

152 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

PJM Interconnection, L.L.C. Docket Nos. ER15-623-002
EL15-29-001

Essential Power Rock Springs, LLC, Essential Power
OPP, LLC, and Lakewood Cogeneration, L.P. Docket No. EL15-41-001

v.
PJM Interconnection, L.L.C.

Advanced Energy Management Alliance
Coalition Docket No. EL15-80-000
v.
PJM Interconnection, L.L.C.

ORDER DENYING REQUEST FOR CLARIFICATION, GRANTING IN PART
REQUEST FOR REHEARING, GRANTING IN PART COMPLAINT, AND
DIRECTING COMPLIANCE FILING

(Issued July 22, 2015)

1. On June 30, 2015, Joint Consumer Representatives (Joint Consumers)¹ filed a request for expedited clarification or, in the alternative, rehearing of the Commission's June 9, 2015 order conditionally accepting PJM Interconnection, L.L.C.'s (PJM)

¹ Joint Consumers consist of the following entities: the PJM Industrial Customer Coalition, the New Jersey Board of Public Utilities, the New Jersey Division of Rate Counsel, the Public Power Association of New Jersey, Maryland Office of People's Counsel, the Office of the People's Counsel for the District of Columbia, the Pennsylvania Office of Consumer Advocate, the Delaware Division of the Public Advocate, Duquesne Light Company, the Illinois Citizens Utility Board and the West Virginia Consumer Advocate Division.

proposed revisions to its Open Access Transmission Tariff (OATT or Tariff) and Reliability Assurance Agreement Among Load Serving Entities (RAA) to establish a new capacity product, Capacity Performance Resources.² Joint Consumers seek clarification that the Capacity Performance provisions conditionally accepted in the Capacity Performance Order require PJM to allow Annual Demand Resources³ and all other resources that qualify as Capacity Performance Resources to participate in PJM's Capacity Performance Transition Incremental Auctions (Transition Auctions). If the Commission does not provide this clarification, Joint Consumers request that the Commission grant rehearing and allow Annual Demand Resources and all other Capacity Performance Resources to participate in the Transition Auctions.

2. Similarly, on June 29, 2015, the Advanced Energy Management Alliance Coalition (AEMA)⁴ filed a complaint, pursuant to section 206 of the Federal Power Act (FPA),⁵ seeking a Commission determination that, under Attachment DD, sections 5.14D and 5.5A(a) of the Capacity Performance provisions, Annual Demand Resources and Annual Energy Efficiency Resources⁶ are permitted to participate in the Transition Auctions. Alternately, if the Commission rejects AEMA's interpretation of the relevant OATT provisions, AEMA alleges that the relevant provisions are unjust, unreasonable, and unduly discriminatory.

3. For the reasons discussed below, we deny Joint Consumers' request for clarification, grant in part Joint Consumers' request for rehearing, and grant in part

² *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) (Capacity Performance Order). The Tariff revisions conditionally accepted in the Capacity Performance Order will sometimes be referred to here as the Capacity Performance provisions.

³ PJM RAA at section 1.1A.

⁴ AEMA is comprised of the following entities: the Advanced Energy Management Alliance, CPower, EnergyConnect, Inc., EnerNoc, Inc., and EMC Development Company, Inc.

⁵ 16 U.S.C. § 824(e) (2012).

⁶ PJM RAA at section 1.1B.

AEMA's complaint.⁷ We further direct PJM to submit a compliance filing to be effective as of the date of this order, within 15 days of the date of this order.

I. Background

4. PJM filed the Capacity Performance provisions on December 12, 2014 in Docket No. ER15-623-000. As proposed in new Attachment DD, section 5.5A(a), "the following types of Capacity Resources are eligible to submit a Sell Offer as a Capacity Performance Resource: internal or external Generation Capacity Resources; Annual Demand Resources; Capacity Storage Resources; Annual Energy Efficiency Resources; and Qualifying Transmission Upgrades." Capacity Performance Resources would be subject to more stringent performance requirements and penalties for a failure to deliver energy when called upon during the most critical hours of the delivery year. PJM also proposed in new Attachment DD, section 5.14D, a transition period in which it would hold two Transition Auctions to procure a portion of Capacity Performance Resources for two delivery years, 2016-17 and 2017-18, for which the Base Residual Auction had already been conducted.⁸

5. In the Capacity Performance Order, the Commission conditionally accepted the Capacity Performance provisions, including the definition of Capacity Performance Resources and the Transition Auction mechanism. PJM subsequently announced its intent to conduct the Transition Auctions on July 27-28, 2015, and August 3-4, 2015.

6. To provide context for the summaries and discussion below, we briefly describe here the OATT and RAA provisions relevant to the Transition Auctions. Attachment DD, section 5.14D, states that "[f]or both the 2016/17 and 2017/18 Delivery Years, PJM will hold a Capacity Performance Transition Incremental Auction to procure Capacity Performance Resources."⁹ The same provision then states that "[a] Capacity Market Seller may offer any Generation Capacity Resource that has not been committed in [a Fixed Resource Requirement] Capacity Plan, that qualifies as a Capacity Performance Resource under section 5.5A(a) and that" meets certain operational requirements.¹⁰ The

⁷ The remainder of the pending rehearing requests will be addressed in a separate order.

⁸ See PJM OATT at Attachment DD, section 5.14D.

⁹ *Id.* at Attachment DD, section 5.14D(B).

¹⁰ See *id.* at Attachment DD, section 5.14D(B)(3).

same provision also states that a Capacity Market Seller may submit an “external Generation Capacity Resource” subject to other operational requirements relevant to external resources.¹¹ PJM’s RAA defines a Generation Capacity Resource as follows: “[A] generation unit, or the contractual right to capacity from a specified generation unit, that meets the requirements of Schedules 9 and 10 of this Agreement, and, for generation units that are committed to [a Fixed Resource Requirement] Capacity Plan, that meets the requirements of Schedule 8.1 of this Agreement. A Generation Capacity Resource may be an Existing Generation Capacity Resource or a Planned Generation Capacity Resource.”

A. Joint Consumers’ Request for Clarification and Rehearing

7. Joint Consumers state that the revisions conditionally accepted in the Capacity Performance Order expressly provide for the participation in the Transition Auctions by all resources that qualify as Capacity Performance Resources, but that PJM is misapplying its OATT by restricting participation solely to Generation Capacity Resources. Joint Consumers request the Commission clarify that nothing in the OATT provisions, as accepted in the Capacity Performance Order, exclude Annual Demand Resources, or any other sub-category of resources permitted to qualify as Capacity Performance Resources (i.e., Annual Energy Efficiency Resources and Qualifying Transmission Upgrades), from participating in the Transition Auctions.

8. More specifically, Joint Consumers argue that section 5.14D of the Capacity Performance provisions (regarding the Transition Auctions) obligates PJM to procure Capacity Performance Resources, which by definition, includes all types of Capacity Performance Resources.¹² Moreover, Joint Consumers add that the Commission-accepted definition of Capacity Performance Resources includes Annual Demand Resources and other resources.¹³ Joint Consumers assert that section 5.14D(B)(3) of the Capacity Performance provisions, which addresses the submission of offers in Transition Auctions by Generation Capacity Resources, restricts the ability of certain Generation

¹¹ *Id.*

¹² Joint Consumers request for clarification and rehearing at 6 (citing PJM OATT, section 5.14D(B)(1)).

¹³ *Id.* (citing PJM OATT, section 5.5A).

Capacity Resources to participate in the Transition Auctions but does not preclude participation by other Capacity Performance Resources.¹⁴

9. According to Joint Consumers, PJM's transmittal letter submitted in support of the relevant Capacity Performance provisions generally refers to "resources," and while it references the limitations in section 5.14D(B)(3) that apply to Generation Capacity Resources, the transmittal letter does not mention any limitations or outright exclusions on the ability of qualified Annual Demand Resources or other types of Capacity Performance Resources to participate in the Transition Auctions.¹⁵

10. Joint Consumers also assert that allowing all types of Capacity Performance Resources to participate in the Transition Auctions supports and helps achieve the objectives of the Transition Auctions to facilitate gradual adaptation by Capacity Performance Resources to the new, more stringent performance requirements and help mitigate price volatility. Accordingly, Joint Consumers argue that excluding certain types of Capacity Performance Resources would run contrary to these objectives.¹⁶

11. In the alternative, Joint Consumers request that the Commission grant rehearing of any aspects of the Capacity Performance Order that could be read to exclude Annual Demand Resources or other Capacity Performance Resources from the Transition Auctions. Joint Consumers contend that allowing only Generation Capacity Resources to participate in the Transition Auctions would be unduly discriminatory given that the Capacity Performance Order found that Annual Demand Resources and other types of non-Generation Capacity Resources are capable of providing the same reliability benefits and qualify as Capacity Performance Resources.¹⁷ Furthermore, Joint Consumers argue, neither PJM nor any other party has made any arguments, or offered any evidence, to support finding that Annual Demand Resources should be excluded from the Transition Auctions. Joint Consumers assert that it would be arbitrary and capricious to find that

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 9-10.

¹⁷ *Id.* at 13 (citing Capacity Performance Order, 151 FERC ¶ 61,208 at PP 99-100).

Annual Demand Resources qualify as Capacity Performance Resources but may not participate in the Transition Auctions.¹⁸

B. AEMA's Complaint

12. In its complaint, AEMA asserts that PJM's refusal to allow demand response resources and energy efficiency resources to participate in the Transition Auctions is inconsistent with the Commission-accepted Capacity Performance Provisions and therefore violates the filed rate doctrine. AEMA further asserts that PJM's interpretation of the OATT to exclude these resource types from the Transition Auctions is unjust, unreasonable, and unduly discriminatory.

13. AEMA states that the OATT provisions that are the subject of its complaint, section 5.14D, providing for the Transition Auctions, and section 5.5A(a), defining the term "Capacity Performance Resource," permit demand response resources and energy efficiency resources to participate in Transition Auctions. AEMA argues that these provisions, read together, expressly provide that all resources that qualify as Capacity Performance Resource are entitled to participate in Transition Auctions. AEMA further argues that none of the references to PJM's procurement obligations, under section 5.14D, limit PJM's obligation to the procurement of Generation Capacity Resources alone. AEMA concludes that excluding such resources from participating in the Transition Auctions violates the filed rate doctrine.¹⁹

14. Regarding a separate sub-section included under section 5.14D, i.e., section 5.14D(B)(3), which addresses the submission of offers in Transition Auctions by Generation Capacity Resources, AEMA further argues that while applicable to Generation Capacity Resources, these limitations and the broader import of section 5.14D(B)(3) do not apply to other, non-generation Capacity Performance Resources.²⁰

15. AEMA further argues that PJM's attempt to preclude demand response resources and energy efficiency resources from participating in the Transition Auctions is inconsistent with the Capacity Performance Order's stated objective of avoiding a

¹⁸ *Id.* at 13-14.

¹⁹ AEMA complaint at 7-8.

²⁰ *Id.* at 9-10.

shortage of Capacity Performance Resources during the transition period.²¹ AEMA states that, in discussing those resources that will participate in the Transition Auctions, the Capacity Performance Order refers to the inclusive term, Capacity Performance Resources.²²

16. Finally, AEMA argues, in the alternative, that if its interpretation of the OATT is rejected, the relevant provisions, as so construed, are unjust, unreasonable and unduly discriminatory. AEMA argues that excluding demand response resources and energy efficiency resources from participating in the Transition Auctions would reduce competition and elevate capacity prices, while producing no corresponding market benefits. AEMA asserts resources capable of satisfying the Capacity Performance Resource obligations are by definition proven reliable supply resources, so excluding them from the Transition Auctions while allowing Generation Capacity Resources to participate, is unduly discriminatory.²³

II. Notice of Complaint and Responsive Pleadings

17. Notice of AEMA's complaint was published in the *Federal Register*, 80 Fed. Reg. 38,676 (2015), with answers, interventions and protests due on or before July 9, 2015.²⁴ PJM submitted a timely answer. A notice of intervention and timely-filed motions to intervene were submitted by the entities noted in the Appendix to this order. In addition, motions to intervene out-of-time were submitted on July 13, 2015 by Inertia Power I, LLC (Inertia) and July 20, 2015 by Wabash Valley Power Association, Inc. (Wabash Valley). Protests were submitted by Exelon Corporation (Exelon), the PJM Power Providers Group (P3), the PJM Utilities Coalition,²⁵ and Talen Companies (Talen).

²¹ *Id.* at 11 (citing Capacity Performance Order, 151 FERC ¶ 61,208 at P 253).

²² *Id.*

²³ *Id.* at 12.

²⁴ *See* Notice of Complaint, Docket No. EL15-80-000 (June 30, 2015).

²⁵ The PJM Utilities Coalition consists of the following entities: American Electric Power Service Corporation, the Dayton Power and Light Company, and FirstEnergy Service Company, Buckeye Power, Inc. and East Kentucky Power Cooperative, Inc.

Public Interest Organizations²⁶ submitted comments in support of the complaint.²⁷ On July 14, 2015, AEMA submitted an answer to PJM's answer and intervenors' protests.

A. PJM's Answer to the Complaint

18. PJM argues that AEMA's complaint should be rejected on procedural grounds. PJM characterizes AEMA's complaint as a collateral attack of the Capacity Performance Order, stating that its proposed OATT language accepted by the Commission in that proceeding was both clear in its intent and express in its terms. PJM notes that no party challenged the relevant language regarding the resource types eligible to participate in the Transition Auctions.

19. PJM argues, in the alternative, that AEMA's complaint should be rejected on the merits. PJM argues that Attachment DD, section 5.14D(B)(3) is clear on its face and must be read to limit participation in Transition Auctions to eligible Generation Capacity Resources. PJM adds that, by its terms, this provision identifies the full class of sell offers that will be permitted in the Transition Auctions and, in so doing, limits that participation to offers submitted by Generation Capacity Resources. PJM further argues that the intended reach of this provision was made clear by PJM in its filing, in Docket No. ER15-623-000, in which this provision was first proposed,²⁸ and was further clarified in a March 5, 2015 online Frequently Asked Questions (FAQ) exchange between PJM and its stakeholders.

20. PJM adds that, if it had intended to permit Annual Demand Response Resources and Annual Energy Efficiency Resources to participate in its Transition Auctions, it would have also been required to subject these resources to the limitations set forth in section 5.14D(B)(3), which addresses the submission of offers in Transition Auctions by

²⁶ Public Interest Organizations consist of the following entities: Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and Sustainable FERC Project.

²⁷ Public Interest Organizations' submission includes both comments on AEMA's complaint and a separate request for rehearing of the Capacity Performance Order. Issues raised in Public Interest Organizations' request for rehearing will be addressed separately in Docket Nos. ER15-623-002 and EL15-29-001. We remind parties that in the future comments and requests for rehearing or clarification should be submitted separately.

²⁸ See PJM answer at 4 (citing Transmittal Letter at 29 and n.144).

Generation Capacity Resources. PJM states, for example, that no resource should be permitted to offer into a Transition Auction if it has already committed itself in a Fixed Resource Requirement (FRR) plan.

21. PJM also defends the justness and reasonableness of the Transition Auction mechanism in section 5.14D. PJM states that it was appropriate to limit the Transition Auctions to generation resources, because, according to PJM, the purpose of the transition period procurement is to provide opportunities for those resources that need to make, or have made, substantial investments to meet performance and fuel assurance requirements. PJM states that, in contrast to the needs of these resources, demand response resources do not require this same level of incremental investment.

22. PJM further states that it was appropriate to limit the Transition Auctions to generation resources, asserting that there are risks attributable to demand response participation in PJM's capacity markets following the D.C. Circuit's ruling in *EPSA v. FERC*,²⁹ vacating the Commission's final rule pertaining to demand response compensation in the wholesale energy markets.³⁰

23. PJM states that at the time it made its Capacity Performance filing, it was prudent for it to restrict both previously cleared and new demand response resources and energy efficiency resources from offering into the Transition Auctions. PJM states that it learned that the United States Solicitor General had authorized the Commission to submit a petition for *writ of certiorari* to the United States Supreme Court seeking review of EPSA only a few days before submitting its Capacity Performance proposal. PJM also notes that, while it submitted additional Tariff changes, in a separate proceeding, addressing the right of demand response resources and energy efficiency resources to participate in PJM's capacity markets, even if the *EPSA* mandate is issued and becomes applicable to PJM's capacity market, this filing could not have been relied upon by PJM at the time it

²⁹ 753 F.3d 216 (D.C. Cir. 2014) (*EPSA*), *cert. granted*, Nos. 14-840, 14-841. The D.C. Circuit stayed its mandate vacating the rule pending outcome of the appeal to the U.S. Supreme Court.

³⁰ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order Nos. 745, FERC Stats. & Regs. ¶ 31,322 (2011), *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011).

submitted its Capacity Performance proposal.³¹ PJM adds that this policy was also consistent with a waiver request submitted by PJM, addressing PJM's obligation to release 2,000 MW of capacity into its third Incremental Auction for the 2015-16 delivery year.³²

24. PJM states that the timing challenges it will face in the event it is required, under *EPSA*, to unwind and replace a demand response resource or energy efficiency resource that is otherwise qualified as a Capacity Performance Resource, have only grown more complex since it submitted its Capacity Performance proposal. PJM states that, if the Supreme Court's ruling is issued in the late spring of 2016 and is adverse to the Commission, PJM will be faced with an imminent loss of capacity, as applicable to the 2016-17 delivery year, that it may not be able to replace. PJM states that similar uncertainties exist for the 2017-18 delivery year, given the potential lead times at issue.

25. If the Commission rules in favor of AEMA, PJM offers two alternatives to allow non-generation resources to participate: (1) limit participation to Annual Demand Resources and Annual Energy Efficiency Resources that *cleared* a Reliability Pricing Model (RPM) auction for the applicable delivery year, or (2) limit participation to Annual Demand Resources and Annual Energy Efficiency Resources that previously *offered* into an RPM auction for the applicable delivery year. PJM notes, however, that the deadlines for Annual Demand Resource and Annual Energy Efficiency Resource requests for participation have already passed (as PJM's Tariff requires 30 days for review of energy efficiency requests and 15 days for review of demand response requests).

B. Comments

26. Public Interest Organizations submitted comments in support of AEMA's complaint. They assert that the tariff language the Commission approved in the Capacity Performance Order did not exclude the ability of Annual Demand Resources and Annual Energy Efficiency Resources that otherwise qualify as Capacity Performance Resources

³¹ See *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,251 (2015) (*EPSA Contingency Order*) (order rejecting filing as premature).

³² See *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,122 (2015) (finding that the release of approximately 2,000 MWs of committed capacity could yield a reserve margin below the established installed capacity needed to assure reliable service to loads given PJM's reliance on committed capacity resources, the poor performance of generating capacity resources last year, and the expected high level of generation retirements).

to participate in the Transition Auctions. They state that there is no legal or operational basis upon which to exclude these resource types, and that doing so would be unduly discriminatory on its face.³³

C. Protests

27. Protests to the complaint, supporting PJM's interpretation of its OATT and urging the rejection of AEMA's complaint, were submitted by Exelon, the PJM Utilities Coalition, P3, and Talen. Intervenors argue that PJM's interpretation of Attachment DD, section 5.14D is clear, with the underlying intent and operation of this provision made known by PJM both in its Capacity Performance filing, in Docket No. ER15-623-000, and in PJM's March 2015 online FAQ exchange. P3 argues that AEMA could have, but did not, raise this issue in Docket No. ER15-623-000. Exelon asserts that because AEMA failed to do so it is procedurally barred from raising this issue in its complaint.³⁴ The PJM Utilities Coalition agrees that AEMA should be precluded from relitigating this issue here.

28. Intervenors also agree with PJM that Attachment DD, section 5.14D(B)(3) expressly addresses sell offers permitted to be made into the Transition Auctions and limits those sell offers to Generation Capacity Resources. Exelon argues that there is no provision in the OATT authorizing the submission of sell offers into the Transition Auctions by demand response resources or energy efficiency resources. P3 and Exelon agree with PJM that if PJM had intended to permit demand response resources and energy efficiency resources to participate in the Transition Auctions, it would have been required to apply section 5.14D(B)(3) limitations to these resources. Exelon and the PJM Utilities Coalition also agree with PJM that the uncertainty presented by *EPSA* provides a sound policy reason supporting PJM's exclusion of demand response resources from the Transition Auctions.

29. The PJM Utilities Coalition responds to AEMA's alternative argument that if the relevant OATT provisions exclude demand response resources from the Transition Auctions, then the provisions are unjust, unreasonable and unduly discriminatory. The PJM Utilities Coalition argues that AEMA fails to meet its FPA section 206 burden of

³³ Public Interest Organizations comments at 12.

³⁴ Exelon protest at 5 (citing *Central Vermont Pub. Serv. Corp.*, 123 FERC ¶ 61,128, at P 35 (2008), and *NSTAR Electric Co. v. ISO New England, Inc.*, 120 FERC ¶ 61,261, at P 33 (2007)).

proof. The PJM Utilities Coalition adds that where, as here, the Commission has approved the relevant OATT provisions as just and reasonable, it is incumbent on the complainant to demonstrate a significant change in circumstances to justify relitigation of that finding.

30. The PJM Utilities Coalition further argues that the Transition Auction rules are not unduly discriminatory, stating that there is a sufficient basis to differentiate between Generation Capacity Resources and non-Generation Capacity Resources, citing the need for generation resources to make additional investments in capital and operation and maintenance. The PJM Utilities Coalition adds that because Annual Demand Response Resources and Annual Energy Efficiency Resources represent new products, with no proven track record, it was permissible for PJM to limit participation in the Transition Auctions to a proven product, i.e., to Generation Capacity Resources.³⁵ Finally, the PJM Utilities Coalition argues that these resource types are not similarly-situated, given the uncertainties posed by *EPSA*.

III. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, we grant the unopposed, late-filed interventions submitted by Inertia and Wabash Valley, given their interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest, an answer to an answer, and an answer to a rehearing request, unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by AEMA, in Docket No. EL15-80-000, and by Exelon, Talen, and PJM, in Docket No. ER15-623-002, *et al.*, and therefore reject them.

³⁵ PJM Utilities Coalition protest at 16 (citing *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,052, at P 65 (2014) (Demand Response Revisions Order) (holding that limited-availability demand response and annual resources are not similarly-situated, given their differing performance requirements)).

IV. Discussion

33. As discussed below, we find that while PJM has correctly interpreted the relevant OATT language as not allowing demand response and other non-generation resources to participate in the Transition Auctions, such exclusion is unjust and unreasonable and unduly discriminatory as applied to technically-capable resources willing to perform as a Capacity Performance Resource through the Transition Auctions. Accordingly, we grant in part Joint Consumers' request for rehearing and grant in part AEMA's complaint to allow non-generation resources technically capable of providing the capacity service to be procured through the Transition Auctions to participate in those auctions. To implement these findings, we direct PJM to submit, within 15 days of the date of this order, revisions to its OATT to allow for participation by such non-generation resources in the Transition Auctions as of the date of this order.³⁶ We also direct PJM to submit a revised timeline to conduct both Transition Auctions, including any applicable revised deadlines for requests to submit sell offers in both Transition Auctions.

34. Joint Consumers and AEMA assert that, under the Capacity Performance provisions and subject to certain limitations, any Capacity Performance Resource (including non-generation resources such as demand response resources) is eligible to participate in the Transition Auctions, and that Attachment DD, section 5.14D(B)(3) – the provision on which PJM and intervenors rely – cannot be read to bar this right. We disagree. Section 5.14D(B)(3), as PJM and intervenors correctly note, addresses sell offers that can be made into Transition Auctions. Specifically, the scope and purpose of this section is signified in its opening clause: “[a] Capacity Market Seller may offer . . . [.]” The provision goes on to specify which resources are permitted to submit such offers, naming only (and subject to certain specified limitations) a “Generation Capacity Resource” and an “external Generation Capacity Resource.” Joint Consumers' and AEMA's assertions that this provision only applies supplemental conditions to Generation Capacity Resources mischaracterizes this provision, which establishes the types of resources that are eligible to submit sell offers into Transition Auctions.

35. We also agree with PJM and intervenors that if section 5.14D(B)(3) was intended to address only a sub-set of resources permitted to participate in Transition Auctions, then a restatement of the participation limitations set forth in that provision

³⁶ We note that because PJM must immediately allow for participation by the non-generation resources as discussed in the body of this order, the tariff revisions directed here are largely ministerial in nature.

would have been required in a second, redundant provision, as applicable to non-generation resource participation. Given that there is no such provision, we conclude that section 5.14D(B)(3) establishes that only Generation Capacity Resources, including external Generation Capacity Resources, are eligible to submit offers into the Transition Auctions.

36. We also reject Joint Consumers' and AEMA's arguments that their reading of section 5.14D is consistent with the Capacity Performance Order. The Capacity Performance Order, while accepting the Tariff provisions at issue here and addressing the rationale underlying PJM's filing, did not specifically discuss the meaning of section 5.14D, and nothing in the Capacity Performance Order otherwise bears upon the question at issue here.

37. Having found that the Capacity Performance provisions do not allow non-generation resources to participate in the Transition Auctions, we next turn to the alternative arguments presented by Joint Consumers and AEMA. For the reasons discussed below, we find that this exclusion of non-generation resources from the Transition Auctions is unjust and unreasonable and unduly discriminatory.

38. The Commission has previously found that a restriction on participation in PJM's capacity auctions must be based on a demonstration why the resource types that would be precluded from participating are not similarly situated to those permitted to participate.³⁷ PJM has failed to provide an adequate explanation, either in its original filing that is the subject of Joint Consumers rehearing request or in its response to AEMA's complaint, as to how non-generation resources are not similarly situated to Generation Capacity Resources for purposes of providing the capacity services PJM plans to procure through the Transition Auctions.

39. PJM now argues that it seeks to limit participation in the Transition Auctions to resources that need to make, or have made, substantial investments to meet performance and fuel assurance requirements, and thus provide those resources an opportunity to obtain an alternative revenue stream. We find that such rationale does not provide a sufficient basis for wholly excluding non-generation resources from the Transition Auctions. The purpose of the Transition Auctions is to procure a more reliable portfolio of capacity resources, and we see no basis for excluding non-generation

³⁷ See Demand Response Revisions Order, 146 FERC ¶ 61,152 at PP 23, 31; *see also, PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,272, at P 44 (2008) (order requiring PJM to permit energy efficiency resources to participate in the Base Residual Auction).

resources capable of providing that service from participating. Indeed, Attachment DD, section 5.5A(a) of the Capacity Performance provisions provide that “internal or external Generation Capacity Resources, Annual Demand Resources, Capacity Storage Resources, Annual Energy Efficiency Resources, and Qualifying Transmission Upgrades”³⁸ that can “demonstrate to the satisfaction of [PJM] that the resource meets the necessary requirements”³⁹ of the higher quality Capacity Performance Resource product may submit sell offers as Capacity Performance. The inclusion of non-generation resources in this provision suggests that non-generation resources may be capable of providing reliable year-round performance, and as such may be similarly situated to generation resources for the purpose of the Transition Auctions.

40. We are unpersuaded by PJM’s attempt to justify the prohibition on demand response resource participation in the Transition Auctions on the uncertainty surrounding *EPSA*. While any litigation of Commission orders creates uncertainty, the Commission has previously rejected similar arguments as premature,⁴⁰ and we disagree that any uncertainty at this point provides a basis for finding that non-generation resources are not similarly-situated to Generation Capacity Resources. In addition, PJM’s Capacity Performance proposal, which was filed after *EPSA*, permits all resource types to seek to qualify as Capacity Performance Resources in future RPM auctions. Moreover, demand response and energy efficiency resources selected in prior auctions are still expected to deliver on their capacity commitments. When PJM filed its contingency proposal to reflect the uncertainty involved in the *EPSA* decision, it expressly proposed to continue to allow such participation in the event that the Supreme Court accepted certiorari. PJM, therefore, has failed to demonstrate that excluding non-generation resources that are Capacity Performance-capable from these Transition Auctions is just and reasonable and not unduly discriminatory.

41. Based upon the foregoing, we grant in part rehearing of the Capacity Performance Order and grant in part AEMA’s complaint. Accordingly, we direct PJM to submit, within 15 days of the date of this order, revisions to Attachment DD, section 5.14D(B)(3), of its OATT to allow all Capacity Performance Resources to participate in the Transition Auctions subject to qualifying as a Capacity Performance

³⁸ PJM OATT at Attachment DD, section 5.5A(a).

³⁹ *Id.* at section 5.5A(a)(ii)(B).

⁴⁰ *EPSA Contingency Order*, 150 FERC ¶ 61,251 at P 32.

Resource under Attachment DD, section 5.5A(a), as modified by the findings of the Capacity Performance Order, and not having been committed in an FRR Capacity Plan.⁴¹ Such revisions will be effective as of the date of this order. While PJM offered in its answer two alternatives to allow demand response and energy efficiency participation, neither of PJM's proposals are sufficient because they prohibit participation in the Transition Auctions by demand response and energy efficiency resources that did not previously submit sell offers in an RPM auction for the applicable delivery year. PJM's current OATT does not place such restrictions on Generation Capacity Resources, and the Commission finds that PJM has failed to support a disparate treatment of other Capacity Performance Resources in its proposed alternatives.

42. Finally, we note that the deadlines for data submission for both Transition Auctions have passed. Thus, in order to grant meaningful relief on AEMA's complaint, we direct PJM to submit a revised timeline to conduct both Transition Auctions, including any applicable revised deadlines for requests to submit sell offers in both Transition Auctions, thereby providing sufficient time for all qualified resources to participate in the Transition Auctions.⁴²

The Commission orders:

(A) Joint Consumers' request for clarification is hereby denied, as discussed in the body of this order.

(B) Joint Consumers' request for rehearing is hereby granted in part, as discussed in the body of this order.

(C) AEMA's complaint is hereby granted in part, to become effective as of the date of this order, as discussed in the body of this order.

⁴¹ When submitting its filing PJM should use the Type of Filing Code 80.

⁴² PJM may submit a revised timeline in the tariff revision transmittal letter.

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(D) PJM is hereby directed to submit tariff revisions effective as of the date of this order, within 15 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Moeller is concurring with a separate statement attached.

Commissioner Clark is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

List of Intervenors in Docket No. EL15-80-000

American Electric Power Service Corporation
American Municipal Power, Inc.
Buckeye Power, Inc.
Calpine Corporation
Direct Energy Business Marketing, LLC
and indicated affiliate
Dominion Resources Services, Inc.
Duke Energy Corporation
East Kentucky Power Cooperative, Inc.
Electric Power Supply Association
Essential Power, LLC, and indicated affiliates
Exelon Corporation
FirstEnergy Service Company
Inertia Power I, LLC *
Maryland Public Service Corporation
Monitoring Analytics, LLC
Natural Resources Defense Council
New Jersey Board of Public Utilities
NextEra Energy Resources, LLC
NRG Companies
Old Dominion Electric Cooperative
PJM Industrial Customer Coalition
PJM Power Providers Group
PSEG Companies
Sierra Club
Southern Maryland Electric Cooperative, Inc.
Sustainable FERC Project
Talen Energy Marketing, LLC and indicated affiliates
The Dayton Power and Light Company
Wabash Valley Power Association, Inc. *

* Motion to intervene out-of-time

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket No. ER15-623-002,
EL15-29-001

Essential Power Rock Springs, LLC, Essential Power
OPP, LLC, and Lakewood Cogeneration, L.P. v. PJM
Interconnection, L.L.C.

Docket No. EL15-41-001

Advanced Energy Management Alliance
Coalition

Docket No. EL15-80-000

v.

PJM Interconnection, L.L.C.

(Issued July 22, 2015)

MOELLER, Commissioner, *concurring*:

In conditionally accepting PJM’s Capacity Performance Filing, the Commission previously recognized that “PJM’s proposal is appropriate, because it creates the same expectations for all Capacity Performance Resources (i.e., the expectation that such resources will be available to provide energy and reserves when called upon), without regard to technology type.”¹ Today’s order granting rehearing in part simply applies this reasoning to participation by non-generation resources as Capacity Performance Resources in Transition Auctions. If demand response, energy efficiency, or other non-generation resources satisfy the Capacity Performance Resource requirements, then there is no cognizable reason to bar them from auction participation merely because service will be rendered during the transition period. To do so would constitute undue discrimination based on technology type and could unnecessarily inflate auction prices.

While a close reading of PJM’s proposed tariff provisions indicates that non-generation resources would be excluded from participation in the Transition Auctions, PJM’s voluminous filing did not make this fact, or its underlying justification, clear to PJM stakeholders or the Commission. PJM initially represented that its Capacity Performance proposal “preserves its current approach” to demand response participation,²

¹ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 99 (2015).

² PJM December 12, 2014 Filing, Docket No. ER15-623-000, at 5-6.

in contrast to its more recent position that it intended to limit non-generation resource participation in the Transition Auction due to the uncertainty surrounding *EPSA*.³ Depending on potential Supreme Court action in *EPSA*, it's possible that PJM's auction results may be disrupted; however, as the Commission previously found, "it is unavoidable that some uncertainty is inherent in the current stance of the *EPSA* case," and addressing this issue is premature and would necessarily impact options the Commission could undertake in response to the *EPSA* decision.⁴

Moreover, while the Advanced Energy Management Alliance Coalition's (AEMA) answer was ultimately rejected on procedural grounds, it correctly pointed out that some non-generation resources will require investments and adjustments in order to qualify as Capacity Performance Resources, just as some generation resources will not.⁵ PJM has never demonstrated that eligibility to qualify as a Capacity Performance Resource should depend on whether resources will make certain capital investments, or why such a requirement should apply only in Transition Auctions.

For these reasons, granting in part rehearing, as well as the associated complaint, is procedurally appropriate and necessary, in light of the Commission's inadvertent approval of unjust and unreasonable tariff language.

Accordingly, I respectfully concur.

Philip D. Moeller
Commissioner

³ PJM July 9, 2015 Answer, Docket No. EL15-80-000, at 8-11 (citing *EPSA v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (*EPSA*), *cert. granted*, Nos. 14-840, 14-841). The D.C. Circuit stayed its mandate vacating the rule pending outcome of the appeal to the U.S. Supreme Court.

⁴ See *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,251, at P 32 (2015) (order rejecting filing as premature).

⁵ AEMA July 14, 2015 Answer, Docket No. EL15-80-000, at 6-7.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	Docket Nos.	ER15-623-002, EL15-29-001
Essential Power Rock Springs, LLC, Essential Power OPP, LLC, and Lakewood Cogeneration, L.P. v. PJM Interconnection, L.L.C.		EL15-41-001 EL15-80-000
Advanced Energy Management Alliance Coalition v. PJM Interconnection, L.L.C.		

(Issued July 22, 2015)

CLARK, Commissioner *dissenting*:

I dissent from today's order as a matter of procedure, policy, and reflection of current uncertainty surrounding Order No. 745.

Procedurally, I note that nothing has changed since June 9, 2015 when the Commission conditionally accepted PJM Interconnection, L.L.C.'s (PJM) Capacity Performance (CP) filing (*Capacity Performance Order*), except for the passage of a brief amount of time.¹ In the *Capacity Performance Order*, the Commission approved clear and unambiguous language in Attachment DD, section 5.14D(B)(3) of PJM's Open Access Transmission Tariff, that the only type of CP Resource eligible to participate in a Transition Incremental Auction is a Generation Capacity Resource, implicitly acknowledging that decision to be a just and reasonable outcome. No new information has subsequently been presented to change this determination. Therefore, as indicated by PJM, this complaint is clearly a late-filed collateral attack by parties that had more than ample opportunity to raise such concerns in the proper venue.²

As a matter of policy, despite the conclusions reached in today's order, PJM's decision to design the Transition Incremental Auction methodology as it did was neither an oversight, nor a haphazard result.³ Rather, PJM's rationale for limiting Transition

¹ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) (*Capacity Performance Order*).

² See PJM answer at P 11.

³ See Order at P 39.

Incremental Auctions to Generation Capacity Resources was a deliberate action treating what are differently situated resources differently (namely the nature of capital investments in traditional generation resources versus the nature of demand response resources). PJM has been both consistent and clear on this position from the initial CP transmittal letter submitted in December 2014 through all subsequent correspondence in the official Commission record.⁴

This being the case, complainants cannot possibly have met their burden under section 206 of the Federal Power Act, which they claim to have accomplished so soon after the original *Capacity Performance Order*. I stress that it is not PJM's burden to now prove that an already agreed on Transition Incremental Auction methodology is just and reasonable. Rather, it is complainants' burden to explain why now, just weeks after the Commission's *Capacity Performance Order* and just days before the first Transition Incremental Auction, the plain tariff reading of Attachment DD, section 5.14D(B)(3) is unjust and unreasonable.

Finally, the Commission should exercise greater discretion given the current legal uncertainties involving Order No. 745 and demand response participation in capacity markets as currently designed.⁵ Rather than proclaiming, "damn the torpedoes, full speed ahead!" I would prefer a modest approach whereby we avoid buying ourselves more potential trouble and refrain from actively adding more demand response megawatts into PJM's capacity construct while it faces an uncertain future and possible disorderly 'unwinding.' While the pendency of Order No. 745 is not alone dispositive, it should cause us to proceed more cautiously than we are doing here.

For these reasons, I respectfully dissent from this order.

Tony Clark

⁴ See PJM answer at PP 7-8 (citing to Transmittal Letter at P 28).

⁵ *Electric Power Supply Ass'n v. FERC*, 754 F.3d 216 (D.C. Cir. 2014) ("EPISA").

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