

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

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

**MOTION TO INTEREVE NE AND COMMENTS OF THE
NEW YORK INDEPENDENT SYSTEM OPERATOR, INC.**

In accordance with Rules 212 and 214(d) of the Commission’s Rules of Practice and Procedure, and with the June 11, 2014¹ *Notice Extending Due Date for Answers, Interventions, and Protests*, the New York Independent System Operator, Inc. (“NYISO”) respectfully seeks leave to intervene and submit comments in this proceeding. The NYISO neither opposes nor supports the *Amended Complaint of FirstEnergy Service Company* (“Amended Complaint”) at this time. It is making this filing to inform the Commission of the Amended Complaint’s potential impacts on the NYISO-administered capacity market and on reliability in New York. The NYISO also asks that the Commission provide guidance in the near future regarding the interpretation of the recent *EPSA* decision² that prompted the Amended Complaint. The existence of the Amended Complaint, and the range of responses it is likely to elicit, illustrates the need for such guidance. The NYISO acknowledges, however, that a complaint docket is

¹ 18 C.F.R. §§ 385.212 and 385.214(d).

² *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (“*EPSA*”).

probably not the right vehicle for such generic guidance and is therefore not asking that the Commission provide it in this proceeding.

I. MOTION TO INTERVENE

The Amended Complaint argues that *EPSA* requires the PJM Interconnection, L.L.C. (“PJM”) to remove all provisions in its tariff, agreements, and business manuals that allow demand side resources to be compensated as capacity suppliers. It also contends that PJM must recalculate the results of its Base Residual Auction (“BRA”) for the 2017/2018 Delivery Year.³

The NYISO and PJM operate neighboring transmission systems and administer neighboring capacity markets. Capacity is traded between the two markets. Resources located in PJM can offer capacity into New York and those located in New York can offer into PJM. A Commission order excluding demand response from the PJM capacity market would presumably increase capacity prices in PJM⁴ and, given the close ties between the two markets, would also affect capacity prices in New York. To the extent that excluding demand response would impact reliability in PJM there could also be reliability implications in New York.

In addition, the Amended Complaint has triggered the first Commission proceeding that can be expected to address *EPSA*’s potentially sweeping implications for Commission-jurisdictional capacity markets. PJM has already highlighted some of the significant jurisdictional and market questions in its October 7 Filing.⁵ Many national organizations and entities from outside of the PJM region have filed to intervene. This proceeding is thus likely to

³ See Amended Complaint at Sections II and III.

⁴ See Amended Complaint at 5.

⁵ PJM’s October 7 informational “courtesy filing” in this proceeding submits a copy of its recent white paper entitled *The Evolution of Demand Response in the PJM Wholesale Market* (“October 7 Filing.”).

establish precedent on major policy issues that would potentially apply to the NYISO. These considerations give the NYISO an even greater interest in the outcome of this proceeding.⁶

Accordingly, the NYISO has multiple interests at stake in this case that cannot be represented by any other entity and should be permitted to intervene.

II. COMMENTS

EPSA vacated Order No. 745⁷ which addressed the compensation paid to demand side resources in the “organized” energy markets. It did not speak directly to capacity market issues. The Commission has expressed the view in recent D.C. Circuit filings that *EPSA*’s implications for capacity markets are unclear.⁸ Even the *EPSA* petitioners have stated that the decision did not rule on participation by demand side resources in the “organized” capacity markets. Instead, they have asserted that the question should be decided, in the first instance, by litigation before the Commission.⁹ Nevertheless, as PJM has acknowledged,¹⁰ *EPSA* raises questions regarding

⁶ The Commission generally rejects requests to intervene that, unlike the NYISO’s, are based solely on the possible precedential impact of a particular decision but has allowed such interventions in cases that “could have the effect of establishing binding precedent on broad issues affecting the entire industry.” See, e.g., *Florida Municipal Power Agency v. Florida Power & Light Co.*, 65 FERC ¶ 61,125 at 61,612 (1993) (allowing such interventions in an early case addressing the Commission’s then new authority under Sections 211 and 212 of the Federal Power Act.) The NYISO respectfully submits that this proceeding could also establish binding precedent on broad issues of interest to the entire industry and that this fact constitutes an additional valid basis for permitting the NYISO to intervene.

⁷ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (2011), *order on reh’g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012) (Order No. 745).

⁸ See, e.g., *Motion of Federal Energy Regulatory Commission to Stay Issuance of Mandate*, U.S. Court of Appeals for the District Columbia Circuit, Case Nos. 11-1486, *et al.*, at 8 (September 22, 2014) (“It is unclear whether the panel majority intended simply to invalidate the Rule, for lack of jurisdiction, to the extent it offers a particular high level of compensation for demand response resources participating in particular energy markets, or whether the panel majority intended its jurisdictional ruling to reach beyond the particular rulemaking on review and to extend to other levels of compensation or to capacity and ancillary markets as well.”).

⁹ See, e.g., *Petitioners’ Response to Respondents’ Motions to Stay Issuance of Mandate*, U.S. Court of Appeals for the District Columbia Circuit, Case Nos. 11-1486, *et al.*, at 7 (“The Commission’s final rule applies only to the energy markets. As a result, the broader precedential effects of the Court’s

the lawfulness of demand response participation in organized capacity markets and the possible need for changes to the markets.

The Amended Complaint presents these questions to the Commission for the first time. It argues that the *EPSA* majority's reasoning must be interpreted to prohibit participation by demand side resources in PJM's capacity market.¹¹ The Amended Complaint contends further that the results of the most recent PJM BRA should be revised to eliminate the impact of participation by allegedly "unlawful demand response resources." It also implies that earlier PJM auction results should eventually be revisited.¹²

The NYISO takes no position at this time on the merits of the Amended Complaint as it applies to the PJM capacity market and auctions.¹³ But the NYISO wishes to make the Commission aware that this proceeding has serious potential consequences for the NYISO. The close ties between the PJM and NYISO capacity markets ensure that any price and reliability impacts in PJM of a Commission order in this docket will have spillover effects in New York. Moreover, the NYISO administers a capacity market with substantial demand response participation. The workings and, perhaps the design, of that market may have to fundamentally change depending on what interpretation of *EPSA* emerges from this proceeding.

Demand side resources have been eligible to participate in the NYISO capacity market since it began in 1999. Their participation was anticipated as far back as the first filings

decision — as it may relate to the capacity markets and other markets — will have to be resolved in future cases and in the first instance by the Commission.")

¹⁰ See October 7 Filing, Attachment at 4 ("The reach of the *EPSA* decision is subject to debate. . . [T]he jurisdictional analysis applied by the majority to reach the *vacatur* suggests a precedent that could apply, when litigated, to PJM's Reliability Pricing Model capacity market.")

¹¹ Amended Complaint, Section II.

¹² Amended Complaint, Section III.

¹³ The NYISO reserves its rights to make such arguments, and to address *EPSA*'s potential legal and jurisdictional implications for NYISO-administered organized markets, in the future.

proposing to establish the NYISO in 1997. Although demand side participation in the capacity market has varied over time it has been substantial in recent years and has contributed to reliability in New York.¹⁴ As of the NYISO's May 2014 ICAP Spot Market Auction, there were 3,681 resources representing 1,082 MW enrolled in the NYISO's "Special Case Resource" ("ICAP/SCR") program eligible to participate in the capacity market. This compares to the NYISO's 2014 Summer Capability Period peak load of nearly 30,000 MW. During Summer 2013, when there was a higher peak and greater stress on the system, the NYISO called on demand response five times to address a prolonged period of high temperatures.

If the Commission were to grant the Amended Complaint the NYISO's ability to continue to allow demand side resources to participate in its capacity market would be called into serious question. If the Commission were to reject the Amended Complaint there would still be substantial uncertainty regarding the legal sustainability of the Commission's determination in light of the unclear scope of *EPSA*'s jurisdictional holding. The uncertainty created by *EPSA* threatens to discourage participation in the NYISO capacity market and to undermine confidence in auction results. Any future auctions that remained open to demand response would still be subject to legal challenge. Similarly, regardless of the Commission's ruling on the Amended Complaint there will be questions about whether past auction results should be revisited in light of *EPSA*. There may also be additional complaints and challenges regarding demand side participation in capacity markets.

Accordingly, the NYISO urges the Commission to provide as much guidance as possible in the near future regarding its interpretation of the scope and implications of *EPSA*. Clear and

¹⁴ The NYISO also administers a reliability-based Emergency Demand Response Program and accommodates demand side participation in its energy and ancillary services markets. But demand side participation in the other NYISO-administered markets has been at lower levels than its involvement in the capacity market.

timely Commission guidance will be very helpful to the NYISO as it considers issues similar to those identified in PJM's October 7 Filing. It would also facilitate discussions among the NYISO, its stakeholders, and the New York State Public Service Commission ("NYPSC") concerning the NYISO's potential response to *EPSA*.

Specifically, if the Commission decides to interpret *EPSA* to permit continued demand side participation in the organized capacity markets it should clearly state that, if its interpretation is later rejected on appeal, it will decline to retroactively undo the results of auctions conducted in reliance on that interpretation. The Commission should also, as a general matter,¹⁵ continue to follow its precedents favoring market certainty and disfavoring requests to retroactively overturn or modify past auction results. It is well-established that the Commission enjoys broad discretion when fashioning remedies, including the discretion to decline to overturn settled market results or require refunds.¹⁶ To the extent that the Commission determines that it may exercise this discretion in the event that demand participation in capacity markets is ultimately found to be unlawful it should state its intention to do so. Such a statement would not necessarily eliminate legal uncertainty but should give some assurance to the markets during the months or years that it may take for the legal questions concerning *EPSA* to be fully resolved.¹⁷

Conversely, if the Commission interprets *EPSA* in a way that would prohibit future demand response participation in the organized capacity markets it should announce that it will

¹⁵ As noted above, the NYISO takes no position at this time on the Amended Complaint's specific request that the May 2014 PJM BRA results be re-calculated.

¹⁶ See, e.g., *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the Commission's breadth of discretion is "at its zenith" when fashioning remedies).

¹⁷ For example, on October 20, 2014 the D.C. Circuit stayed the issuance a mandate in the *EPSA* proceeding until December 16, 2014 pending the outcome of the federal government's decision of whether to file a petition for writ of certiorari. If such a petition is filed it is foreseeable that the issuance of a mandate will be delayed longer. But even if a petition is not filed with, or accepted by, the Supreme Court, it may be years before the jurisdictional questions raised by *EPSA* are settled through other litigation.

exercise its remedial discretion to allow ISOs/RTOs that administer those markets to transition to post-*EPISA* alternatives in an orderly fashion. The Commission should indicate that it will work with state regulators, as necessary, to afford ISOs/RTOs and state regulators, a reasonable time to make the transition. The Commission should also state that it will do what it can to accommodate proposals aimed at minimizing market disruption during the transition. The goal in such a scenario should be to allow ISOs/RTOs to find legally permissible ways to continue to recognize the reliability and economic benefits of demand response.

In the NYISO's case, it is likely that tariff and software changes would be necessary to implement an alternative market design that would shift demand response participation from the present wholesale model to a "retail" model subject to NYPSC regulation. Such modifications may require considerable time to complete. Aside from developing necessary tariff and software changes, implementation of an alternative "retail" design should be timed so that stakeholders have an opportunity to adapt their market strategies to the new paradigm well in advance of any NYISO auctions that would exclude demand side resources as suppliers. Under New York's model, the first step in determining the State's resource adequacy requirements is establishing the Installed Reserve Margin ("IRM") for the upcoming summer and winter Capability Periods. Once the IRM is approved, Locational Minimum Capacity Requirements for the New York Localities are set. It is only after those two steps occur, that Load Serving Entities can determine their capacity requirements for the subsequent winter and summer Capability Periods. In short, a rational transition for New York should commence before the annual IRM-setting process to avoid disruptive mid-course corrections after Capability Period auctions have been run.

Although an orderly, measured transition would be preferable, the NYISO recognizes that it may not have the luxury of time to make capacity market changes that might be required

under *EPSA*. Thus, the NYISO is also actively exploring shorter-term “stopgap” plans to address *EPSA*’s potential jurisdictional implications. It may propose tariff or market rule changes that address these issues in future filings. Commission guidance concerning the interpretation of *EPSA* would assist with the development of these plans and facilitate more rapid implementation should it be required.

III. COMMUNICATIONS

Communications regarding this proceeding should be addressed to:

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IV. CONCLUSION

For the reasons set forth above the NYISO respectfully requests that the Commission grant its motion to intervene, consider its comments, and take separate action in near future to provide the guidance that the NYISO has requested.

Respectfully Submitted,

/s/ Ted J. Murphy
Counsel to the
New York Independent System Operator, Inc.

October 22, 2014

cc: Michael Bardee
Gregory Berson
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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2014).

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

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