



Electric Power Supply Association
Advocating the **power** of competition

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Environmental Protection Agency
Mailcode: 2822T
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RE: Comments on Proposed Settlement Agreement, Docket ID No. EPA-HQ-OGC-2011-1030

Dear Sir/Madam:

Pursuant to the Notice of Proposed Settlement Agreement and Request for Public Comment issued by the Environmental Protection Agency (“EPA”) on January 4, 2012,¹ the Electric Power Supply Association (“EPSA”), the Electric Power Generation Association (“EPGA”), the Independent Power Producers of New York, Inc. (“IPPNY”) and the New England Power Generators Association (“NEPGA”)² hereby comment on EPA’s proposed Settlement Agreement (the “Proposed Settlement”) with EnerNOC, Inc., EnergyConnect, Inc., CPower, Inc., and Innoventive Power, LLC (together, “DR Providers”). As described herein, the Proposed Settlement does nothing to promote the reliability of the electric grid, and will instead distort competition in the country’s energy markets and stifle the development of cleaner generation resources. Moreover, it will result in increased environmental impacts without corresponding benefits. Accordingly, the Proposed Settlement should be rejected.

¹ See *Proposed Settlement Agreement*, 77 Fed. Reg. 282 (Jan. 4, 2012).

² The comments contained in this filing represent the positions of EPSA, EPGA, IPPNY and NEPGA as organizations, but not necessarily the views of any particular member of any of these organizations with respect to any issue.

EPSA

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.

EPGA

EPGA is a regional trade association headquartered in Harrisburg, Pennsylvania, whose membership includes major electric generating companies that supply wholesale power in Pennsylvania and surrounding states. EPGA member companies own and operate more than 150,000 megawatts of generating capacity, approximately half of which is located in the mid-Atlantic region. EPGA members engage in marketing the energy, capacity, and ancillary services from their generating facilities in wholesale markets in interstate commerce and make wholesale electric sales into markets administered by PJM Interconnection, L.L.C. ("PJM").

IPPNY

IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York.

NEPGA

NEPGA is the largest trade association representing competitive electric generating companies in New England. NEPGA's member companies represent approximately 27,000 megawatts of generating capacity in the region. NEPGA's mission is to promote sound energy policies which will further economic development, jobs, and balanced environmental policy. NEPGA believes that sustainable competitive markets are the best means to provide long-term reliable and affordable supplies of electricity for consumers.

Terms Of The Proposed Settlement

Under the Proposed Settlement, EPA would, by April 20, 2012, issue a notice of proposed rulemaking³ that includes a proposal to modify the National

³ EPSA, EPGA, IPPNY and NEPGA reserve the right to submit additional comments in the event that EPA accepts, and issues a notice of proposed rulemaking as contemplated in, the Proposed Settlement.

Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (the “RICE NESHAP”) to permit emergency stationary internal combustion engines to operate for the lesser of 60 hours per year, or the minimum hours required by the applicable independent system operator (“ISO”), as part of a demand response program in circumstances where the ISO has determined that emergency actions are required.⁴ This is a fourfold increase compared to the existing rule, which permits emergency engines to operate for 15 hours per year as part of an emergency demand response program.⁵ To the extent that EPA promulgates a final rule that includes changes to the RICE NESHAP substantially similar to those set forth in the Proposed Settlement by December 14, 2012, DR Providers will move to dismiss their petitions for review of the March 2010 Final Rule.

Comments

The Proposed Settlement represents bad environmental policy and bad energy policy and must be rejected. The changes to the RICE NESHAP contemplated by the Proposed Settlement would give owners and operators of a subset of generators – *i.e.*, “behind-the-meter” (“BTM”) generators that are installed on-site to provide backup energy to industrial users – the ability to run and sell energy and capacity for up to 60 hours a year without complying with the emissions restrictions applicable to generation that is located “in front of the meter.” Thus, while wholesale generators that make transparent sales into the wholesale markets will be required either to retire or to invest in the upgrades needed to comply with EPA’s emissions limitations, BTM generators masquerading as demand response need make no such environmental investments.

The Proposed Settlement provides no rationale or analysis whatsoever supporting such preferential treatment of BTM generators, and it is hard to imagine what possible justification there could be, given that where a generator sits relative to the wholesale meter clearly has no bearing on its emissions or the consequences of those emissions. Indeed, there is no reliability, environmental or other rationale for providing BTM generators with the broad allowance contemplated under the Proposed Settlement. To the contrary, the Proposed Settlement raises concerns regarding EPA’s interference with the economic

⁴ As a general matter, emergency actions undertaken by an ISO occur outside of normal economic operations and involve non-priced actions. Such actions are generally undertaken to restore operating reserve levels to prevent a loss of power if one, two or more sources or transmission links fail simultaneously.

⁵ See *National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines*, 75 Fed. Reg. 9648 (Mar. 3, 2010) (“March 2010 Final Rule”).

energy markets and the environmental harm that will follow from such interference.

A. The Proposed Settlement Will Not Promote Reliability

The Proposed Settlement is apparently designed to address DR Providers' arguments that the 15 hour allowance under the March 2010 Final Rule would "prevent emergency engines from participating in emergency [demand response] programs" ⁶ The Proposed Settlement thus would increase the allowance to a maximum of 60 hours, ostensibly to permit BTM generators to participate in the emergency demand response program administered by PJM. ⁷ While apparently prompted by reliability concerns, the increased operating allowance for BTM generators will, in fact, do nothing to promote reliability.

First, it is important to recognize that BTM generators do not provide any special reliability benefits to the electric grid. When an ISO determines that emergency actions are necessary, it is not dependent upon, and will have no particular preference for, BTM generation. Instead, the ISO will evaluate a wide variety of options available to it and will have a whole range resources upon which it may call in an emergency. For example, in the event of an emergency, PJM may: (1) dispatch generation that is restricted for reasons other than cost; (2) recall non-capacity backed off-system sales; (3) purchase emergency energy; or (4) implement load relief measures. ⁸ PJM is therefore not reliant on BTM generators in emergency situations; to the contrary, as discussed in greater detail below, PJM has expressed concern that relying on BTM generators with limited availability may jeopardize reliability. Given that BTM generators do not provide any kind of special service or benefits, there is no reason for granting them preferential treatment.

Second, the increased operating allowance contemplated by the Proposed Settlement is not necessary for BTM generators to participate in emergency

⁶ See Petition for Reconsideration of CPower, Inc, EnergyConnect, Inc., EnerNOC, Inc., and Innoventive Power, LLC at 8, RIN 2060-AP36, EPA Docket No. OAR-2008-0708 (filed May 27, 2010) ("DR Providers' Reconsideration Petition").

⁷ See *id.* at 8-9 (arguing that the operating hour allowance should be increased to 60 hours to permit participation in PJM's emergency demand response program).

⁸ See PJM Manual 13: Emergency Operations at 18 (Jan. 1, 2012) (relevant excerpts provided as Attachment A hereto), entire manual available at <http://pjm.com/~media/documents/manuals/m13.ashx>. See also *id.* at 4 (setting forth various actions that PJM may take in order to alleviate or end emergencies); *id.* at 10 (PJM may recall energy that is delivered outside PJM or purchase energy from resources outside PJM to address emergencies). These comments focus on PJM given that the 60 hour maximum operating allowance under the Proposed Settlement was apparently designed to address PJM's rules.

demand response programs. DR Providers do not and cannot point to any rule that requires BTM generators to be **exempt** from emissions control requirements in order to provide emergency services. Indeed, BTM generators are fully capable of participating in emergency demand response programs even in the absence of any operating hour allowance simply by investing in emissions control equipment, like other generators that wish to participate in the wholesale markets.⁹ Of course, it is understandable that DR Providers and BTM generators may wish to reap additional profits by providing emergency power without incurring any emissions control costs. But such self-interested economic goals do not warrant an increased allowance unavailable to similarly situated generators on the other side of the wholesale meter, or otherwise justify granting BTM generators unduly preferential treatment under the RICE NESHAP.

Moreover, while DR Providers argue that BTM generators may, for economic reasons, choose not participate in emergency demand response programs absent an expanded allowance,¹⁰ such reasoning hardly justifies special treatment of the kind contemplated by the Proposed Settlement. It is entirely foreseeable that a generator (whether a BTM generator or otherwise) may determine that the installation of emissions control equipment is not cost-effective and instead choose not to participate in, or to withdraw from, the market. But such decisions are simply a natural part of how a healthy electric market responds to changed environmental requirements, and EPA should refrain from interfering with market mechanisms that help allocate resources and ensure that inefficient generators will be replaced.

Third, DR Providers have not shown any need for the 60 hour maximum operating allowance contemplated by the Proposed Settlement. In their Reconsideration Petition, DR Providers argued that “in order for emergency engines to participate in the [PJM Emergency Load Response Program], they must be available to operate for up to 60 hours (10 interruptions times 6 hours duration per interruption) per year.”¹¹ To dispel any confusion created by DR Providers’ selective quoting of PJM’s Reliability Assurance Agreement (the “PJM RAA”) and Open Access Transmission Tariff (the “PJM Tariff”),¹² PJM does not require demand response providers to be available for 60 hours a year to participate in its emergency program. The PJM Tariff makes it clear that, “[t]o

⁹ See DR Providers Reconsideration Petition at 8 n.10 (conceding that BTM generators may drop out of emergency demand response programs simply because they are “unwilling to make the capital investment”).

¹⁰ See *id.*

¹¹ *Id.* at 9.

¹² See *id.* (quoting PJM Tariff provision requiring emergency demand response providers to comply with environmental regulations, and separate PJM RAA provisions requiring demand response providers seeking to sell capacity to be available for 60 hours a year).

participate in . . . the Emergency Load Response Program, the distributed resource” is only required to: (1) “[b]e capable of reducing at least 100 kW of load”; and (2) “[b]e capable of receiving PJM notification to participate during emergency conditions.”¹³ The 60-hour availability requirement only applies to generators that wish to participate as suppliers in, and receive additional revenues from, PJM’s **capacity markets**.¹⁴ BTM generators that are available for less than 60 hours may still participate in the Emergency Load Response Program in the “Energy Only Option,” but will not receive a capacity payment.¹⁵ The 60 hour requirement thus has nothing to do with ensuring that BTM generators are available to provide emergency service, and everything to do with BTM generators’ eligibility for capacity payments over and above the payments they would receive for providing emergency service. But even assuming that DR Providers had accurately characterized the requirements of the PJM Emergency Load Response Program, the Proposed Settlement is overly broad because it would exempt all BTM generators nationwide, not merely those potentially eligible to sell into the PJM regional market.

Finally, as discussed above, the 60 hour allowance under the Proposed Settlement is not necessary for PJM’s emergency program, but would merely permit BTM generators to receive extra capacity payments without incurring the costs of environmental upgrades faced by generators on the other side of the meter that wish to participate. But even with respect to PJM’s capacity markets, PJM recently petitioned the Federal Energy Regulatory Commission (“FERC”) to modify the PJM RAA and the PJM Tariff out of concern that it was procuring **too much** capacity from demand response resources that are only available for 60 hours per year. PJM explained that the 60-hour requirement “accord[s] with a traditional utility view of peak load-shaving, and served their purposes well under more traditional approaches to meeting the region’s capacity needs.”¹⁶ This requirement was based on “an explicit assumption that [demand response

¹³ PJM Tariff, Emergency Load Response Program at page 1687 (provided as Attachment B hereto), entire PJM Tariff available at [http://pjm.com/documents/~media/documents/agreements/tariff.ashx](http://pjm.com/documents/~/media/documents/agreements/tariff.ashx). See also DR Providers’ Reconsideration Petition, Attachment 4, PJM Interconnection L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1, Sheet No. 417 (earlier version of the same tariff provision).

¹⁴ See PJM RAA, Rate Schedule FERC No. 44, Schedule 6 (setting forth qualification requirements for resources to participate in capacity markets) (provided as Attachment C hereto), complete PJM RAA available at <http://pjm.com/documents/~media/documents/agreements/raa.ashx>. See also DR Providers’ Reconsideration Petition, Attachment 5 (earlier version of Schedule 6 of the PJM RAA).

¹⁵ See PJM Tariff, Emergency Load Response Program at page 1686 (Attachment B hereto). See also *id.* at page 1694 (participants in the Energy Only Option may voluntarily reduce load in response to PJM’s emergency request).

¹⁶ PJM Transmittal Letter at 2, FERC Docket No. ER11-2288-000 (filed Dec. 2, 2010) (provided as Attachment D hereto).

resources] would comprise a very small share of the total capacity committed to PJM.”¹⁷ By contrast, the implementation of PJM’s new capacity market structure – the Reliability Pricing Model (“RPM”) – has resulted in “a marked increase in the commitment of demand-side resources to PJM.”¹⁸ With the proliferation of demand response resources, PJM became increasingly concerned that “the current [demand response] product definition is no longer adequate to ensure that reliability requirements are met.”¹⁹ PJM therefore proposed modifications to the PJM RAA and the PJM Tariff that: (1) reclassify demand resources that are only available for 60 hours a year as “Limited Demand Resources”; (2) establish a methodology by which PJM will determine the amount of capacity that it may safely procure from Limited Demand Resources without jeopardizing reliability; and (3) permit PJM to procure capacity from demand response resources that would be available for more than 60 hours a year. FERC accepted the modifications, noting that the procurement of more broadly available demand response products would address concerns regarding potential over-reliance on Limited Demand Resources.²⁰ PJM has thus made it clear that there is no need for additional measures – such as the increased operating allowance under the Proposed Settlement – to encourage participation by BTM generators.

B. The Proposed Settlement Distorts The Nation’s Energy Markets And Harms The Environment

By arbitrarily exempting a particular subset of generators from emissions limitations, the Proposed Settlement will distort price signals in the energy markets and displace other generation resources, to the detriment of reliability and the environment.

To return to the example of PJM, the 60-hour maximum operating allowance will, as explained above, permit BTM generators to participate in PJM’s RPM capacity market.²¹ Under the RPM structure, PJM holds annual and other periodic auctions where suppliers compete to sell capacity, and where the price of capacity is determined based on a FERC-approved demand curve that reflects the reliability value of increased supply in specific regions. This market mechanism is intended to promote reliability by sending the appropriate price signals to incentivize suppliers to build new, and retain existing, generation

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 1.

²⁰ See *PJM Interconnection, L.L.C.*, 134 FERC ¶ 61,066 at P 32 (provided as Attachment E hereto), *order on compliance filing and reh’g*, 135 FERC ¶ 61,102 (2011).

²¹ See PJM RAA, Schedule 6, § A (providing that Demand Resources (including Limited Demand Resources that are only available for 60 hours a year), may participate in the capacity market auctions) (Attachment C hereto).

where needed, including as a result of EPA rules.²² The structure is further intended to give “generation, demand response, and transmission **a reasonable opportunity to compete** in solving reliability concerns.”²³

The Proposed Settlement disrupts this carefully designed market structure by permitting BTM generators to compete on an **unequal** footing with other generators. Because BTM generators will be able to avoid costs of environmental upgrades faced by generators on the other side of the wholesale meter, they will be able to submit lower bids into the RPM auctions. This could allow BTM generators to squeeze traditional generators out of the market, and could also result in suppressed prices, thereby discouraging wholesale investment and hastening the retirement of existing resources that would otherwise be economic. This, in turn, will harm reliability as PJM will be forced to rely even more on Limited Demand Resources, despite already having expressed concerns regarding heavy use of such resources.

Equally importantly, the market distortion resulting from the Proposed Settlement could inflict significant harm on the environment. To be clear, although the Proposed Settlement refers to participation in demand response programs, the contemplated allowances will not lead to any reductions whatsoever in energy usage; instead, the allowances simply permit increased use of diesel-fired BTM generators, which will be exempt from emissions limitations. The harm to the environment will be amplified because such BTM generators, which emit far more pollution than other generators, will be forcing out and replacing traditional generators, which have to comply with EPA’s increasingly stringent emissions limitations. Indeed, PJM explained that almost 4,900 MW of coal generation was replaced by demand response resources in the most recent capacity market auction, likely because “the costs of environmental retrofits . . . made the uncleared coal capacity uneconomic relative to lower cost resources such as demand response and energy efficiency.”²⁴ Because other ISOs have market structures similar to PJM, similar results could be expected in other regions. Nonetheless, no analysis whatsoever has been conducted of the potential environmental ramifications of the expanded operating allowance under the Proposed Settlement.

²² See generally *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) (approving PJM’s RPM structure) (provided as Attachment F hereto).

²³ *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 6 (2006) (emphasis added) (provided as Attachment G hereto).

²⁴ PJM 2014/2015 RPM Base Residual Auction Results at 1-2 (provided as Attachment H hereto), available at [http://pjm.com/markets-and-operations/rpm/~media/markets-ops/rpm/rpm-auction-info/2014-2015-rpm-bra-results-report-addendum.ashx](http://pjm.com/markets-and-operations/rpm/~/media/markets-ops/rpm/rpm-auction-info/2014-2015-rpm-bra-results-report-addendum.ashx).

C. The Proposed Settlement Contravenes EPA's Environmental Concerns Articulated Throughout The Historical Record For The RICE NESHAP

As discussed above, the Proposed Settlement clearly gives BTM generators an illegitimate and unwarranted economic advantage over other generators by permitting BTM generators to sell energy for up to 60 hours a year without incurring any emissions control costs. This preferential treatment flies in the face of EPA's longstanding policies and the history of the RICE NESHAP.

Beginning with the initial RICE NESHAP proposal in 2002, EPA has deliberately sought to restrict the use of emergency stationary reciprocating internal combustion engines ("RICE") to true emergencies. Starting in the initial proposed rule, EPA stated that an emergency RICE should "operate only in emergencies."²⁵ The first final rule adopted that approach, making it clear that:

Emergency stationary RICE means any stationary RICE that operates in an emergency situation. Examples include stationary RICE used to produce power for critical networks or equipment (including power supplied to portions of a facility) when electric power from the local utility is interrupted, or stationary RICE used to pump water in the case of fire or flood, etc.²⁶

Two years later, EPA proposed further clarification to prohibit an emergency RICE from being used for financial gain. In particular, EPA expressed concern that the existing definition "was not given appropriate restrictions and would unintentionally allow significant operation of an engine in nonemergency situations"²⁷ Recognizing its obligation to "consider environmental and health consequences for failing to regulate the operation of emergency engines appropriately and prevent loop-holes,"²⁸ EPA modified the definition to make it clear that "[s]tationary RICE used for peak shaving are not considered emergency stationary RICE. Stationary ICE used to supply power to

²⁵ *National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines*, Proposed Rule, 67 Fed. Reg. 77,830, 77,836 (Dec. 19, 2002).

²⁶ *National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines*, Final Rule, 69 Fed. Reg. 33,474, 33,512 (June 15, 2004) (codified at 40 C.F.R. § 63.6675).

²⁷ *Standards of Performance for Stationary Spark Ignition Internal Combustion Engines and National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines*, 73 Fed. Reg. 3568, 3583 (Jan. 18, 2008).

²⁸ *Id.*

an electric grid or that supply power as part of a financial arrangement with another entity are not considered to be emergency engines”²⁹

In the most recent review, EPA reiterated that, although emergency RICE may be operated for nonemergency purposes for 50 hours a year,

owners and operators may not engage in income-generating activities during those 50 hours. The 50 hours per year for non-emergency purposes cannot be used to generate income for a facility, for example, to supply power to an electric grid or otherwise supply power as part of a financial arrangement with another entity.³⁰

It was only in the most recent final rule that EPA permitted emergency RICE to operate as part of demand response programs, and then only in response to commenters who represented that such an exception was necessary for reliability.³¹ Even as it apparently accepted these representations at face value, EPA nonetheless fashioned an exception that would apply only during a “**limited**” number of hours of operation per year in situations where grid failure and a blackout are imminent.”³²

In an abrupt departure from EPA’s past rulings that emergency RICE should not be exploited for financial gain, the Proposed Settlement would inexplicably expand the limited exception allowed in the March 2010 Final Rule into a gaping loophole that would subsidize BTM generators at the expense of generators that participate directly in the wholesale markets. There is no justification for such a drastic reversal in policy. Indeed, as explained herein, the preferential treatment contemplated under the Proposed Settlement is not required to preserve reliability and will instead harm the nation’s energy markets and the environment.

²⁹ *National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines*, Final Rule, 73 Fed. Reg. 3568, 3607 (Jan. 18, 2008) (codified at 40 C.F.R. § 63.6675).

³⁰ *National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines*, Proposed Rule, 74 Fed. Reg. 9697, 9704-05 (Mar. 5, 2009).

³¹ See March 2010 Final Rule, 75 Fed. Reg. at 9667.

³² *Id.* (emphasis added).

D. FERC Has Not Requested Or Contemplated Any Exemption For BTM Generators

FERC recently adopted Order No. 745, which provides financial incentives to, and will greatly increase the amount of, demand response participating in organized wholesale power markets.³³ In so doing, FERC did not request that EPA make any special exceptions, such as those contemplated in the Proposed Settlement, to promote reliability or increase participation by BTM generators. Instead, FERC designed its compensation rules for demand response resources based on the assumption that such resources are subject to the same emissions requirements as other generators, and that BTM generators are, in fact, “usually subject to more stringent environmental regulations than remotely sited central station power plant facilities due to being primarily located in urban non-attainment areas.”³⁴ EPA therefore does not need to take any steps to facilitate BTM generators’ participation in the FERC-regulated wholesale markets. Unfortunately, because EPA and FERC have not sought to harmonize their approaches, the Proposed Settlement has the unintended effect of disrupting the competitive market mechanisms designed by FERC by giving BTM generators a broad exemption from emissions regulations, and would also result in a regulatory “big gaping hole” with respect to environmental regulation of BTM generators that was not intended by FERC. Indeed, because of its assumption that demand response providers are subject to emissions limitations, FERC has not conducted any environmental analysis in formulating the recently revamped demand response compensation rules in Order No. 745, or required ISOs to take environmental considerations into account in their dispatch determinations. At the same time, EPA has not even conducted any analyses or studies of the environmental impacts of the Proposed Settlement, either alone or in combination with FERC’s Order No. 745.

³³ See *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 76 Fed. Reg. 16,658 (Mar. 24, 2011), FERC Stats. & Regs. ¶ 31,232, 134 FERC ¶ 61,187 (provided as Attachment I hereto), *order on reh’g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011).

³⁴ Letter from Jon Wellinghoff, Chairman, Federal Energy Regulatory Commission to Ed Whitfield, Chairman, Subcommittee on Energy and Power, U.S. House of Representatives, Committee on Energy and Commerce at Answer to Question 23 (Oct. 4, 2011) (provided as Attachment J hereto), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/091411/WellinghoffQFR.pdf>.

Conclusion

For the reasons set forth herein, the Proposed Settlement fails to provide reliability benefits and will harm the nation's energy markets and the environment. EPSA, EPGA, IPPNY and NEPGA therefore request that EPA reject the Proposed Settlement.

Respectfully submitted,

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