthermore, AEMA has significant concerns about the rough ideas contained in the Whitepaper Proposal and the potential for significant negative ramifications to PJM's capacity market, the rates paid for capacity, as well as the operational tools PJM has come to depend upon with demand response in its capacity markets. For example, as a threshold matter, the proposal would largely diminish the role of CSPs which account for 77% of the demand response currently registered.[162] AEMA is also concerned about the elimination of an availability payment for demand response in RPM would be discriminatory as compared to the payments available to generators participating in RPM, and the potential for disrupting commitments for years with

[162] *See* 2014 Demand Response Operations Markets Activity Report: September 2014.

BRAs already cleared as contemplated in the Whitepaper Proposal. The anticompetitive effects of the Whitepaper Proposal must be addressed so that the market is not pushed into turmoil and so competition, efficiency and reliability can be served within any regulatory regime the Commission determines is consistent with its jurisdiction.

### 1. PJM Admits the Whitepaper Proposal is Not Ripe for Consideration

PJM states that it filed the Whitepaper Proposal in this docket "[g]iven the close relationship of that topic to the issues raised in this proceeding, and as a convenience to the Commission and the parties,"[163] but maintains that the information in the Whitepaper Proposal "is intended to be solely informational."[164] Throughout the Whitepaper Proposal, PJM admits that its proposal is not fully developed,[165] and concedes that "any path forward will be subject to stakeholder comment and critique and acceptance by the [Commission] and state regulators."[166] That must occur before the Commission should engage in any consideration of the ideas in the Whitepaper Proposal.

As an initial matter, PJM states that it has put forth the Whitepaper Proposal as an attempt to mitigate litigation risk and the potential for disrupting settled transactions.[167] It would be inefficient and wasteful, however, to address the preliminary Whitepaper Proposal in advance of the Commission's ruling on the threshold jurisdictional issue. Given that *EPSA* does not require a retreat in the Commission's regulation of demand response in the PJM capacity market,

[163] *Id*., Transmittal Letter at 1.

[164] *Id*. at 1.

[165] *See, e.g.*, Whitepaper at 5 ("PJM will be the first to agree that the EPSA decision, both in regards to its scope and its division of state and federal responsibilities, raises numerous unanswered questions and is open to various differing, reasonable interpretations); *id*. ("[O]ne could propose different paths forward and argue such approaches are consistent with or distinguishable from *EPSA*"); *id*. at 8 ("PJM believes it is appropriate at this time to lay out this "road map" for continued participating by demand in wholesale markets - one that fits within reasonable interpretation of EPSA"). *Id.* at 8.

[166] Whitepaper Proposal at 4.

[167] *Id*. at 3.

the Commission should not approve a proposal that would have immediate anticompetitive effects by excluding CSPs whose market participation is critical to accomplishing just and reasonable rates and in advancing the Commission's policies that are designed to promote competition in wholesale capacity markets. Further, *EPSA* does not implicate capacity markets, the *EPSA* mandate has not issued, and therefore there is no basis to even discuss changes to even the energy market at this time.

Stakeholders have yet to have the opportunity to sufficiently discuss or vet the details of the Whitepaper Proposal with PJM or other interested parties such as the States. In the fourteen days since the issuance of the Whitepaper Proposal, there has been one half hour stakeholder meeting addressing it. This underscores that the Whitepaper Proposal is not ripe for Commission consideration. Additionally, as PJM notes, the scope of how to allow for demand response participation in light of *EPSA* "is open to various differing, reasonable interpretations."[168] Should the Commission decide to consider any proposals regarding demand response participation in wholesale markets going forward, it should only do so after the benefit of stakeholder meetings and other noticed proceedings to address the issue. The impact on rates and reliable operations that any proposal to change the nature of demand response participation in PJM's capacity markets would have is simply too great to deny parties the benefit of due process and full and proper consideration of all elements of such proposal.

It would be premature to address the Whitepaper Proposal at this time, and the Commission should decline to address it in this proceeding.

[168] *Id*. at 5.

### 2. The Whitepaper Proposal Suffers From Fundamental Flaws.

Under the Whitepaper Proposal, in order for demand response to participate in PJM's wholesale market, PJM has proposed that (i) demand response would have to come from a wholesale market entity (*i.e.*, an LSE) to ensure that the transaction maintains a wholesale character and (ii) demand response would be treated as demand rather than supply. As a result, capacity made available by demand response would not be treated comparably with capacity from generating resources. This also gives rise to a threat of discrimination based upon who is authorized to provide, or offer, demand response into RPM under the rough ideas in the Whitepaper Proposal. Specifically, PJM states that PJM will account for curtailment "only to the extent it reflects the action of a wholesale entity, such as a load-serving entity or competitive retail service provider, and only to the extent such curtailment reflects that entity's own wholesale load."[169] PJM "envisions" a role for CSPs, like the AEMA members, but only through partnerships with LSEs to "provide their customer management expertise."[170] Forcing CSPs, who currently account for 77% of the demand response in PJM's capacity market, to partner with LSEs will potentially create unreasonable barriers to entry for CSPs, lead to unjust and unreasonable rates, and potentially create market power issues. Even PJM predicted that under the Whitepaper Proposal, only 30% of current demand response resources will be eligible to continue participating in PJM's markets, although this figure is more likely to be approximately only 23%.[171]

As discussed above, the Commission's encouragement of demand response has created innovations, investments, and cost efficiencies. These beneficial impacts on the markets would

[169] *Id*. at 5.

[170] *Id*. at 6.

[171] *See* 2014 Demand Response Operations Markets Activity Report: September 2014.

be significantly hampered, if not undone, by the rough ideas in the Whitepaper Proposal. Eliminating CSPs as an option and forcing all demand response in the PJM capacity market to come from LSEs entities that predominately have minimal motivation to maximize the demand response capabilities of their customers - will result in stifling of choice and decreased participation in PJM's demand response programs. This in turn will reduce the economic efficiencies that demand response has demonstrated it can deliver, and the reliability role of demand response that PJM has come to depend upon operationally will be put at risk.

To see the potential effects, the Commission needs only to look at other markets where demand response in capacity markets is confined to LSEs, such as in National Energy Market ("NEM") in Australia (excluding Western Australia and the Northern Territory). In that market, despite exposure to prices potentially as high as $13,500 per megawatt hours, demand response makes up only about 1.5% of the peak demand.[172] This is compared to approximately 8.6% in PJM, where there is choice between CSPs and LSEs.

Creating such a risk of massive degradation in the efficacy of demand response in RPM simply to avoid the risk that the Commission might later choose to unwind transactions or because of concern that the Commission might later decide these transactions are not within the Commission's jurisdiction is not just or reasonable. The Commission can address PJM's concern by providing assurances that it will not resettle auction results.

Moreover, by essentially forcing an arranged marriage between demand response providers and LSEs, the Whitepaper Proposal amounts to the antithesis of customer choice, which is the fundamental principle of healthy, competitive markets.

[172] *See* 2014 Australian Energy Market Operator's National Electricity Forecasting Report. (AEMO's NEFR), the Information Methodology Paper containing "2014 NEFR Demand-side Participation" dated June 30, 2014 *available at:* http://www.aemo.com.au/Electricity/Planning/Forecasting/National-Electricity-Forecasting-Report/NEFR-Supplementary-Information.

As a practical matter, the Whitepaper Proposal introduces a new, unnecessary contractual relationship with potentially significant transaction costs between CSPs and retail aggregators. This occurs with either of the two most obvious models that the Whitepaper Proposal suggests. In one scenario, the CSP would need to negotiate contracts with large numbers of retail aggregators which serve CSP customers. In another scenario, CSPs contract with providers to be exclusive providers of CSP services. Both scenarios incur a new layer of contracts with associated costs. They both reduce customer choice. They both increase risk for provision of CSP services due to uncertainty regarding contract terms. In short, the Whitepaper Proposal is a step backwards.

## VII. CONCLUSION

For the reasons set forth above, AEMA members respectfully request that the Commission deny the Complaint.

Respectfully submitted on behalf of AEMA,

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Dated: October 22, 2014

# ATTACHMENT A

# AFFIDAVIT OF BRUCE CAMPBELL

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

| | | |
|---|---|---|
| **FirstEnergy Service Company** | **)** | |
| **v.** | **)** | **Docket No. EL14-55-000** |
| **PJM Interconnection, L.L.C.** | **)** | |

## AFFIDAVIT OF BRUCE CAMPBELL

Mr. Bruce Campbell, having been duly sworn, deposes and states as follows:

1. My name is Bruce Campbell. Since October of 2007 I have been employed as Director of Regulatory Affairs for EnergyConnect, Inc. ("EnergyConnect"), a curtailment service provider ("CSP") of demand response services. I am responsible for EnergyConnect's regulatory affairs nationwide and have particular responsibility for EnergyConnect's activity in PJM Interconnection, L.L.C.'s ("PJM") electricity markets, serving as EnergyConnect's Primary Voting Member and member/participant in a wide variety of committees and subcommittees. In July of 2011, EnergyConnect was bought by Johnson Controls, Inc. ("JCI") and is now a wholly owned subsidiary of JCI. I also direct regulatory activities in other Regional Transmission Organizations ("RTOs"), including CAISO, NYISO, and ERCOT. I represent JCI as a founding member and Secretary/Treasurer of the Advanced Energy Management Alliance ("AEMA").

2. Prior to my employment at EnergyConnect, beginning in November 2000, I served in a similar role at Mirant, an independent wholesale generator. I began my career with the Potomac Electric Power Company ("PEPCO") in 1975 as a mechanical engineer serving in a number of engineering and management positions including generating station manager and power market consultant. In the latter position I was responsible for

advising PEPCO in the transition of PJM from a utility owned power pool to its current Independent System Operator ("ISO") structure. I have nearly 40 years of industry experience, including more than 15 years involvement with PJM and electric market design. I have participated in every stakeholder process that has addressed PJM's approach to procurement of capacity for reliability, and also have an understanding of pre-ISO reserve sharing processes. I have expert knowledge of PJM's Reliability Pricing Model ("RPM") and of both generation and demand response roles within RPM.

3. I submit this affidavit ("Affidavit") in support of the Protest of the Advanced Energy Management Alliance in this proceeding. In this Affidavit, I provide a description of the way demand response works in PJM's electric capacity market, or "RPM." PJM's RPM rules are regulated by the Federal Energy Regulatory Commission ("FERC"). Under the RPM rules, PJM holds an annual "Base Residual Auction" or "BRA" to procure sufficient electric generating capacity to meet PJM's peak demand plus a reserve margin necessary to provide for reliability. Reserves are required to assure that there is capacity to meet contingencies such as generator outages, extreme weather conditions and deviations from forecasts. The reserve margin is based on this need.

4. Demand response, generation supply within PJM, certain energy efficiency projects, and imports to PJM are the primary sources of electric capacity serving PJM load. PJM is faced with the retirement of coal-fired electric generators representing a substantial amount of capacity that historically participated in the RPM. (*See* PJM 2013 Annual Report, p. 14 (May 2014), *available at:* http://www.pjm.com/~/media/about-pjm/newsroom/annual-reports/2013-annual-report.ashx). According to a section entitled "Adapting to a New World" in PJM's last annual report, in the previous annual capacity

auction for the 2016/2017 delivery year, 5,463 MW of new generation and 12,408 MW of demand response capacity cleared the auction. (*Id.*). According to PJM's report of the 2017/2018 BRA Auction Results, 10,974 MW of demand response capacity cleared that auction. It is apparent that demand response plays a significant role in PJM's wholesale capacity market.

5. Demand response is curtailment service. As relevant to the PJM annual capacity auctions (BRAs), demand response involves a commitment to provide electric capacity for a year commencing three years after PJM completes each BRA. Accordingly, the capacity commitments extend up to approximately four years after each BRA.

6. The predominant form of curtailment service begins with an end-user contracting to deliver curtailment service through a CSP. Approximately 77% of the curtailment service which cleared the PJM annual capacity auction was from stand alone CSPs. (*See* 2014 Demand Response Operations Markets Activity Report: September 2014 by James McAnany, p. 9 (September 10, 2014)). CSPs may also be Load Serving Entities ("LSEs") or Electric Distribution Companies ("EDCs"). When I use the term "CSP" below, depending on the context, it can describe any one or all of these models.

7. LSEs supply unbundled electric supply to retail electric consumers. EDCs provide the local distribution service to retail electric customers. Much of this electric distribution service is provided by franchise utilities regulated by state or local utility regulators. Local distribution is a term used in the Federal Power Act, the meaning of which is described in the Protest of the Advanced Energy Management Alliance. For purposes of this affidavit, it means the bundled retail sale of electric energy including transmission on the EDC system and/or lower voltage, more local transportation of electric energy

combined with the sale of electric energy itself, or just the local transportation of electric energy on an unbundled basis. The state or local utility regulators regulate the EDCs functioning in their role as EDCs and LSEs, although the retail supply of electric energy may be lightly regulated or unregulated at the state or local regulatory level. Some large retail consumers also act as their own CSP. In the BRAs, PJM procures electric capacity sufficient to satisfy the requirements of all LSEs and charges each LSE for the capacity it requires to satisfy PJM's requirements. The tariff provisions governing these requirements and the RPM are subject to FERC review and approval.

8. In order for curtailment service to participate in the capacity market, several transactions take place. First, a common form for curtailment service to participate in the PJM capacity market is for a CSP, such as EnergyConnect, to enter into an agreement with the end user which is the source of the curtailment service. EnergyConnect is a subsidiary of Johnson Controls and a CSP in PJM. EnergyConnect uses a "Master Service Agreement" pursuant to which curtailment service participants agree to provide curtailment capability to meet PJM RPM capacity requirements, as well as other PJM ancillary services to the extent the customer so agrees. The terms of service are closely aligned with the PJM Open Access Transmission Tariff ("Tariff") requirements that define what PJM will buy. CSPs register each customer with PJM to assure that there is no double counting of capacity and to provide a basis for performance measurement. It is worth noting that customers may be under contract for periods beyond any auction year. EnergyConnect has contracts that extend to the 2018-19 delivery year and beyond. The Base Auction for 2018-19 will not be held until May 2015. ECI and the customers rely on the continuing ability to provide curtailment.

9. Second, the curtailment service aggregator/CSP offers the curtailment service to PJM, the RTO and market administrator, as capacity for the BRA. PJM has different transmission zones generally corresponding to each electric transmission owner within PJM. The CSP offers are typically on a transmission zone basis with all registered customers within a zone aggregated in the zonal offer. Exhibit BC-1 is a redacted screenshot of EnergyConnect's settlement detail from PJM. Column 4001.22 is entitled "Resource Name." The EnergyConnect cleared capacity positions in the PJM BRA are identified on an aggregate basis by transmission zone. Generically, this column lists the resource name as *CSP NAME – ZoneName - Product type*. Accordingly, "ECONCT" is the name for Energy Connect. "METED," "JCPL," and "PECO" refer to the transmission zones for Metropolitan Edison Company, Jersey Central Power & Light Company (both FirstEnergy subsidiaries) and Philadelphia Electric Company, respectively. Column 4001.23 is entitled RPM Auction and displays the type of auction or round. For example, "BASE" appears for capacity cleared in the BRA. Column 1600.11 is entitled "Cleared Capacity (MW)" and is populated by the aggregate amount of capacity which EnergyConnect as a CSP cleared in that zone. Thus, the CSP offers a zonal aggregation of curtailment capacity sources to PJM. In its settlement system, PJM compensates curtailment service from demand response based on the zone-based resource offerings. It illustrates that the CSP is providing a wholesale, zone-based offer of capacity to PJM and that compensation is zone-based and aggregated as well. Each curtailment capacity resource may consist of many individual registrations.

10. Third, PJM runs each BRA taking into account all capacity resources duly offered into the BRA by market participants, including generators and CSPs which aggregate

curtailment service capacity. PJM's RPM rules specify that generation capacity resources, energy efficiency resources, and curtailment capacity resources satisfy performance criteria in order for PJM to maintain system reliability. (See PJM Reliability Assurance Agreement at Section 1.8). PJM stacks the capacity offers and determines the least cost solution to ensure enough capacity clears each auction to satisfy PJM load and reserve requirements. Accordingly, only generation and curtailment capacity which is sufficient from a resource adequacy perspective and economic clears each auction, resulting in commitments for the resources which clear the auction. In the PJM settlement detail contained in Exhibit BC-1, as noted, Column 1600.11 is entitled "Cleared Capacity (MW)" and is populated by the aggregate amount of capacity which EnergyConnect as a CSP cleared in that zone. Column 3001.22 is entitled "Capacity Price ($/MW)" and shows the applicable zonal clearing price for the specified auction. This is a single clearing price for a particular auction in a particular zone and applies to all capacity resources which clear that auction in that zone. This is not specific to EnergyConnect, but representative of the manner in which PJM clears capacity for other CSPs.

11. In the case of each annual BRA, in which the vast majority of all PJM capacity clears, the commitments resulting from PJM's cleared and posted results apply for the delivery year commencing approximately three years after the auction (the May 2011 BRA results require the cleared resources to be available June 1, 2014 through May 31, 2015). In PJM auctions, capacity is procured while recognizing transmission constraints within regions called "Locational Deliverability Areas" or "LDAs." An LDA may consist of one or more zones and in some limited instances, regions within zones. In such situations, PJM considers capacity from demand response or generation in any zone within the LDA to be

sufficient to satisfy LSE obligations anywhere within that LDA. An LDA or zone may cross state lines as well.

12. Fourth, in a given delivery year PJM uses the capacity secured through the RPM to satisfy the obligations of all LSEs within PJM on a zonal basis as provided for in the Tariff. PJM charges the LSEs for capacity PJM procured on each LSE's behalf. (*See* PJM Tariff, Att. DD, Section 6).
13. Fifth, each EDC in its role as an EDC provides local distribution service to its end use customers pursuant to state-jurisdictional tariffs subject to review by the state regulator of electric distribution services. In the electrical area served by PJM, there are 14 such regulators in 13 states and the District of Columbia and in addition, numerous smaller municipal systems and cooperatives that provide a similar role with respect to the many municipal and cooperative electric distribution systems electrically within PJM.
14. Sixth, each LSE, including EDCs and competitive energy service companies that are LSEs, makes retail sales of electric energy to its end use customers either pursuant to state-jurisdictional tariffs or agreements subject to review by the state regulator or unregulated agreements permitted by the state regulator. It is possible that the fifth and sixth elements may be bundled together by some entities in some states.
15. When a CSP such as EnergyConnect enters into an agreement with an end use customer to secure curtailment service, it does not sell electric energy or provide local distribution service to the end use customer. Rather, it secures curtailment service to offer into the PJM capacity market auctions, including the BRAs as part of PJM’s RPM process. PJM is not an end user of the electric capacity, including curtailment service, which PJM clears through the RPM auctions. PJM compensates capacity suppliers, including CSPs,

but PJM is not the end user. Rather, PJM procures the capacity on behalf of the LSEs in PJM and charges the LSEs for this capacity. LSEs in their capacity as LSEs are not end users of electric energy. Rather, the LSEs provide the electric commodity to end users through retail sales of electric energy. The sales of capacity from customers providing curtailment service to the CSPs to PJM to the LSEs are not end use sales of capacity. They are sales for resale -- wholesale sales -- of capacity.

This concludes my Affidavit.

**AFFIDAVIT**

Bruce Campbell , being duly sworn, deposes and states that the contents of the foregoing Affidavit of Bruce Campbell are true and accurate to the best of his knowledge, information and belief.

Bruce Campbell
Director of Regulatory Affairs
EnergyConnect, Inc.

For and on behalf of
Advanced Energy Management Alliance

Subscribed and sworn to me this 21 day of October, 2014:

Juanita E. Singleton
Notary Public

Printed Name: Juanita E. Singleton

My commission expires: 3-31-2017

JUANITA E. SINGLETON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires March 31, 2017

# EXHIBIT BC-1

MSRS
Market Settlements Reporting System

PJM Settlement

# MSRS Report Viewer

Customer Account: EnergyConnect, Inc. Report: RPM Auction Credits

Start Date: 09/01/2014 | End Date: 09/01/2014 | Version: Latest | File Type: CSV

Display | Download Now | Add to Cart | E-Mail PJM Market Settlements about this report.

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| | 4000.04 | 4001.21 | 4001.22 | 4001.23 | 1600.11 | 3001.22 | 2600.01 | 2600.11 | 2600.02 |
|---|---|---|---|---|---|---|---|---|---|
| er Code | Date | Resource ID | Resource Name | RPM Auction | Cleared Capacity (MW) | Capacity Price ($/MW) | RPM Auction Credit ($) | Make-Whole MW | RPM Auction Make-Whole Credit ($) |
| 10623 | ECONCT | 09/01/2014 | 3697962 | ECONCT JCPL EE J11M12 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3673903 | ECONCT JCPL EE J12M13 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3673905 | ECONCT JCPL EE J13M14 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683683 | ECONCT METED DR ES | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683684 | ECONCT METED DR LMT | BASE | | 125.47 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683684 | ECONCT METED DR LMT | SECOND | | 56.94 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683684 | ECONCT METED DR LMT | THIRD | | 132.20 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 2367683 | ECONCT METED DR PLANNED LMT | FIRST | | 5.23 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 2367683 | ECONCT METED DR PLANNED LMT | SECOND | | 56.94 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 2367683 | ECONCT METED DR PLANNED LMT | THIRD | | 132.20 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3697959 | ECONCT METED EE J11M12 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3673902 | ECONCT METED EE J12M13 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3673900 | ECONCT METED EE J13M14 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683661 | ECONCT PECO DR ES | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683662 | ECONCT PECO DR LMT | BASE | | 125.47 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3689067 | ECONCT PECO DR PLANNED LMT | BASE | | 125.47 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3689067 | ECONCT PECO DR PLANNED LMT | FIRST | | 5.23 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3689067 | ECONCT PECO DR PLANNED LMT | SECOND | | 56.94 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3697961 | ECONCT PECO EE J11M12 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3673901 | ECONCT PECO EE J12M13 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3673898 | ECONCT PECO EE J13M14 | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683675 | ECONCT PENELEC DR ES | BASE | | 136.50 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3683676 | ECONCT PENELEC DR LMT | BASE | | 125.47 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 2367684 | ECONCT PENELEC DR PLANNED LMT | FIRST | | 5.23 | | 0.0 | 0.00 |
| 10623 | ECONCT | 09/01/2014 | 3697958 | ECONCT PENELEC EE J11M12 | BASE | | 136.50 | | 0.0 | 0.00 |

## CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 22nd day of October, 2014.

/s/ *Herminia M. Gomez*
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