



that the current tariff is unjust and unreasonable, much less that its filed proposal is just and reasonable.

## **I. MOTION TO INTERVENE & COMMUNICATIONS**

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving power markets. EPSA seeks to bring the benefits of competition to all power customers.

Many of EPSA's members both own generation assets and are authorized to sell energy and ancillary services in PJM, and also participate in the RTO's capacity market. Given this involvement in the PJM markets, EPSA's members are significantly affected by the various demand response programs in PJM. Hence, EPSA has a direct and substantial interest in the instant proceeding that cannot be adequately represented by any other party, and allowing EPSA to actively participate in this proceeding would be in the public interest. Accordingly, EPSA respectfully requests that the Commission grant this timely motion to intervene.

All pleadings, correspondence and other communications concerning this proceeding should be directed to:

Nancy E. Bagot, Vice President of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Avenue, N.W., 11th Floor  
Washington, D.C. 20005  
(202) 628-8200  
[NancyB@epsa.org](mailto:NancyB@epsa.org)

## II. BACKGROUND

PJM's proposed changes to the ELRP were filed as a supplemental report and request for further Commission action on rehearing – allegedly in response to the Commission's December 31, 2007 order denying a complaint by the PJM Industrial Customer Coalition (PJMICC).<sup>3</sup> In its complaint, the PJMICC asked the Commission to (1) block the sunset of subsidy payments under PJM's ELRP which were set to expire on December 31, 2007; and, (2) approve PJMICC's alternative proposal for continuing subsidy payments. Of note, such a report was not required by the Complaint Order. The Commission re-docketed the instant PJM filing; the Complaint Order remains pending on rehearing. Significantly, the Complaint Order determined that PJMICC did not provide evidence showing that the subsidy payments were needed to ensure just and reasonable rates and therefore the payments expired under the ELRP on December 31, 2007.<sup>4</sup>

The Complaint Order also “encourage[d] PJM and the parties to continue discussions to reach agreement on an efficient demand response program” and further emphasized that it would “look to PJM and its senior staff’s participation.....to identify, analyze, and resolve remaining issues on the Economic Program.”<sup>5</sup> As outlined in its filing, PJM adhered to this directive and has continued stakeholder discussions on the ELRP without achieving consensus on particular changes. PJM states that during the extensive

---

<sup>3</sup> *PJM Industrial Customer Coalition v. PJM Interconnection, L.L.C.*, 121 FERC ¶ 61,315 (2007) (Complaint Order).

<sup>4</sup> Complaint Order at P 26.

<sup>5</sup> *Id.* at P 29.

stakeholder process several proposals were considered, including a straw proposal by PJM, but none of the proposals received the stakeholder super-majority consensus necessary for PJM to file amendments to the ELRP pursuant to section 205 of the FPA. It should be noted that the PJM “compromise proposal” reflected in the instant filing differs in important aspects from the PJM straw proposal considered in the stakeholder process with respect to the increased level of the proposed subsidy payment and a more open-ended, rather than date-certain, sunset provision for the payments, among other things.

PJM says that due to the importance of strong demand response in its energy markets “and the Commission’s expectation that PJM would work to resolve remaining issues regarding its [ELRP], the PJM Board determined to report the results of the stakeholder process to the Commission and suggest PJM’s comprehensive compromise solution as a means of resolving this proceeding on rehearing.”<sup>6</sup> The as-filed PJM proposal reflects revisions to the ELRP compensation and settlement rules as follows:

- (1) Base compensation for demand reductions by Fixed Price Customers would be changed from the current rate of LMP less both the generation and transmission (LMP – G +T) components of the retail rate to LMP less only the generation component of the retail rate (LMP – G). The intent is to provide similar compensation for Fixed Price Customers and LMP-Based Customers who reduce demand.
- (2) Fixed Price Customers and Day-Ahead LMP Customers would be exposed to charges when they self-schedule and submit requests for settlements but fail to reduce consumption.
- (3) Subsidy payments for demand response would be reintroduced. The threshold above which subsidy payments are provided to customers that reduce consumption is set, in each zone, at the highest priced 9% of hours from the previous calendar year. They would receive an LMP

---

<sup>6</sup> PJM Filing at pg. 4.

payment without a deduction for the generation portion of their retail rates. Therefore, the compensation for Fixed Price Customers effectively would be equal to the LMP in the wholesale market at the time of the reduction plus the avoided applicable generation charge (G) in its fixed price retail contract. In other words, Fixed Price Customers would receive, through the combination of the Economic Program and the retail rate savings, LMP + G, where G (avoided cost) represents the incentive portion of compensation for demand reductions. The incentive compensation for Day-ahead LMP Customers and Real-time LMP Customers would be a simple fixed payment of \$75/MWh for demand reductions only in the Real-time Energy market (LMP + \$75). The subsidy payments would sunset 60 days after PJM has determined that 1,000 MW of new price responsive demand capability for small and medium-sized end-use customers has been added to the PJM footprint.<sup>7</sup>

### III. PROTEST

As an initial matter, EPSA acknowledges and commends the progress and successful efforts by PJM to promote valuable demand response resources into its markets. Certain of these efforts were required by Order No. 890 to better incorporate demand response into planning processes and comparability among resources, as well as by Order No. 719 that required further refinements to eliminate barriers to comparable treatment of demand resources in organized markets.<sup>8</sup> Additionally, PJM has been a leader in undertaking initiatives of its own, including facilitating stakeholder processes, to establish the appropriate structure for competitive participation by demand-side resources. These resources are an important element of robust electricity markets and can help make markets more efficient.

---

<sup>7</sup> PJM Filing at pgs. 29-31.

<sup>8</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007) and *Wholesale Competition in Regions with Organized Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008).

EPSA members support participation of demand resources in the PJM energy, capacity and ancillary services markets on just and reasonable terms. They have been actively involved in the stakeholder processes to develop and facilitate demand response within PJM. EPSA members further support competition and market participation on a level playing field. EPSA believes that demand response now enjoys such equitable opportunities in the wholesale markets administered by PJM, as evidenced by recent capacity market results. Unfortunately, PJM's present filing goes astray of these principles by proposing preferential treatment to a certain class of resource through a subsidy that may instead distort wholesale price signals in order to achieve a desired result in retail markets, producing inefficient market outcomes.

In considering the PJM filing, EPSA asserts that as a threshold matter, the Commission has already deemed the existing ELRP rates to be just and reasonable, and PJM has not met its burden of proof that the existing rates are unjust and unreasonable, nor has it proved that its new proposed rate is superior to the existing rate. The appropriate form for such a filing is under section 206 of the FPA, not as a supplemental report in a complaint proceeding on which rehearing is pending. Given these procedural deficiencies alone, the Commission should reject the PJM filing.

Of particular concern to EPSA, with regard to the form of the PJM filing, are the meaningful differences between the subsidy payment provisions considered in the stakeholder process and the as-filed provisions. For PJM to file unvetted/unsupported changes that have potentially significant cost impacts

in the form of a supplemental report further renders the proposal unjust and unreasonable. If the filing in its entirety is not rejected, the subsidy payment provisions should be rejected as unjust and unreasonable. A subsidy is not required at this time to incent new or retain existing demand resources, nor does a subsidy eliminate any barriers to comparable treatment of demand side resources in PJM's wholesale markets.

**A. The Current ELRP Rate Is Just And Reasonable**

In the Complaint Order denying, among other things, an extension of the subsidy payments under the ELRP as sought by the PJMICC, the Commission determined:

Even without the subsidy payments, the Economic Program provides customers within PJM the incentive to reduce load based on the wholesale rates they confront. For those customers paying retail rates below the applicable wholesale rate, PJM reimburses them for the difference between the wholesale rate and their retail rate. That payment provides customers under retail rates with the same economic incentive to curtail load as if they were paying the wholesale rate itself. It is true that customers currently paying the wholesale price of energy will no longer receive subsidy payments if they curtail load. However, because these customers are paying the applicable wholesale price, they already have an incentive to curtail load. PJMICC has provided no evidence showing that the subsidy payments are needed to ensure just and reasonable rates.<sup>9</sup>

At the time these payments expired in December 2007, they had already been in place for over five years. The subsidies provided customers with an incentive to participate in the demand response program and to provide reimbursement for start-up expenses of participation. The Commission had initially approved such payments only as an interim measure and further

---

<sup>9</sup> Complaint Order at P 26.

determined “[w]e cannot find it unreasonable for the PJM stakeholders to conclude that customers interested in demand response have already had sufficient opportunity to recover start-up costs, so that a subsidy payment is no longer necessary to create an incentive to participate in the program.”<sup>10</sup>

As PJM notes in its filing, while the Commission encouraged PJM and the parties to continue discussions to reach agreement on an efficient demand response program, there was no finding or direction that a subsidy is a necessary component in promoting development of such a program or one that should be made a permanent (or in this instance, an open-ended) part of the market. Consequently, the Commission approved the current ELRP without a subsidy payment and deemed it to be just and reasonable. It would be arbitrary and capricious for the Commission to grant PJM’s requested relief and abruptly reverse course from its previous decision to sunset the subsidy based on the scant support offered in a supplemental report.<sup>11</sup>

---

<sup>10</sup> *Id.* at P 27.

<sup>11</sup> The Commission has a history of Orders that have set forth a reasonable regulatory expectation that the subsidy payments will sunset. *See* generally the Complaint Order and *PJM Interconnection, LLC*, 114 FERC ¶ 61,201 (2006). (The latter order granted PJM’s request to make the ELRP permanent, but allowed the subsidy payments to remain only as a temporary feature of the ELRP.); also, *PJM Interconnection LLC*, 99 FERC ¶ 61,227 at P. 14 (2002) (The Order issued seven years ago stated “While clearly an incentive program with no end in sight would be undesirable, PJM is not proposing such a program. Rather, PJM has proposed a program which will sunset by its own terms in 30 months, but which will provide a long enough period....to give customers an incentive to invest in and develop load reduction mechanisms.”).

**B. PJM Fails To Satisfy Its Burden of Proof And Its Compromise Proposal Should Be Rejected**

Although PJM submitted its proposed ELRP changes in the form of a supplemental report, the appropriate vehicle for such a filing would have been under section 206 of the FPA.<sup>12</sup> PJM's submittal of a supplemental report in the prior complaint proceeding was not specifically required and should be rejected on procedural grounds. If the Commission chooses to evaluate the proposal under section 206 requirements to consider a change in rates or service terms, EPSA asserts that PJM has failed to satisfy its burden of proof and its proposal must be rejected. Under section 206, PJM must first establish that the current ELRP rate is, "unjust, unreasonable, unduly discriminatory or preferential."<sup>13</sup> Further, PJM must show that the proposed remedy – including re-instatement of the subsidy payment with certain changes – is just and reasonable.<sup>14</sup> The burden of proof under the "just and reasonable" standard is a heavy one and PJM's filing fails to meet this standard and should be rejected.<sup>15</sup>

As the underlying basis for the proposed ELRP changes, PJM says that demand response is currently underdeveloped based on a recent PJM market monitor report on demand response barriers to entry (required by Order No.

---

<sup>12</sup> 16 U.S.C. A. § 824e.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See e.g., *PacifiCorp. V. Reliant Energy Services, Inc., Morgan Stanley Capital Group Inc., Williams Energy Marketing & Trading company, and El Paso Merchant Energy, L.P.*, 103 FERC ¶ 61,355 at pg. 87 (2003).

719).<sup>16</sup> Further, PJM says that the proposal represents a compromise, short-term solution to bridge to PJM's long-term vision of more extensive price responsive demand at the retail level that would ultimately eliminate the need for a separate demand response program at the wholesale level. However, as the market monitor report acknowledges, the demand side subsidies do not directly address the root of the problem – the lack of real time price information at the retail level.<sup>17</sup> Instead, the subsidies are merely a work-around – in the wholesale markets – for a problem in the retail market. There is little chance that the proposed subsidy will foster the goal of more price responsive demand at the retail level (after all, five years of the subsidy previously failed to do so) and the Commission must consider the significant costs of the subsidy – implicit costs to wholesale competition and explicit costs to end users funding the subsidies. The end result of PJM's reinstatement of subsidy payments to demand response resources will amount to significant costs being borne by wholesale load in an effort to resolve concerns at the retail level; this is an inappropriate reallocation of retail "costs" to wholesale load.

If PJM's filing is accepted, the subsidy will result in one class of market participants (demand response) being paid substantially more than another (generation) despite the fact that they are intended to provide the same service. This would undermine competition in the energy market and is antithetical to the

---

<sup>16</sup> See Monitoring Analytics, The Independent Market Monitor for PJM, Barriers to Demand Side Response in PJM, (July 1, 2009), *available at* [http://www.monitoringanalytics.com/reports/Reports/2009/Barriers\\_to\\_Demand\\_Side\\_Response\\_in\\_PJM\\_20090701.pdf](http://www.monitoringanalytics.com/reports/Reports/2009/Barriers_to_Demand_Side_Response_in_PJM_20090701.pdf) (MMU Barriers to Entry Report).

<sup>17</sup> *Id.* at pgs. 2-3, 27.

“comparable treatment” between supply sources that the Commission has sought.<sup>18</sup> Second, the costs of the subsidy are not insignificant. End users will pay millions of dollars to fund the incentives. While these facts might be overcome if the subsidy could remedy the prime barrier to entry for demand response (i.e., lack of price responsive demand), PJM does not assert that this is the case. The lack of price responsive demand is due to a technology gap at the retail level and policy matters within the purview of state regulators, not the Commission or PJM.<sup>19</sup> There is no nexus as to how a wholesale subsidy resolves this retail problem, and such a subsidy would only further perpetuate a costly program that was previously determined to be unnecessary for the ELRP to be just and reasonable.

Indeed, it is questionable whether the previous removal of the subsidy can be tied to a decrease in demand response in the energy market at all. PJM notes that the PJM market monitor (PJM MMU) has observed a decrease in settlement demand reductions since issuance of the Complaint Order and the sunset of the ELRP subsidy payments. In 2008, settled demand reductions decreased by 35.8 % from 714,200 MWh in 2007, to 458,300 MWh and the decline continued through March 2009.<sup>20</sup> The PJM MMU offered that while removal of the incentives may have reduced participation, the exact role is not known because there were changes in other key factors which directly impact

---

<sup>18</sup> See Order No. 719 at P 16, (“Commission policy does not favor granting preference for demand response; rather, our goal is to eliminate barriers to the participation of demand response in the organized power markets by ensuring comparable treatment of resources.”).

<sup>19</sup> MMU Barriers to Entry Report at pgs. 5-8.

<sup>20</sup> PJM Filing at pgs. 3-4 and MMU Barriers to Entry Report at pg. 22.

participation. The PJM MMU noted other possible factors contributing to the decrease, including FERC-approved revisions to Customer Baseline Load (CBL) calculations, implementation of a settlement review process, and a drop in PJM price levels. Importantly, the PJM MMU report further states that “[t]he evidence does not support the claim that the removal of the incentive program resulted in a reduction of activity in the Economic Program (emphasis added).”<sup>21</sup>

EPSA asserts that the decrease in economic demand response, given the above factors is, in fact, reasonable and does not support any conclusion that the current rates are unjust and unreasonable, or that its proposed solution is a just and reasonable alternative. First and foremost, the decrease in the growth rate of megawatts registered in the ELRP reported by the PJM MMU<sup>22</sup> is most likely a response to lower LMPs. LMPs are generally lower due to decreased energy demand and lower commodity input prices (i.e., natural gas prices) as widely reported, which demonstrates that the market is self-selecting the least costly solutions to meet load’s day-to-day demands. This outcome is efficient and in the best interest of all market participants. Second, the peak load differences for this summer versus last summer highlight that there was a reduction in participation of all generation resources as a result of decreased demand in general. Given that demand response tends to pick up at peak times, the decrease in demand response resource participation is logical – and does not reflect a market structure problem. Third, as noted, PJM implemented more stringent requirements to assess baseline (i.e., CBL) versus actual use

---

<sup>21</sup> MMU Barriers to Entry Report at pg. 22.

<sup>22</sup> *Id.* at pg. 24.

requirements. PJM made these changes to “facilitate efficient participation of demand response in the PJM energy markets” to address phantom curtailments and decrease the ability for participants to game the market.<sup>23</sup> This change may have also contributed to the decrease in demand response participation.

### **C. Treatment and Participation of Demand Response in PJM**

EPSA urges the Commission to assess the instant PJM filing within the broader context of all of the numerous improvements that have been made across the various PJM demand response programs and the resultant overall increased participation, rather than focusing on one type of demand response in a particular program.

For example, as further evidence that demand response is a full participant in the PJM market and does not require further incentives, EPSA notes results of the latest RPM Base Residual Auction (BRA) for the 2012-2013 planning year. In that auction demand response offers increased by 496% over the prior auction, totaling 9,847 MW of Unforced Capacity. Over 70% of the offered demand response capacity, or 7,047 MW, cleared the auction. This represents an increase in cleared demand response resources of 5,682 MW, when compared to the 2011-2012 planning year BRA and reflects that demand response resources are fully capable of entering the PJM market and are responding to existing price signals.<sup>24</sup>

---

<sup>23</sup> *PJM Interconnection, LLC*, 123 FERC ¶ 61,257 at P. 2 and P. 8 (2008).

<sup>24</sup> See generally PJM 2012 – 2013 RPM Base Residual Auction Results (2009), available at <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2012-13-base-residual-auction-report-document-pdf.ashx>.

Additionally, demand response is paid with other supply resources in the capacity market and will receive a significant level of revenues from participation. Recent PJM information indicates that demand response resources' estimated revenue across the capacity, ancillary and energy markets totals approximately \$180 million as of early September 2009, with the bulk of the estimated revenues resulting from capacity market commitments.<sup>25</sup> Extrapolating that number through year-end to December 31, 2009, results in full year 2009 demand response revenues totaling approximately \$270 million. By any account, this is an enormous compound growth rate, especially considering demand response resource revenues were almost non-existent in the 2002-2003 planning year. Again, such a statistic is reflective of the overall significant growth of demand resource participation across the PJM markets and its opportunities to compete in these markets with other resources. Further, it should be noted that these statistics do not include revenues from the most recent RPM BRA for the 2012-2013 planning year, which as discussed above, reflected an exponential increase in demand resource participation.

While demand response is given the opportunity to compete on a level playing field with other supply resources, a point of concern relates to screening to qualify and penalties for non-performance, which are currently not nearly as stringent for demand resources as they are for generation resources. This lack of parity must be remedied to further allow demand resources to compete directly

---

<sup>25</sup> PJM Market Implementation Committee (MIC) Market Operations Report, (September 10, 2009), Slide 14, *available at* <http://www.pjm.com/committees-and-groups/committees/-/media/committees-groups/committees/mic/20090910/20090910-item-15-mic-markets-report.ashx>.

and equitably with other resources. A recent paper from the University of California Energy Institute highlights this point and discusses the need to treat consumers and producers of electricity symmetrically in the wholesale market.<sup>26</sup>

Notably, in the context of the PJM filing, the paper states:

It is true that the quantity of demand response resources that market participants are willing to provide is likely to be less if demand response resources are required to participate in the ISO markets under the same terms and conditions as generation unit owners. However, the success of DR programs should not be judged by the amount of MWs or MWhs sold, if these magnitudes are in fact not financially binding or directly verifiable. For example, the ISO could purchase a large quantity of MWhs of demand reductions that are purely the result of an artificially high baseline. These demand reductions provide no economic or reliability benefits, but consumers must still pay for them. To judge a program as a success because it has a large number of participants and a large number of MWhs sold fails to recognize the primary goal of symmetric treatment of demand and supply resources – to improve market efficiency and system reliability.<sup>27</sup>

**D. The Incentive Payment Is Unnecessary, Unjust And Unreasonable**

If the Commission determines that PJM has met its burden to demonstrate that the current rates are unjust and unreasonable, it should still reject the proposed solution in the filing as unjust and unreasonable. Specifically, the Commission should reject the subsidy payment form, threshold “trigger” and sunset provisions as unjust and unreasonable.

As an initial matter, there is no need for a subsidy to incent participation at this time, given the demonstrated ability for demand resources to fully participate in PJM markets as discussed above. The subsidy payment provisions are flawed

---

<sup>26</sup> “When it comes to Demand Response, is FERC its Own Worst Enemy?,” University of California Energy Institute, Center for the Study of Energy Markets (CSEM) Working Paper Series, James Bushnell, Benjamin F. Hobbs and Frank A. Wolak, (August 2009), (CSEM Paper).

<sup>27</sup> CSEM Paper at pg. 9.

due to, among other things, the fact that the proposed \$75 MWh subsidy to those already receiving LMP (i.e., customers exposed to real-time prices) is arbitrary and unnecessary. As noted, decreasing demand response participation levels as a function of decreasing overall demand and falling energy prices is not tantamount to an unjust and unreasonable market design. Further, the 9% threshold is too liberal. Subsidy payments would be available for the peak 788 hours each year, which is significantly greater than the entire summer peak period window of 640 hours. While EPSA argues there should be no such provision at all, if the Commission approves reinstatement of subsidy payments to demand response resources, PJM's proposed sunset provision of 1,000 MW of new LMP-priced customers being able to respond to real-time pricing is too open-ended; there should be a date-certain established for its expiration.

In sum, EPSA has concerns with a wholesale subsidy designed to incent a pre-determined amount of a specific class of retail resource that discriminates unjustly and preferentially toward other resources. Additionally, and perhaps more gravely, the proposed subsidy has the potential to distort price signals or result in other negative economic impacts or inefficiencies marketwide. In this instance, the facts do not demonstrate that such a payment is required or desirable to incent certain market behaviors or outcomes, and may in fact perpetuate a cycle in which PJM relies on a wholesale price fix to resolve a retail infrastructure problem. To repeat this approach is not supported by the overarching record on the ELRP.<sup>28</sup>

---

<sup>28</sup> See Complaint Order. Also, see *PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,201 (2006) (The Order granted PJM's request to make the ELRP permanent, but allowed the subsidy payments to

#### IV. CONCLUSION

Wherefore, EPSA respectfully requests that the Commission grant its motion for leave to intervene in this proceeding, consider the comments herein, and reject the PJM proposal as procedurally deficient. Alternatively, the Commission should reject the subsidy payment provisions as they are unnecessary, unjust and unreasonable.

Respectfully submitted,



---

Nancy Bagot, Vice President of Regulatory Affairs  
Sharon Theodore, Director of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Ave, NW  
11<sup>th</sup> Floor  
Washington, D.C. 20005

September 16, 2009

---

remain only as a temporary feature of the ELRP.); and, *PJM Interconnection LLC*, 99 FERC ¶ 61,227 at 61,935-36 & n.15 (2002). (Issued seven years ago, the 2002 Order found that these payments constitute “a *short-term incentive* that is properly viewed as a *form of start-up cost* that is needed *to help institute a program* which provides significant benefits to the entire PJM market [emphasis added].”)

**CERTIFICATE OF SERVICE**

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

Dated at Washington, D.C., September 16, 2009.



---

Nancy Bagot, VP Regulatory Affairs