

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

<b>PJM Interconnection, L.L.C.</b>	)	<b>Docket No. ER11-4106-000</b>
<b>California Independent System Operator Corporation</b>	)	<b>Docket No. ER11-4100-000</b>
<b>New York Independent System Operator, Inc.</b>	)	<b>Docket No. ER11- 4338-000</b>
<b>ISO New England, Inc.</b>	)	<b>Docket Nos. ER11-4336-000</b>
	)	<b>ER11-4336-001</b>
	)	<b>ER11-4336-002</b>
<b>Midwest Independent Transmission System Operator, Inc.</b>	)	<b>Docket No. ER11-4337-000</b>
<b>Southwest Power Pool, Inc.</b>	)	<b>Docket No. ER11-4105-000</b>
<b>Demand Response Compensation In Organized Wholesale Energy Markets</b>	)	<b>Docket No. RM10-17-000</b>
	)	<b>(Not Consolidated)</b>

**COMMENTS, MOTION FOR LEAVE TO ANSWER AND ANSWER  
OF THE ELECTRIC POWER SUPPLY ASSOCIATION  
ON ORDER NO. 745 COMPLIANCE FILINGS**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),<sup>1</sup> and the Commission's August 31, 2011 "Notice of Extension of Time" issued in Docket No. ER11-4337-000, the Electric Power Supply Association ("EPSA")<sup>2</sup> hereby submits these comments and this motion for leave to answer and answer in the

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<sup>1</sup> 18 C.F.R. §§ 385.212 and 385.213 (2011).

<sup>2</sup> EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

above-captioned proceedings, which address the filings submitted by each independent system operator and regional transmission organization (“ISO/RTO”)<sup>3</sup> in compliance with the Commission’s directives in Order No. 745.<sup>4</sup>

EPSA has separately filed comments on the CAISO, ISO-NE, NYISO, and PJM Compliance Filings to address issues particular to each compliance proposal,<sup>5</sup> and noted the intention to submit additional comments on any or all of the compliance filings after all of the ISO/RTOs submitted their respective implementation proposals. This step back and assessment of the compliance

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<sup>3</sup> See PJM Interconnection L.L.C., Order No. 745 Compliance Filing, Docket No. ER11-4106-000 (filed July 22, 2011). (the “PJM Compliance Filing”); California Independent System Operator Corp., Demand Response in Organized Wholesale Energy Markets: ISO Compliance Filing, Docket No. ER11-4100-000 (filed July 22, 2011) (the “CAISO Compliance Filing”); New York Independent System Operator, Inc., Demand Response in Wholesale Energy Markets, Docket No. ER11-4338-000 (filed Aug. 19, 2011) (the “NYISO Compliance Filing”); ISO New England Inc., Order No. 745 Compliance Filing (Part 1 of 2), Docket No. ER11-4336-000 (filed Aug. 19, 2011); ISO New England Inc., Order No. 745 Compliance Filing (Part 2 of 2), Docket No. ER11-4336-001 (filed Aug. 19, 2011) (collectively, the “ISO-NE Compliance Filing”); Midwest Independent Transmission System Operator, Inc., Order No. 745 Compliance Filing, Docket No. ER11-4337-000 (filed Aug. 19, 2011) (the “MISO Compliance Filing”); Southwest Power Pool, Inc., Order No. 745 Compliance Filing, Docket No. ER11-4105-000 (filed July 22, 2011) (the “SPP Compliance Filing”).

<sup>4</sup> Final Rule, *Demand Response in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 (2011) (“Order No. 745” or “Final Rule”). See also *Demand Response Compensation in Organized Wholesale Energy Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,656 (2010) (the “NOPR”). As explained further below, in this filing, EPSA is submitting comments on the MISO Compliance Filing. In addition, EPSA moves, to the extent necessary, for leave to answer and answer the protests and comments filed in the other five Order No. 745 compliance proceedings, pursuant to Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011). Although the Commission’s procedural rules do not provide for answers to protests or comments as a matter of right, the Commission regularly allows answers where, as here, the answer provides further explanation or otherwise helps ensure a full and complete record and Commission understanding of that record. See, e.g., *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,154 at P 14 (2003); *Williams Energy Mktg. & Trading Co. v. Southern Co. Servs., Inc.*, 104 FERC ¶ 61,141 at P 10 (2003); *Ameren Servs. Co.*, 100 FERC ¶ 61,135 at P 15 (2002).

<sup>5</sup> See Comments of the Electric Power Supply Association, Docket No. ER11-4106-000 (filed Aug. 12, 2011) (“EPSA Comments on the PJM Compliance Filing”); Comments of the Electric Power Supply Association, Docket No. ER11-4100-000 (filed Aug. 12, 2011) (“EPSA Comments on the CAISO Compliance Filing”); Comments of the Electric Power Supply Association, Docket No. ER11-4338-000 (filed Sept. 9, 2011); Comments of the Electric Power Supply Association, Docket No. ER11-4336-000, *et al.* (filed Sept. 9, 2011). EPSA has not previously submitted comments on the MISO or SPP Compliance Filings.

filings as a whole is necessary in these proceedings due to the lack of specificity and detail in Order No. 745, as EPSA and others have pointed out throughout the rulemaking proceeding established in Docket No. RM10-17-000. Certain concerns or issues are specific to particular ISO/RTO regions, whereas others are shared by all of the organized markets. That has proven to be the case, and EPSA is therefore submitting this answer and comments to address the broad concerns that are common to each region and thus should be raised in each ISO/RTO compliance proceeding.

Of note, broad concerns in many cases have been highlighted in the ISO/RTO compliance filings themselves, but the bulk of these issues are raised in stakeholder comments and protests. For this reason, EPSA is submitting the instant filing to respond to these comments and protests. Largely, the compliance filings have sparked response and criticism from demand response (“DR”) providers who interpret Order No. 745 to mandate greater compensation for DR resources, but ignore the fact that the pre-condition for such resources to be eligible for the higher, locational marginal price (“LMP”) pricing is that the DR product or service must balance supply and demand in a manner comparable to generation. In their protests of the proposed changes to self-scheduling options, measurement and verification (“M&V”) tools, baseline calculation and reliance on behind-the-meter generation (“BTM Generation”), DR providers have revealed an aversion to subject themselves to the same requirements as generators, while at the same time demanding that they receive greater compensation than generation. DR providers and industrial customer protests serve as exhibit A as

to why the Commission must revisit this Final Rule. These and other stakeholder comments pose critical questions for the implementation of Order No. 745, and argue for the Commission to hold all of the above-captioned ISO/RTO compliance proceedings in abeyance in order to first fully address the insufficiencies and issues raised on rehearing of the Final Rule before implementation is required by the ISOs/RTOs. Both the details and the very foundation of the Final Rule remain in question, as highlighted by the compliance proceedings and the numerous implementation issues raised therein.

## **I. BACKGROUND**

EPSA is fully supportive of competitive markets that efficiently and reliably utilize all resources to serve consumers, including DR resources. In that context, EPSA has maintained throughout the Order No. 745 rulemaking proceeding that the NOPR did not adequately explain or support the sweeping change to DR compensation for any one ISO or RTO, much less the adoptions of a standard pricing element across all ISOs/RTOs. The Commission should have tailored DR compensation to address specific, identified market barriers if and to the extent they exist. Instead, Order No. 745 establishes a pricing regime that subsidizes one set of market participants with funds from others in order to address a problem – the purportedly inadequate level of DR participation – that the Commission failed to establish actually exists. EPSA and others pointed out that the Commission’s proposal would result in substantial inequalities that will harm the market and consumers, and that will produce rates that are demonstrably unjust and unreasonable, and unduly discriminatory.

EPSA has highlighted the numerous defects and insufficiencies of the Final Rule in its comments filed in the Order No. 745 rulemaking proceeding, outlining extensive legal, economic, technical and practical market implementation flaws in the NOPR and the Final Rule.<sup>6</sup> In addition, EPSA, along with other groups representing competitive suppliers and public power groups, filed two detailed rehearing requests of Order No. 745 that are still pending. The first rehearing request – which was jointly filed by EPSA other industry sector trade associations, including the National Rural Electric Cooperative Association and the American Public Power Association – challenged the Commission’s assertion of ratemaking authority, which under the FPA is limited to **wholesale sales**, over rates for **retail non-purchases**.<sup>7</sup> The second rehearing request, filed jointly with several other competitive power associations, outlines a host of additional legal flaws in the Final Rule, in particular, the lack of evidence supporting Order No. 745’s finding that a uniform, national rule for DR compensation is necessary to ensure that ISO/RTO rates are just and reasonable, and the fact that it mandates DR compensation that will cause rates received by jurisdictional sellers to be unjust, unreasonable, and unduly discriminatory.<sup>8</sup> Additionally, twelve other requests for rehearing and/or clarification were filed in this proceeding, representing eighteen entities and virtually every type of industry stakeholder or

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<sup>6</sup> See generally Comments of the Electric Power Supply Association, Docket No. RM10-17-000 (filed May 13, 2010) (“EPSA NOPR Comments”); See Reply Comments of the Electric Power Supply Association, Docket No. RM10-17-000 (filed June 30, 2010).

<sup>7</sup> See Joint Request for Rehearing of the Electric Power Supply Association, *et al.*, Docket No. RM10-17-000 (filed Apr. 14, 2011) (the “Joint Rehearing Request”).

<sup>8</sup> See Request for Rehearing of the Competitive Supplier Associations, Docket No. RM10-17-000 (filed Apr. 14, 2011).

market participant. Most rehearing requests question the foundation of the Final Rule itself.

EPSA will not repeat here all of the arguments that are included throughout the record in the underlying rulemaking docket. However, as discussed herein and exemplified by the concerns and questions raised by the ISO/RTO Order No. 745 compliance filings, it is of the utmost importance that the Commission act on rehearing before acting on these compliance filings. Beyond the overarching legal and technical flaws in the Final Rule, there are several requests for clarification or rehearing that speak to the ISO/RTO's ability to comply with the rule. EPSA supports requests that the Commission act quickly on rehearing, and before further resources are expended on complying with a rule that may well change fundamentally upon full consideration of the multiple requests for rehearing submitted to the Commission.

## **II. COMMENTS**

### **A. Opposition to Limitations On DR Self-Scheduling Vitiates The Comparability Upon Which LMP-Based Compensation Is Predicated.**

The theoretical foundation of Order No. 745 is that when DR “has the capability to balance supply and demand as an alternative to a generation resource and when dispatch of that demand response resource is cost-effective as determined by the net benefits test”<sup>9</sup> (*i.e.*, when DR is behaving in a manner comparable to supply), it warrants comparable compensation. In response to concerns expressed throughout this proceeding that DR is not a product

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<sup>9</sup> Order No. 745 at P 2.

sufficiently similar or comparable to generation supply, the Commission explained its finding that they are as follows:

Generation and load must be balanced by the RTOs and ISOs when clearing the day-ahead and real-time energy markets, and such balancing can be accomplished by changes in either supply or demand. The Commission finds that in the organized wholesale energy markets demand response can balance supply and demand as can generation.

Commenters that oppose this finding do not adequately recognize a distinctive and perhaps unique characteristic of the electric industry. The electric industry requires instantaneous balancing of supply and demand at all times to maintain reliability. ***It is in this context that the Commission finds that demand response can balance supply and demand as can generation when dispatched, in the organized wholesale energy markets.***<sup>10</sup>

Though EPSA and a plethora of others have questioned the ability of DR to provide a product or service that is sufficiently comparable to that provided by generators to warrant the same compensation (leaving aside for the moment that payment of the full LMP for DR is higher than the compensation generators receive and, in fact, represents a subsidized overpayment), it is incumbent on the ISOs/RTOs to develop rules, obligations and requirements that ensure the greatest comparability possible while operating the system efficiently and reliably; preferably these parameters would have been clearer and more directly outlined in Order No. 745.

For example, ISO New England Inc. (“ISO-NE”), the New York Independent System Operator, Inc. (“NYISO”), and PJM Interconnection, L.L.C. (“PJM”) have each proposed tariff provisions to clearly identify and establish bidding and dispatch rules and obligations for DR to be eligible for the higher, LMP-based

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<sup>10</sup> *Id. at PP 55-56 (emphasis added).*

compensation mandated by Order No. 745. However, these provisions, which intended to ensure that DR provides a comparable service, are heavily opposed by several DR providers, which highlights the lack of sufficient discussion or explanation of the DR product or service in Order No. 745 and related proceedings.<sup>11</sup> In particular, an *ad hoc* coalition of DR providers and large industrial and commercial customers that refers to itself as the “Demand Response Supporters”<sup>12</sup> protest the limitations proposed by PJM on the ability of DR providers to self-schedule DR. While the PJM DR Supporters accept that DR “should be compensated at full LMP if the response occurs when LMPs equal or exceed the monthly benefits threshold,”<sup>13</sup> they gloss over the requirement that DR must also **balance** supply and demand. As noted by PJM:

[A] mere reduction in load does not “reduce[ ] the need for dispatching additional generation” if, due to the lack of notification to the dispatcher, PJM has already dispatched the generation as the most cost-effective option available. To the contrary, an unexpected reduction in load creates an imbalance that PJM must schedule around in a way that can lead to increased balancing operating reserves charges that are socialized among, and increase costs to, remaining loads.<sup>14</sup>

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<sup>11</sup> See Comments and Limited Protest of Demand Response Supporters at 2, Docket No. ER11-4106-000 (filed Aug. 12, 2011) (“PJM DR Supporters Protest”) (“PJM creates an undue burden and unnecessary barrier to participation by imposing strict scheduling and dispatch requirements for demand response.”); See also Comments and Protest of Demand Response Supporters at 4, Docket No. ER11-4338-000 (filed Sept. 9, 2011); Comments and Limited Protest of NEPOOL Industrial Customer Coalition at 5, Docket No. ER11-4336-000 (filed Sept. 9, 2011).

<sup>12</sup> The “Demand Response Supporters” that protested the PJM Compliance Filing include the following companies: Comverge, Inc.; EnergyConnect by Johnson Controls, Inc.; EnerNOC, Inc.; the PJM Industrial Customer Coalition; Wal-Mart Stores, Inc.; American Forest & Paper Association; and Viridity Energy, Inc. (collectively, the “PJM DR Supporters”). EPSC supports DR as an important part of well functioning competitive wholesale markets, and therefore objects to any insinuation that those not included in this coalition, or raising questions related to comments filed by this particular coalition, do not support demand response.

<sup>13</sup> PJM DR Supporters Protest at 6.

<sup>14</sup> See Answer of PJM to Comments and Protests at 8, Docket No. ER11-4106-000 (filed Aug. 29, 2011).

Similarly, ISO-NE's Director of Demand Response Strategy explains:

The balancing of supply and demand is achieved when each energy resource follows Dispatch Instructions based on the bids/offers submitted to the ISO and on a least-cost security-constrained dispatch and commitment algorithm administered by the ISO. Self-scheduling, by definition, occurs outside of ISO resource commitment and dispatch, and therefore does not contribute to the balancing of supply and demand. Rather, self-scheduling requires the ISO to readjust the dispatch of other resources to rebalance the system.<sup>15</sup>

Therefore, self-scheduled DR does not, and cannot, satisfy the very narrow Order No. 745 requirement that DR resources must actually balance supply and demand to qualify for LMP-based compensation.

In opposing changes to self-scheduling options for DR eligible for LMP-based compensation, the PJM DR Supporters assert that flexibility “[u]nder current rules” that “has been in place for many years,”<sup>16</sup> and argue that such flexibility must be retained unchanged by the RTO. This request exhibits a lack of appreciation or understanding for what Order No. 745 is ostensibly trying to achieve, namely, a new regime in that DR must provide a product or service that is comparable to generation in balancing supply and demand in order to be eligible for LMP-based compensation. This is a new and specific DR product that will require tailored requirements and obligations. While the PJM DR Supporters dismiss generators' comments in the Order No. 745 rulemaking proceeding as a mere attempt to thwart competitors,<sup>17</sup> their protests in these compliance

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<sup>15</sup> See ISO-NE Compliance Filing, Attachment 5, Testimony of Henry Y. Yoshimura at 41:29-42:5 (“Yoshimura Testimony”).

<sup>16</sup> PJM DR Supporters Protest at 3-4.

<sup>17</sup> See, e.g., Motion for Leave to Answer and Answer of the Demand Response Supporters at 6-8, Docket No. ER11-4106-000 (August 29, 2011) (“Such exclusionary tactics by suppliers should be rejected.”).

proceedings underscore the fact that they are the ones who are seeking preferential treatment by arguing that DR must receive higher compensation for providing a product that is ostensibly comparable to that provided by generation, without being willing to make any concomitant changes to ensure that DR is actually comparable. In sum, if they wish to continue operating under pre-Order No. 745 dispatch procedures, they should continue to receive pre-Order No. 745 compensation, including cost allocation.

The outcry over changes to DR self-scheduling is particularly loud in the ISO-NE compliance proceeding, in which numerous industrial customer coalitions filed protests, including the NEPOOL Industrial Customer Coalition, the Industrial Energy Consumers Group, the Industrial Energy Consumers Group, Industrial Energy Consumers of America (“IECA”), the “Joint Commenters,”<sup>18</sup> the “Joint Parties,”<sup>19</sup> and the Association of Businesses Advocating Tariff Equality (a coalition of industrial companies). For example, IECA claims that, “[u]nfortunately, several of the nation’s ISOs/RTOs have taken up the banner of opposing comprehensive integration of demand response into their energy markets **on a basis fully equivalent to electric generation**,”<sup>20</sup> and then goes on to invoke the Public Utility Regulatory Policies Act of 1978 (“PURPA”) to

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<sup>18</sup> The “Joint Commenters” in the ISO-NE and NYISO compliance proceedings are: the American Council for an Energy Efficient Economy, American Forest & Paper Association, IECA, and the U.S. Clean Heat & Power Association.

<sup>19</sup> The “Joint Parties” are: Industrial Energy Consumers Group, EnerNOC, Inc., Comverge, Inc., Viridity Energy Inc., Maine Pulp & Paper Association, Wisconsin Paper Council, Wisconsin Industrial Energy Group, and Minnesota Large Industrial Group.

<sup>20</sup> See Motion to Intervene and Protest of the Industrial Energy Consumers of America at 3, ER11-4336-000 (filed Sept. 12, 2011) (“IECA Protest of ISO-NE Filing”) (emphasis added). Of note, the ISO-NE Compliance Filing explicitly states that, “The best overall approach to complying with Order No. 745 is to fully integrate demand resources into the day-ahead and real-time energy markets and system operations infrastructure.” Yoshimura Testimony at 8:6-8.

support the even and fair treatment of small, independent generation by the ISOs/RTOs.<sup>21</sup> The protest of the Joint Parties claims that the Commission's proposed solution is "an equally clear qualification for resource eligibility,"<sup>22</sup> citing the Order No. 745's twofold requirement that DR balance supply and demand and be cost effective, but the "equal" qualifications appear to end with those two requirements. The Joint Parties choose to ignore the fact that generation is subject to much higher requirements, while receiving less compensation.

Such a response from numerous DR providers underscores the lack of sufficient detail, discussion or response to commenters from the Commission in Order No. 745. For example, PJM DR Supporters state that, "nothing in Order No. 745 addresses existing self-scheduling opportunities for demand response and, certainly, nothing in Order No. 745 requires RTOs and ISOs to eliminate any existing self-scheduling opportunities."<sup>23</sup> Similarly, Joint Commenters state that, "nothing in Order No. 745 implies or mentions the need for ISOs and RTOs to search for or justify additional distinctions among otherwise eligible customers...unless such customers cannot satisfy the requirements of balancing supply and demand within the confines of the net benefits test."<sup>24</sup> This simplistic argument that the plain language of Order No. 745 represents the exhaustive list of DR qualifications to participate as a supply resource defies logic, as if DR

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<sup>21</sup> IECA Protest of ISO-NE Filing 4.

<sup>22</sup> See Protest of Industrial Energy Consumers Group, EnerNOC, Inc., Comverge, Inc., Viridity Energy Inc., Maine Pulp & Paper Association, Wisconsin Paper Council, Wisconsin Industrial Energy Group, and Minnesota Large Industrial Group at 4, Docket No. ER11-4336-000 (filed Sept. 9, 2011) ("Joint Protest of ISO-NE Filing").

<sup>23</sup> PJM DR Supporters Protest at 4.

<sup>24</sup> See Joint Protest of ISO-NE Filing at 8.

somehow behaves outside the physics of the bulk power market grid with no regard for the efficient and reliable dispatch of the system. The ISOs/RTOs, however, correctly interpret Order No. 745 to require a DR resource to actually be capable of providing a balancing service that is comparable to that provided by generators in order to be eligible for LMP-based compensation. In other words, far from compensating only that amount of DR efficiently dispatched to balance supply and demand, PJM DR Supporters seek to tip the balance in favor of as much DR as possible. The Commission should heed the interpretation of the *independent* operators of wholesale energy markets over the interpretation put forward by many DR providers, who stand to receive substantial, windfall profits in the form of subsidized over-payments under an expansive reading of Order No. 745's scheme.

Order No. 745 provides little detail as to how DR resources are required to function in the ISO/RTO markets, apart from the statement that they must have “the capability to balance supply and demand as an alternative to a generation resource and when dispatch of that demand response resource is cost-effective as determined by the net benefits test.”<sup>25</sup> While the ISO/RTO compliance proceedings may not be the appropriate venues to litigate Order No. 745's numerous deficiencies, it is inescapable that these proceedings highlight those deficiencies, as DR providers and industrial groups argue that the ISO/RTO compliance filings “exceed[] the scope of the Order and fail[] to comply with the

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<sup>25</sup> Order No. 745 at P 2.

plain language of Order No. 745.”<sup>26</sup> These entities would have DR function as a self-certified product, outside of the scope of the ISO/RTO supervision, but paid by the ISO/RTO as a market resource. EPISA reiterates the need for the Commission to address the many open issues pending on rehearing in this rulemaking proceeding to limit the resources expended (and likely wasted) on efforts to comply with the Final Rule in its current form and to offer greater guidance going forward in order to establish a robust, viable market for DR, which EPISA supports, while protecting reliability and economic viability of the existing wholesale energy markets in the ISOs/RTOs.

**B. M&V Tools And Baseline Calculation Enhancements Are Critical To Implementation.**

Commenters expressed extensive concerns and criticisms of the proposed enhancements and improvements to the ISOs/RTOs’ M&V tools and baseline calculation methodologies. Many agree that implementation of Order No. 745 will likely result in greater participation by DR providers. There should be no question then that, at the initial implementation stage of this new regime, M&V tools and baseline calculations must be clear and effective. It does a disservice to DR, as well as to all the other market participants, to adopt minimal and/or ineffective M&V or baseline calculation tools, as they may lead to market distortions or other problems. Order No. 745 is clear that this is necessary:

The Commission agrees that as a general matter demand response providers and generators should be subject to comparable rules that reflect the characteristics of the resource, and expect ISOs and

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<sup>26</sup> Joint Protest of ISO-NE Filing at 14.

RTOs to continue their evaluation of their existing rules in light of this Final Rule and make appropriate filings with the Commission.<sup>27</sup>

Therefore, EPSA respectfully submits that it is incumbent upon the ISOs/RTOs to review and enhance their M&V tools and baseline calculation methodologies as necessary, and the Commission should make it clear that such improvements are necessary for compliance with Order No. 745.

As was the case with the protests to limitations on DR self-scheduling discussed above, protesting DR providers and industrial customers refer to the Final Rule's lack of detail to oppose any changes to M&V tools or baseline calculations, and go so far as to claim that any proposed enhancements are veiled attempts to erect barriers against DR entry in organized markets.<sup>28</sup> Again these arguments defy logic, as the clear intent of Order No. 745 is to establish a regime that provides comparable treatment among all resources that are capable of balancing supply and demand. DR providers and their customers seem to think that this comparability is all about compensation without regard to concomitant obligations. This cherry picking should be rejected, as it ignores the fact that there are relevant differences even among resources that are otherwise comparable. By its very nature, DR poses particular M&V and baseline issues. ISOs/RTOs will therefore need to develop new tools, which are specifically tailored to the capabilities and requirements of DR resources, for measuring and verifying DR participation in the energy market. In particular, DR participation cannot be measured as the net total "output" of a product, as is the case with

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<sup>27</sup> Order No. 745 at P 66.

<sup>28</sup> PJM DR Supporters Protest at 7-8.

generation, but rather it is a reduction from an amount normally consumed that varies from customer to customer and is based on an administrative formula estimating historical demand. Moreover, if the definition of DR in Order No. 745 is to have any intellectual or operational integrity, DR cannot be equated with **any** reduction in load that occurs (or is certified by DR providers to have occurred), but must instead be a verifiable reduction from expected use relative to an established and viable baseline.

In addition, the provision of DR service is, generally speaking, not the primary business of the entity providing the service, as is the case with generation. Resistance to such meaningful tools indicates that, rather than seeking to facilitate the participation of DR as a reliable resource that is treated comparably to generation, DR providers are seeking unduly preferential treatment and compensation. Moreover, they urge the Commission to use something as fundamental to the nation as electricity to experiment with an untested “virtual” supply product predicated on paper transactions and commitments that may or may not be met, in place of, and displacing, a physical network of power plants that actually deliver generation supply. To do so for the real-time energy market is to take a gamble on the nation’s economy, and flies in the face of widespread concerns that DR may not be able to balance supply and demand when it is most needed.<sup>29</sup>

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<sup>29</sup> See Motion for EnerNOC to Amend the Agreement for Capacity Resources between the Potomac Edison Company and EnerNOC Inc. at 7, Maryland Public Service Case No. 9149 (June 28, 2011) (“Upon being awarded the Agreement, EnerNOC set out to contract with end users to obtain all the requisite Capacity Resources under the Agreement. As of May 31, 2011 (the deadline for enrollment for the 2011-2012 Delivery Year), despite its best efforts, EnerNOC did not obtain the requisite Capacity Resources for the 2011-2012 Delivery Year.”).

**C. BTM Generation Poses Serious Concerns As A DR Product Or Service And Should Not Participate As DR Pursuant To Order No. 745.**

In the rulemaking proceeding, EPISA and number other commenters questioned whether BTM Generation could, or should, be permitted to participate as DR resource that is eligible for LMP-based compensation. The Commission has not responded to these concerns. As noted initially and explained in depth in the EPISA NOPR Comments, the use of such generation is not in fact a genuine load reduction. Consequently, payment of full LMP, in addition to the savings that a customer using BTM Generation receives by not paying for the foregone retail purchases (or that an LSE receives from avoided wholesale purchases) creates the economically perverse incentive for generation to move behind the meter when possible, even where it is less efficient. Moreover, this permits the customer or LSE to serve its load outside of the ISO/RTO energy market, while at the same time being paid LMP by the same ISO/RTO, as if it had actually reduced its load. The dangers and concerns of this incentive were discussed at length in the EPISA NOPR Comments and in the attached policy paper by Professor William W. Hogan.<sup>30</sup>

Whether BTM Generation can qualify as a DR resource or be utilized to provide DR service hinges on whether it can be considered a reduction in consumption. The Final Rule defines DR as follows:

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<sup>30</sup> See *generally* EPISA Comments, Attachment 1, William W. Hogan, Implications for Consumers of the NOPR's Proposal to Pay the LMP for all Demand Response.

[A] reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.<sup>31</sup>

MISO interpreted the rule literally, stating in a footnote:

[Demand Response Resources] that [are] Behind the Meter Generation (“BTMG”) will not be paid the full LMP, in part, because BTMG is not a demand response reduction in energy, pursuant to Order No. 745, but rather is an incremental increase in Energy behind the meters. See, Order No. 745 fn 2.<sup>32</sup>

This is a fair reading of the Final Rule, as BTM Generation is **not** a net **reduction** in consumption. However, some have argued that BTM Generation could represent DR on a wholesale level, based on the fact that Order No. 745 requires only that consumption from the wholesale electricity grid be decreased. Within the discussion of M&V tools, the Commission agrees with stakeholders that demand reductions that are not genuine may be violations of the Commission’s anti-manipulation rules.<sup>33</sup> In this context, does BTM Generation equate to a **genuine** reduction in demand or not? The Commission should address this debate and clarify that BTM Generation cannot participate as DR, based on the host of questions and concerns raised throughout the rulemaking process and emerging again in the ISO-NE compliance proceeding in particular.

In that proceeding, the ISO-NE Internal Market Monitor (“ISO-NE IMM”) issued an opinion on May 26, 2011, finding that BTM Generation does not face barriers to participate in organized wholesale energy markets and thus is outside the scope of Order No. 745, concluding that “apparent demand reductions

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<sup>31</sup> Order No. 745 at P 2 n.2.

<sup>32</sup> MISO Compliance Filing at 16.

<sup>33</sup> Order No. 745 at P 95.

created by the operation of behind-the-meter generation should not be treated as demand response.”<sup>34</sup> The IMM explains its finding as follows:

Since the benefits of demand response upon which the Order relies require genuine demand reduction, ***the market rules and the market monitor must ensure that demand response payments are made only when the demand reduction is genuine....*** One issue that has been raised in the Order 745 rulemaking process is whether load reduction achieved by behind-the-meter generation should be treated as actual demand reduction and therefore compensated under Order 745. The IMM believes that treating generation behind the meter the same as demand reduction is inconsistent with Order 745, because it enables participants to inflate their baselines, thereby increasing the likelihood of payment for non-genuine demand response, and it will decrease market competitiveness. Additionally, the rationale, upon which Order 745 is based, that there are barriers to demand participation in the wholesale market, does not apply to behind-the-meter generation. ***The IMM believes that unlike demand resources, generation resources do not have barriers to participate in the wholesale market, and therefore, it is appropriate to consider behind-the-meter generators outside of the scope for demand reduction payment.*** Otherwise, the Commission would have enumerated the barriers to behind-the-meter generation and explicitly stated that generators behind the meter must be compensated as demand resources. Instead, Order 745 is silent on the issue.<sup>35</sup>

The ISO-NE IMM then goes on to describe the other problems created by permitting BTM Generation to qualify as DR, in particular, the creation of gaming opportunities.<sup>36</sup> According to ISO-NE, customers can artificially increase their

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<sup>34</sup> Memo from Dave LaPlante and Hung-po Chao, Internal Market Monitor, “Opinion on behind-the-meter generation in the proposed Order 745 Transition Rules” at 1 (dated May 26, 2011)(“ISO-NE IMM Opinion”), available at: [http://www.iso-ne.com/committees/comm\\_wkgrps/mrks\\_comm/mrks/mtrls/2011/jun22011/a3\\_imm\\_memo\\_05\\_26\\_11.doc](http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2011/jun22011/a3_imm_memo_05_26_11.doc)

<sup>35</sup> *Id.* at 2 (emphasis added).

<sup>36</sup> *Id.* (“For example, behind-the-meter generation has been used by demand resources to artificially inflate customer baselines to obtain payments while not taking any action to reduce load. This is accomplished by turning off a distributed generator that normally operates when the baseline is being calculated and then turning the distributed generator back on and resuming normal operation of the distributed generator when demand reduction is being measured. The result is that the demand resource is paid for operating normally.”).

DR payments by inflating their baselines, or by moving generation currently in front of the meter to behind the meter.<sup>37</sup> This phenomenon creates problems for payment to DR providers relying on BTM Generation, but also raises a far greater concern, which is the slow but eventual erosion of the ISO/RTO markets themselves. As the Commission has repeatedly emphasized, large, centrally dispatched markets offer the most efficient, reliable and competitive markets for electricity.<sup>38</sup> The LMP-based energy market design was premised on all resources supplying energy receiving the same energy price for delivery of that electricity (and charging LMP to those who consume the electrons). Paying LMP to loads for phantom reductions in consumption (and also avoiding the LMP charges that would have been incurred), and worse yet, paying BTM Generation the LMP while allowing it to also sell that energy to the behind-the-meter load, disrupts these efficiencies and produces unjust and unreasonable results. The Commission has long promoted the growth of organized markets, which are growing in both size and capabilities and are delivering substantial savings to ratepayers. Order No. 745 threatens to frustrate this long-standing Commission policy by creating economic incentives that would fracture these centrally organized markets into a patchwork quilt that destroys the economic efficiency and reliability assurance that they currently provide. As explained by the ISO-NE

IMM:

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<sup>37</sup> *Id.* at 2-3.

<sup>38</sup> See generally *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008); *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 235 (2007); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 20 (2007).

[I]t may appear that the behind-the-meter generation has met the Commission's net benefits test and therefore increases market competitiveness. This is too narrow a view of competitiveness, because larger and more efficient generators have similar incentives to move behind the meter. If large generators begin to locate behind the meter of industrial and commercial customers, it would not only distort the wholesale price but makes it more difficult for the distribution and grid operators to protect contingencies caused by failures of behind-the-meter generators. Additionally, if behind-the-meter generation continues to receive this favorable treatment it will stifle investment in more efficient generation technologies in the wholesale market and raise prices to all customers over the long run, the opposite result from that which would occur in a competitive market. The impact of behind-the-meter generation on investment and system reliability warrants further study.<sup>39</sup>

At a minimum, EPSA agrees with the ISO-NE IMM that it is incumbent upon the Commission to openly address and analyze directly the impacts of BTM Generation on the organized markets, the viability of DR, and the treatment of wholesale generation on the grid in relation to BTM Generation.

Interestingly, in comments filed in the ISO-NE compliance proceeding, numerous industrial customer groups invoke PURPA to support the Commission's treatment of DR. In one of the many industrial group filings in that proceeding, they state that:

One of the fundamentals of FERC energy policy is that small, independent generation as promoted by PURPA should be treated evenly and fairly by utilities. The fairness doctrine also applies to the operators of the nation's regional transmission systems, without nondiscriminatory access to which, these smaller generators would be harmed, and without such generation, consumers would not be able to benefit.<sup>40</sup>

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<sup>39</sup> ISO-NE IMM Opinion at 3.

<sup>40</sup> IECA Protest of ISO-NE Filing at 4.

While this confusion and conflation between small, independent generation and demand response is perplexing, EPSA agrees with the premise of that argument – generators of all sizes should be treated equitably.<sup>41</sup> Additionally, Order No.

745 notes:

The Commission agrees that as a general matter demand response providers and generators should be subject to comparable rules that reflect the characteristics of the resource, and expect ISOs and RTOs to continue their evaluation of their existing rules in light of this Final Rule and make appropriate filings with the Commission.<sup>42</sup>

The industrial customer groups' constant references to the PURPA statute in their comments are both confusing and contradictory. The lesson of PURPA is actually on the side of those that, like EPSA, urge caution and careful examination of any federally-mandated compensation scheme for DR under the Final Rule as implemented through all of the compliance filings at issue in these proceedings. As a legal matter, it is not clear from the industrial group comments what specific provisions of PURPA are supposed to be relevant to the development and implementation of Order No. 745. The Final Rule makes no mention of PURPA whatsoever, much less does it cite to any provision of that statute as a legal basis for its issuance. Moreover, even as a rhetorical device or source of broad policy, the PURPA statute itself, and historical experience with its implementation, tends to refute, not support, the industrials' arguments. First of all, while industrial commenters state that the regulatory scheme established by PURPA establishes fairness for all generators, it does not treat all generators equally. A number of principal provisions of PURPA (e.g., the requirement for

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<sup>41</sup> See *generally* 16 U.S.C. §§ 824d, 824e (2006).

<sup>42</sup> Order No. 745 at P 66.

utilities to purchase the output of “qualifying facilities” (“QFs”) at higher, “avoided cost” rates, and the exemption of QFs from most provisions of the FPA) are available only to generators that are “qualifying small power production facilities”<sup>43</sup> or “qualifying cogeneration facilities.”<sup>44</sup> PURPA thus explicitly distinguishes among generators on the basis of size, fuel used, generation technology, ownership, date of certification of construction, or some mixture of foregoing factors.

In addition, commenters invoking PURPA ignore the fact that Congress amended the statute extensively in EPAct 2005 largely in response to claims that compensation under PURPA's one-size-fits-all mandatory federal compensation formula had become exorbitant and excessive in certain cases. The relevant lesson of PURPA is that compensation formulas, even if well intended, can

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<sup>43</sup> Section 3(17) of the FPA, 16 U.S.C. § 796(17) (2006), defines the term “small power production facility,” and authorizes the Commission to promulgate further rules to determine whether a given facility is a “qualifying small power production facility.” 16 U.S.C. § 796(17)(C)(i) (2006). Specifically, the FPA defines a “small power production facility” as a facility that is an “eligible solar, wind, waste, or geothermal facility,” or a facility with a capacity of 80 MW or less that “produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof.” 16 U.S.C. § 796(17)(A) (2006). An “eligible solar, wind, waste, or geothermal facility” is one that uses solar or wind energy, or waste or geothermal resources, as the primary energy source and for which, either an application for QF certification or a notice of QF status was submitted to the Commission by December 31, 1994, or construction commenced by December 31, 1999. 16 U.S.C. § 796(17)(E) (2006). To be a qualifying “small power production facility,” the facility must be “owned by a person not primarily engaged in the generation or sale of power,” 16 U.S.C. § 796(17)(C)(ii) (2006), and it must satisfy the additional criteria and requirements set forth in the Commission’s regulations. See *generally* 18 C.F.R. Pt. 294, Subpt. B (2011).

<sup>44</sup> “Small cogeneration facilities” are similarly defined through the interplay of the FPA’s statutory definitions and the Commission regulations. Section 3(18)(A) of the FPA, 16 U.S.C. § 796(18)(A) (2006), defines a “cogeneration facility” as a facility that produces “(i) electric energy, and (ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating or cooling purposes.” *Id.* In addition, to be a “qualifying cogeneration facility,” the facility must be “owned by a person not primarily engaged in the generation or sale of power,” 16 U.S.C. § 796(18)(B)(ii) (2006), and it must satisfy additional requirements regarding minimum size, fuel use, and fuel efficiency that are set forth in the Commission’s regulations. See 16 U.S.C. § 796(18)(B)(i) (2006); 18 C.F.R. § 292.205 (2011) (setting forth operating and efficiency standards for “qualifying cogeneration facilities”).

produce undesirable results, which is the very point that EPSA and most other commenters have been making throughout the Order No. 745 rulemaking proceeding and in the instant compliance proceedings. In fact, as the Commission is well aware, subsequent to enactment of EAct 2005's amendments to PURPA, the Commission has moved as directed by those statutory amendments to remove the PURPA utility purchase obligation for many regions of the country served by organized markets<sup>45</sup> based on EAct 2005's statutory test for competitiveness in regions and utility footprints.<sup>46</sup> Thus, in the very same organized markets subject to the Final Rule's compliance obligations, the Commission's default assumption is that, by their very nature, ISO/RTO markets are sufficiently competitive to justify removal of the PURPA purchase obligation, and it has consistently granted the termination requests of utilities in such markets.<sup>47</sup> Thus, the invocation of the spirit of PURPA past by industrial customers to justify yet another well intentioned but flawed federal compensation scheme, this time in the form of Order No. 745's approach to DR, is simply not credible. In any case, there is no legal or factual basis for their claim that BTM

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<sup>45</sup> See 18 C.F.R. §§ 292.309-312 (2011); *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

<sup>46</sup> 16 U.S.C. § 824a-3(m)(1) (2006).

<sup>47</sup> See, e.g., *Duke Energy Shared Servs., Inc.*, 119 FERC ¶ 61,146 (2007); *American Elec. Power Servs. Corp.*, 120 FERC ¶ 61,052 (2007) (PJM); *PECO Energy Co.*, 122 FERC ¶ 61,022 (2008); *Alliant Energy Corporate Servs., Inc.*, 123 FERC ¶ 61,155 (2008); *United Illuminating Co.*, 123 FERC ¶ 61,269 (2008); *Virginia Elec. and Power Co.*, 124 FERC ¶ 61,045 (2008); *Allegheny Power Co.*, 124 FERC ¶ 61,236 (2008); *Montana-Dakota Utils. Co.*, 126 FERC ¶ 61,121 (2009); *Wolverine Power Supply Coop., Inc.*, Docket Nos. QM09-4-000 and -001 (July 24, 2009) (unreported); *PPL Elec. Utils. Corp.*, Docket No. QM09-6-000 (Oct. 14, 2009) (unreported); *Old Dominion Elec. Coop.*, Docket Nos. QM09-7-000 and -001 (Jan. 8, 2010) (unreported); *Pacific Gas and Elec. Co.*, 135 FERC ¶ 61,234 (2011); *Northern States Power Co.*, 136 FERC ¶ 61,093 (2011).

generation needs to be considered as DR in order to have fair access to competitive wholesale energy markets. The PURPA law as it exists today and the Commission's application of it since EAct 2005 compel a conclusion exactly the opposite of that urged by industrial customers. While PURPA may be relevant to the DR issue and the Order No. 745 compliance filings, its lesson is certainly not that urged by industrial customers.

Simply put, wholesale generation cannot be discriminated against in order to incent and support generation that is not part of the wholesale market. Preventing such unlawful discrimination is all that ISO-NE has attempted to do. ISO/RTO rules and requirements must apply equally to all generators, whether they are located in front of or behind the meter, that participate in the ISO/RTO market. The first step, then, is for ISOs/RTOs to determine (and to inform the Commission) how much BTM Generation exists in its footprint, how much is participating in its markets, how it is participating, how much DR is or could be BTM Generation, and whether the rules, obligations and requirements are being appropriately applied to BTM Generation as it is to other wholesale generation. Similarly, no one appears to know how much BTM Generation there is, what sort of fuel resource mix might be implicated, what environmental regulations might or might not apply or how it might participate in ISO/RTO markets. Quite simply, these are the facts that are missing from this discussion, and apparently not available, as EPSA's inquiries to ISOs/RTOs, State commissions, and the Commission have not yielded any answers or quantifications. These are critical questions that must be answered without delay.

Many DR providers and industrial customers seem to want it both ways, namely, to keep their BTM Generation outside of and out of view from the ISOs/RTOs, but to be paid the full LMP **by** the ISO/RTO. The FPA requires the Commission to ensure that jurisdictional participants in the wholesale markets are treated fairly and equitably and that prices in those markets are just, reasonable, and not unduly preferential or discriminatory.

To do otherwise, as numerous DR providers and industrial companies and coalitions are urging, is not only unduly discriminatory to generators and other market participants, but threatens the reliability and efficiency of centrally organized regional electricity markets. Additionally, the participation of BTM Generation raises market power and mitigation concerns. If BTM Generation participation in the wholesale markets increases, that growth should be reflected in the market power analysis of “on grid” wholesale generation, which will have a correspondingly lower market share and therefore less market power. This reduction in generator market share and market power must be reflected in the application of market power mitigation mechanisms. Moreover, the price suppression due to DR in general, and to BTM Generation in particular, raises concerns as to whether compensation for wholesale generation will continue to be just and reasonable. As EPSA explained in the Joint Rehearing Request, generators have both a constitutional and a statutory right under the FPA to just and reasonable compensation, and it is the Commission’s obligation to ensure that they do, whereas there are no equivalent rights or responsibilities with

respect to the compensation received by non-jurisdictional BTM Generation or by DR resources more generally.

Again, these are serious and real concerns that need to be addressed before BTM Generation is permitted to participate (and to receive LMP-based compensation) in wholesale markets under the guise of DR. EPSA submits that BTM Generation should instead be required to participate as generation, rather than DR. This will be of particular concern if DR participation expands as predicted in light of increased compensation mandated by Order No. 745.<sup>48</sup> As DR providers aggregate available BTM Generation MWs, large DR providers will represent blocks of generation (e.g., 300-500 MWs) that may well be equal or greater in size and market impact to traditional generation plants. That massive block of BTM Generation might participate as a DR resource under Order No. 745's "comparability" theory as interpreted by some, but without being subject to comparable requirements, mitigation, or energy market settlement. The Commission and the regional market operators must ensure that there is no discrimination between BTM Generation and the on grid wholesale generation, just as there can be no discrimination between two on grid generators. This is a fundamental concern that goes to the heart of the debate over BTM Generation – is "off grid" supply really a DR resource and how should it be treated in the wholesale energy market settlement?

In its NOPR comments, EPSA highlighted the fact that "[n]othing in the NOPR's proposed tariff language addresses this flaw and in fact the proposed

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<sup>48</sup> CAISO Market Surveillance Committee, Opinion on Economic Issues Raised by FERC Order 745: Demand Response Compensation in Organized Wholesale Energy Markets at 7-8 (dated June 6, 2011), available at: <http://www.aiso.com/2b97/2b97a0bb6ef70.pdf>.

definition of 'demand response' would allow it."<sup>49</sup> This oversight was not corrected in the Final Rule, and it leaves the ISOs/RTOs in a precarious situation in their attempts to craft compliance filings that are just and reasonable and do not distort their wholesale energy markets. Thus, in ISO-NE, an attempt to simply address (but still allow) BTM Generation has resulted in a debate that has reached a fever pitch, with unsubstantiated claims from industrial customers that large manufacturers might shut their doors based on the ISOs/RTOs' treatment of DR.<sup>50</sup> Notably, EPISA pointed to the impacts on jobs early in this proceeding, although EPISA's concern was that overpayment for DR would result in load shifting or the shutting down of manufacturing in favor of more lucrative DR sales that employ far fewer people than if these entities actually fully engaged in their primary businesses. EPISA's position appears to be supported by the claims of large industrials that they rely on DR payments to remain viable as businesses.<sup>51</sup>

In another ironic twist, IECA claims, without substantiation or analysis, that ISO-NE's proposal will harm the environment by promoting the utilization of peaking generation as opposed to efficient renewable generation or BTM Generation. EPISA similarly noted that Order No. 745 may **negatively** impact the environment, because it would promote the operation of **less** efficient, more polluting BTM Generation, which may not be subject to the same environmental

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<sup>49</sup> EPISA NOPR Comments at 26.

<sup>50</sup> IECA Protest of ISO-NE Filing at 6 ("Reducing the economic viability of such large consumers by reducing their compensation for participation in DR and by exposure to unnecessarily high peak electricity or grid transmission charges, not only hurts their ability to provide direct jobs in their communities, but also creates secondary economic harm as vendors and suppliers are affected by the large consumer's reduced economic activity.").

<sup>51</sup> *Id.*

laws or regulations as on grid generation, and would therefore discourage the development of new, cleaner and more efficient wholesale generation.<sup>52</sup> This concern appears to have been borne out by efforts of DR providers to loosen regulations for the operation of BTM Generation under Environmental Protection Agency (“EPA”) regulations, including their successful efforts to persuade the agency to amend its National Emissions Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (“RICE NESHAP”).<sup>53</sup> This amendment changed the operating limitations of existing stationary compression ignition reciprocating internal combustion engines (“RICE”) to permit these units to run for longer periods in order to participate in emergency DR programs.<sup>54</sup> In its own petition for reconsideration of this EPA action, the State of Delaware Department of Natural Resources & Environmental Control (“Delaware DNR&EC”) urges the agency to reconsider the amendment allowing RICE units to run as emergency DR, noting that in Delaware the RICE units represent a block of up to 127.5 MWs and that, in a three-hour period, they would emit between 315% - 530% more emissions than a new combustion turbine of similar

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<sup>52</sup> See EPSCA NOPR Comments at 25-26, 57-62. EPSCA notes that the Commission dismissed EPSCA’s concerns. Order No. 745 at P 34.

<sup>53</sup> *National Emissions Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines*, Docket No. EAP-HQ-OAR-2008-0708, 75 Fed. Reg. 9648 (Mar 3, 2010). (“RICE amendment”).

<sup>54</sup> See EPA, Notice of Proposed Rulemaking, *National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines*, 75 Fed. Reg. 75937 (Dec. 7, 2010). The proposed rule states that: “The petition from EnerNOC, *et al.* requested that EPA revise the allowance for emergency demand response operation in the final rule to allow the engines to be operated for a maximum of 60 hours per year or the minimum hours required by the Independent System Operator (ISO) tariff, whichever is less.”

size.<sup>55</sup> The Delaware petition further points out that for these RICE units to run as DR, “such operation occurs exactly when conditions leading to the formation of ground-level ozone are at their worst. This is the type of use that would be allowed under EPA’s modified definition of emergency stationary RICE.”<sup>56</sup>

Delaware’s serious concerns are warranted. While EPSA does not presently know the range of environmental emissions of BTM Generation, such information should be collected, calculated and analyzed before going down the path of increasing such BTM Generation by paying it as if it were a DR resource. There is a glaring lack of information on the extent of the situation, *e.g.*, what types of generation comprise BTM Generation or what amounts of generation are implicated. Even Delaware, in assessing the impact of EPA’s action on the state, could only find and reference data compiled for the Northeast region in 2003 in the NESCAUM report.<sup>57</sup> At a high level, as noted above, this rush to promote BTM Generation may result in the disintegration of centrally dispatched, organized markets, the model deemed to be the most efficient and reliable for serving consumers. More narrowly, these concerns clearly warrant the Commission to take a step back, hold the above-captioned Order No. 745 compliance proceedings in abeyance, and actually develop a factual record on the many implications of the proposed DR regime that were raised in the comments on the NOPR, but were not addressed at all in the Final Rule.

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<sup>55</sup> *The Delaware Department of Natural Resources and Environmental Control's Petition for Reconsideration* at 5, EPA Docket No. EPA-HQ-QAR-2008-0708 (April 30, 2010).

<sup>56</sup> *Id.* at 3.

<sup>57</sup> See The Northeast States for Coordinated Air Use Management, *Mercury Emissions from Coal-Fired Power Plants: The Case for Regulatory Action* (dated October 2003) (the “NESCAUM Report”), available at: <http://www.nescaum.org/activities/major-reports>.

Clearly there are disagreements on the impacts of Order No. 745 and the implementation thereof in the instant ISO/RTO compliance filings on markets, consumers, the economy and even the environment. This is one of the many reasons why EPSA urged the Commission not to issue any final rule or regulation before it had addressed the many concerns and open questions that were raised by EPSA and others in their comments on the NOPR. These questions and concerns were either not addressed at all, or not addressed adequately, in the Final Rule. Therefore, at this point, EPSA again implores the Commission to address the concerns raised throughout the rulemaking proceeding and in rehearing motions by numerous stakeholders representing every sector of the electricity industry, before permitting any of the ISO/RTO compliance filings to become effective.

### III. CONCLUSION

**WHEREFORE**, for the foregoing reasons, EPSA respectfully requests that the Commission consider these comments and this answer in the above-captioned compliance proceedings. The Commission should hold all of the above-captioned compliance proceedings in abeyance, until after it has acted on the pending requests for rehearing and/or clarification of Order No. 745 . The concerns raised in these requests address issues directly impacting how ISOs/RTOs should comply with the Final Rule, including those addressed in these comments, as well as the very foundation of the compensation mechanism mandated by Order No. 745.

Respectfully submitted,



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Nancy Bagot, Vice President of Regulatory Affairs  
Electric Power Supply Association  
1401 New York Avenue, NW, 11<sup>th</sup> Floor  
Washington, DC 20005  
(202) 628-8200  
[NancyB@epsa.org](mailto:NancyB@epsa.org)

**CERTIFICATE OF SERVICE**

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

Dated at Washington, D.C. September 23, 2011.

  
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