UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Demand Response Compensation In Organized Wholesale Energy Markets	**)** **)** **)**	**Docket No. RM10-17-001**

REQUEST FOR REHEARING OF THE PJM POWER PROVIDERS GROUP

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On behalf of the
PJM Power Providers Group

Dated: April 14, 2011

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In accordance with Section 313(a) of the Federal Power Act (the "FPA"),[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the PJM Power Providers Group ("P3"),[3] petitions for rehearing of the final rule on demand response ("DR") compensation in organized markets issued on March 15, 2011.[4] P3 and its members consistently have recognized that demand response is an important element of an efficient PJM wholesale electricity market. The ability of end-use customers to respond to price signals and adjust their consumption based on price is fundamental to any commodity market. P3, however, believes

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1 16 U.S.C. § 825(a) (2006).

2 18 C.F.R. § 385.713 (2010).

3 P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM region. P3 membership is comprised of energy providers that are members of PJM, conduct business in the PJM control area, and are signatories to various PJM agreements. Combined, P3 members own over 80,000 megawatts of power and over 51,000 miles of transmission lines in the PJM region, serve nearly 12.2 million customers and employ over 55,000 people in the PJM region, representing 13 states and the District of Columbia. The request for rehearing contained herein represents the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, visit www.p3powergroup.com

4 *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 (2011) (the "Final Rule").

the Final Rule is unlawful and ill-conceived public policy that will ultimately harm markets, consumers and investors.

P3 has reviewed the Request for Rehearing of the Electric Power Supply Association ("EPSA"), and generally supports EPSA's filing and comments. In addition, for reasons previously stated, P3 believes that the Commission has overstepped the statutory limitations of its jurisdiction.

As a general matter, as detailed below, the Final Rule does not satisfy the Commission's obligations to ensure that just and reasonable rates are established for public utilities, and does not appreciate the substantial adverse consequences that the Final Rule will have on competitive markets.

P3 urges the Commission to grant rehearing for these reasons and the reasons further explained below.

I. STATEMENT OF ISSUES AND ERRORS

Pursuant to Rule 713(c) of the Commission's Rules of Practice and Procedure,[5] P3 hereby lists each error and each issue on which it seeks rehearing of the Final Rule and provides representative precedent in support of its positions on these issues:

1. The Commission exceeded its jurisdiction, taking actions outside its authority by requiring every RTO and ISO to pay full LMP compensation to demand response in every hour of the year. *See , e.g., Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) ("*Atlantic City*").

2. The Final Rule is arbitrary and capricious and contray to law because it fails to establish that existing DR compensation is unjust and unreasonable and provides an unlawful preference to demand

[5] 18 C.F.R. § 385.713(c) (2010).

response. *See, e.g.,Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001) ("*CAPP*"); *American Gas Ass'n v. FERC*, 593 F.3d 14 (D.C. Cir. 2010) ("*AGA*"); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578 (D.C. Cir. 1979) ("*Columbia Gas*").

3. The Final Rule is arbitrary and capricious and fails to demonstrate reasoned decision making because the Net Benefits Test, which was universally opposed by the RTOs and ISOs, is unworkable. *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005) ("*PPL Wallingford*"); *See Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066 (D.C. Cir. 2003) ("*MoPSC*").

4. The Commission's conclusion that a uniform, national rule for DR compensation is necessary to ensure that ISO/RTO rates are just and reasonable is arbitrary and capricious, and unsupported by substantial evidence. *See, e.g., Wis. Valley Improvement v. FERC*, 236 F.3d 738 (D.C. Cir. 2001) ("Wisconsin Valley").

5. The Commission's rejection of the LMP – G alternative Is arbitrary and capricious and not supported by substantial evidence. See e.g., *AGA*, 593 F.3d 14.

6. The Final Rule is contrary to law and arbitrary and capricious because the Commission violated the requirements of the Regulatory Flexibility Act. 5 U.S.C. §§ 601-612 (2006); *Thompson v. Clark*, 741 F.2d 401 (D.C. Cir. 1984) ("*Thompson*").

II. BACKGROUND

On March 18, 2010, the Commission issued a notice of proposed rulemaking (the "NOPR")[6] in which it proposed to require Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") to pay DR resources Locational Marginal Pricing ("LMP") for their demand reductions in all hours regardless of price or need.[7] .

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[6] *Demand Response Compensation in Organized Wholesale Energy Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,656 (2010) (the "NOPR").

[7] The Commission claimed jurisdiction to regulate DR compensation pursuant to Section 205 of the FPA, (NOPR at P 5 (*citing* 16 U.S.C. § 824d (2006)), and the statement of congressional policy in Section 1252(f) of the Energy Policy Act of 2005 ("EPAct 2005"). *NOPR,* FERC Stats. & Regs. ¶ 32,656 at P 5 (*citing* Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 965 (2005)).

The Final Rule, issued nearly a year later, requires ISOs/RTOs to pay full LMP to DR resources, subject to two conditions that were not articulated in the NOPR: (1) that the DR resource "has the capability to balance supply and demand as an alternative to a generation resource;"[8] and (2) that the "dispatch of that [DR] resource is cost-effective as determined by the net benefits test."[9] The Final Rule states that the Final Rule was needed to ensure just and reasonable rates in the organized wholesale energy markets,[10] and states that any other compensation level would be unjust and unreasonable.[11] The Final Rule maintains that, paying full LMP is necessary to address barriers to entry by DR providers[12] – barriers that are purported to exist either at the retail level or that stem from the disconnect between wholesale and retail rates.[13] The Final Rule[14]

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8 Final Rule FERC Stats. & Regs. ¶ 31,322 at P 2.

9 *Id.* at P 2.

10 *Id.* at P 2.

11 *Id.* at P 47.

12 *Id.* at P 58.

13 *See id.* at P 57.

14 In a strongly worded dissent, Commissioner Moeller characterizes the Final Rule as:

> . . . a misguided attempt to encourage greater demand response participation . . . [that] imposes a standardized and preferential compensation scheme that conflicts both with the Commission's efforts to promote competitive markets and with its statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.

Commissioner Moeller Dissent at 1.

orders all ISOs/RTOs to file the tariff revisions required by the Final Rule, including a net benefits test and a cost allocation mechanism, by July 22, 2011.[15]

As P3 detailed in its comments, PJM, along with certain regional utilities and states in the PJM balancing authority, have had programs to encourage demand response in effect for some time.[16] As P3 stated, demand response is able to compete on a level playing field with supply resources in the capacity, energy and ancillary services markets in PJM without the need for market distorting subsidies created by the Final Rule.[17]

III. REQUEST FOR REHEARING

A. The Commission Exceeded its Jurisdiction by Requiring Every RTO and ISO to Pay Full LMP Compensation to Demand Response in Every Hour of the Year.

As P3 noted in its comments, while the Commission has authority to address issues relating to wholesale rates, the Final Rule steps over the jurisdictional divide into areas of state jurisdiction and over which Congress has not granted the Commission authority to act, and otherwise is at odds with the FPA's requirements.[18] P3 agrees with the joint rehearing request of EPSA and others in that demand response is not a service subject to the Commission's ratemaking jurisdiction because the demand response service is not a sale by a public utility at wholesale but rather a foregone retail purchase. Demand

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15 Final Rule. at P 6.

16 *See* Comments of the PJM Power Providers Group at 6, Docket No. RM10-17-000 (filed May 13, 2010) ("P3 Comments").. *See* P3 Comments p 6-13 for full background on demand response programs in PJM.

17 *See* P3 Comments at 13.

18 *See* P3 Comments at 39.

response is a decision not to consume grounded in retail policies outside of the Commission's jurisdiction. This jurisdictional overstep implicates the entire Final Rule and, if not recognized by the Commission, subjects the Final Rule to lengthy judicial review and sentences every organized market to prolonged and unnecessary regulatory uncertainty.

As P3 previously detailed in its comments,[19] assuming the Commission does have the FPA jurisdiction it has asserted over ISO/RTO demand response programs, the Commission is taking actions equivalent to those the U.S. Court of Appeals for the District of Columbia Circuit concluded were outside its authority.[20] Rather than taking its proper "'passive and reactive' role under section 205,"[21] the Commission is seeking to upend ISOs'/RTOs' authority to make rate filings regarding the compensation to demand response providers that is appropriate given the individual facts and circumstances of each ISO's or RTO's program.

B. The Final Rule Fails to Establish that Existing DR Compensation Is Unjust and Unreasonable and Provides an Unlawful Preference to Demand Response

As articulated above, P3 believes that the Commission does not have jurisdiction over DR compensation as asserted in the Final Rule. However, assuming *arguendo* that the Commission could lawfully assert jurisdiction, the Commission failed to explain why and how existing tariff provisions regarding DR

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19 *See* P3 Comments at 39-43.

20 *Atlantic City*, 295 F.3d 1.

21 *See id.* at 10, (*citing City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.).

compensation structures in every ISO/RTO are unjust and unreasonable[22] and why and how payment of LMP will cause rates to be just and reasonable[23] in order to satisfy the requirements of the FPA.[24] Mere assertions that increased DR compensation will lower jurisdictional rates and mitigate market power do not meet the statutory requirements of Section 206 of the FPA.

In addition, the Final Rule simply dismisses or ignores the overwhelming concerns expressed by numerous commentators (including not only P3, EPSA and other generator interests, but also ISOs, RTOs, market monitors, state commissions, LSEs, and consumer groups) who opposed the Final Rules' mandate to pay DR full LMP. By "fail[ing] to acknowledge, much less substantively address,"[25] the serious concerns raised by commenters, the Commission has failed to engage in reasoned decisionmaking.

The Commission has not presented any convincing evidence that current levels of DR compensation are in fact inadequate. The Final Rule's reasoning is circular and boils down to an incorrect assertion that DR compensation must be inadequate because DR participation is inadequate because DR compensation is inadequate.[26] To the contrary, numerous parties including experts at the

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22 *See* Final Rule FERC Stats. & Regs. ¶ 31,322 at P 47 ("payment by an RTO or ISO of compensation other than LMP is unjust and unreasonable.").

23 *See id.* ("payment of LMP to these resources will result in just and reasonable rates for ratepayers.").

24 16 U.S.C. § 824e (2006).

25 *AGA,*, 593 F.3d at, 21

26 *See, e.g.,* NOPR, FERC Stats. & Regs. ¶ 32,656 at P 13 ("current compensation levels appear to have become unjust and unreasonable.") Again, the Commission did not repeat its claims from the NOPR that DR compensation is inadequate or that it has become unjust and unreasonable, but if it had not concluded that DR compensation is inadequate, it would have had no reason to adopt the Final Rule requiring ISOs/RTOs to

Federal Trade Commission ("FTC") as well as ISOs/RTOs, commented that current levels of DR compensation are in fact adequate, and that the Final Rule would *overcompensate*[27] DR resources by unjustifiably and unlawfully subsidizing DR at the expense of other market participants and competing suppliers.[28] Furthermore, as P3 addressed previously in its reply comments,[29] participation in existing PJM DR programs has grown dramatically without the discriminatory price signal mandated by the Final Rule – particularly in PJM's capacity markets. In fact, results of the last Reliability Pricing Model ("RPM") capacity auction demonstrate the ease with which new demand response resources can participate and grow in the market. As noted in PJM's Auction

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increase DR compensation. As such, the Commission acted arbitrarily and capriciously by failing to articulate the critical facts and assumptions on which it relied. *See, e.g., Columbia Gas*, 628 F.2d at 593.

[27] *See, e.g., .,* Comment of the Federal Trade Commission at 6, Docket No. RM10-17-000 (filed May 13, 2010) ("FTC Comments") (agreeing that commenters' "concern about overcompensation is well founded."); Comment of the Federal Trade Commission at 4, Docket No. RM10-17-000 (filed Oct. 13, 2010) (noting that even commenters supporting the proposal in the NOPR "implicitly recognize that the payment of full LMP constitutes overcompensation for demand response providers who pay flat retail rates."); Moeller Dissent at 4 (noting that under the Final Rule a DR Resource would receive "total compensation of LMP+G"); Comment on Notice of Proposed Rulemaking of PJM Interconnection, L.L.C. at 2, Docket No. RM10-17-000 (filed May 13, 2010) ("PJM Comments") . Several other commenters characterized payment of full LMP as the equivalent of providing DR customers with a free call "option to sell power they never purchased at a full LMP market price." PJM Comments at 6. *See also* Comments of the Midwest Independent Transmission System Operator, Inc. at 6-7, Docket No. RM10-17-000 (filed May 13, 2010) ("Midwest ISO Comments"); Comments of the Edison Electric Institute at 4, Docket No. RM10-17-000 (filed May 13, 2010) ("EEI Comments").

[28] *See, e.g.,* Comments of the New York Independent System Operator, Inc. at 7, Docket No. RM10-17-000 (filed May 13, 2010) ("NYISO Comments") (payment of full LMP overcompensates DR "at the expense of non-participating customers and other competing technologies not eligible for the subsidy"). At least one DR provider publicly admitted that payment of full LMP can be a subsidy, albeit one that it considers appropriate. *See, e.g., Comments of* CPower, Inc. Comments at 2-3, Docket No. RM10-17-000 (filed May 13, 2010)

[29] *See* Reply Comments of the PJM Power Provders Group at 4, Docket No. RM10-17-000 (filed June 14, 2010) ("P3 Reply Comments").

Report summarizing the auction results, there was an increase in both demand response megawatts offered and cleared between the 2012/2013 Base Residual Auction (“”BRA”) and the 2013/2014 BRA.[30]

The Final Rule is contrary to law because it requires an unduly and unlawful preferential treatment of DR resources and a discriminatory treatment of generators. As many comments have stressed, DR resources and generation are not “equivalent” in terms of their physical characteristics, economics, performance requirements and penalties, and, most importantly, in the value of the services that they provide. In particular, DR is indisputably inferior to generation for operational and reliability purposes. The Final Rule, however, requires DR providers to be paid more for their lower quality, non-jurisdictional service than generators receive for jurisdictional sales. This irrational preference is unlawful, arbitrary and capricious and demands rehearing.

Moreover, the Final Rule is arbitrary and capricious[31] in that it fails to respond to the arguments that demand response and generation should receive the same compensation “only if both are subject to the same market participation rules, penalty structures, testing requirements, and market monitoring provisions.”[32] As P3 noted in its comments, requiring every ISO/RTO to pay demand responders full LMP is decidedly not providing comparable payment for

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30 *See* PJM 2013/2014 RPM Base Residual Auction Report available at http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2013-2014-base-residual-auction-report.ashx at p.1 (“PJM Auction Report”)

31 *See, e.g., CAPP,* 254 F.3d at 299.

32 Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 66.

a comparable product.[33] Further, as P3 stated in its reply comments, the Commission has assumed not only that demand response and generation are equivalent products and that one can be substituted for the other at all times, but also that more demand response is always better.[34] However, as the PJM Demand Response Saturation Analysis ("PJM Saturation Analysis") indicates, the products are not perfect substitutes in all conditions and there is a limit to how much demand response the system reliably can handle.[35] The PJM Saturation Analysis indicated that reliability may be jeopardized if too much demand response comes into the market.[36]

C. The Net Benefits Test, which Was Universally Opposed by the RTOs and ISOs , Presents Implementation Challenges that are Emblematic of the Arbitrary and Capricious Final Rule.

The addition of the "net benefits" test exacerbates the unjustness and inefficiencies caused by paying DR LMP, and creates additional (and perhaps insurmountable) implementation problems, as was made abundantly clear at the September 13, 2010, FERC Technical Conference. For these and other reasons, all of the ISOs/RTOs uniformly opposed a net benefits test,[37] along with a clear majority of commenters from various interests.[38]

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33 *See* P3 Comments at 35.

34 *See* P3 Reply Comments at 6.

35 *See id*. The PJM Demand Response Saturation Analysis is available at http://www.pjm.com/~/media/committees-groups/committees/mrc/20100518/20100518-item-05-dr-saturation-anaylsis.ashx and is also available as Exhibit A to P3 Reply Comments.

36 *See* P3 Reply Comments at 5.

37 As Commissioner Moeller noted at the March 17, 2011 meeting, all of the ISOs/RTOs said "please, please, please don't give us a net benefits test, because we don't know how to do it. Yet that's what the rule did." March 17, 2011 Commission

Without providing a reasoned analysis demonstrating why commenters' concerns are unfounded, the Final Rule falls short of satisfying the Commission's legal obligation to engage in reasoned decisionmaking.[39]

Specifically, the Commission explicitly acknowledged that its "net benefits" approach cannot achieve the purpose for which it was adopted (*i.e.*, identifying hours in which it is cost-effective to pay DR the full LMP and in which the cost savings from reduced LMPs will offset the "billing unit effect").[40] According to the Commission:

> . . . the threshold price approach we adopt here may result in instances both when demand response is not paid the LMP but would be cost-effective and when demand response is paid the LMP but is not cost-effective.[41]

Besides the admitted problem described above, the Commission understands that there will inevitably be differences among the tests that ISOs/RTOs ultimately adopt, and that these differences will cause DR to receive differing

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Meeting Tr. at 13:10-12. *See also* Comments of the California Independent System Operator Corporation at 4-5, Docket No. RM10-17-000 (filed Oct. 13, 2010); Comments of ISO New England Inc. at 4-6, Docket No. RM10-17-000 (filed Oct. 13, 2010); Midwest ISO Post-Conference Comments at 9-10; Comments of the New York Independent System Operator, Inc. at 3-4, Docket No. RM10-17-000 (filed Oct. 13, 2010); Comments of Southwest Power Pool, Inc. at 3-4, Docket No. RM10-17-000 (filed Oct. 13, 2010); Statement of Andrew L. Ott at 2-4, Docket No. RM10-17-000 (dated Sept. 13, 2010).

[38] Moeller Dissent at 6. *See also* Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 40 (noting that "[o]pposition to use of a net benefits tests comes from several directions.").

[39] *See, e.g., PPL Wallingford,* 419 F.3d at 1198.

[40] *See MoPSC,*, 337 F.3d at 1075.("[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking.").

[41] Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 80.

levels of compensation in each ISO/RTO.[42] Yet, the Commission offers no explanation as to why it will permit variations among ISOs/RTOs in DR compensation stemming from the methodology chosen for the net benefits test, but not for other reasons. In the end, the Final Rule's net benefits test is an unworkable experiment that is doomed for failure. The test was not part of the NOPR and its presence in the Final Rule, despite overwhelming evidence of its unworkable nature, demonstrates lack of reasoned decisionmaking

D. The Commission's Conclusion that a Uniform, National Rule for DR Compensation Is Necessary to Ensure that ISO/RTO Rates Are Just and Reasonable Is Arbitrary and Capricious and Unsupported by Substantial Evidence.

In justifying its decision to impose a uniform, national rule for DR compensation, the Commission unlawfully shifted its own burden of proof to commenters to demonstrate that its changes to existing, Commission approved ISO/RTO compensation rules are just and reasonable.[43] It is the Commission, not the commenters, that has the burden to justify tariff changes under Section 206 of the FPA.

Without explanation, the Final Rule diverges from the Commission's long-standing policy of not only permitting, but encouraging, regional variations in

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[42] *See id.* at P 78 n.160 ("[t]here will be inherent differences in the supply curves determined by each RTO and ISO under the net benefits test required herein due to decisions the RTOs and ISOs must make based on supply data for their regions, the mathematical methods each RTO and ISO chooses to use for smoothing the supply curves, the certainty of changes in supply due to outages in each region, local generation heat rates, and the choice of relevant fuel price indices.").

[43] *See id.* at P 67 ("the commenters have not shown why such [regional] differences warrant a different compensation level among the ISOs and RTOs.").

ISO/RTO rate and market design.[44] The Commission fails to explain or justify why it has chosen DR compensation as the one element of market design to be singled out for standardization while arguably more critical elements are allowed to vary by region. The Final Rule fails to explain why this single element of market design is appropriate for standardization while other elements are not. Moreover, existing DR compensation structures are in essence nullified by this Final Rule without any determination that they are unjust or unreasonable. As such, the Commission's action is arbitrary and capricious.[45]

The Final Rule also failed to establish why the long-standing practice of permitting regional differences in compensation constitutes a barrier to entry or explain how variations among the various ISO/RTO DR compensation rules render them unjust and unreasonable, restrict competition, or facilitate the exercise of market power.[46] As noted above, ISOs/RTOs and their market monitors were uniformly opposed to the adoption of a uniform, national rule. For example, as P3 discussed in its reply comments, PJM conducted a study, at the request of the Maryland Public Service Commission, to assess compensation for demand response resources at full LMP as compared to compensation at LMP-

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[44] Further, the Commission has not explained why it is important to require standardization solely for ISO/RTO markets, but not for other markets, and this aspect of the Final Rule is likely unduly discriminatory.

[45] *See, e.g., Wisconsin Valley,* ,236 F.3d at 748 (stating that "an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.").

[46] There are numerous differences in the ISO/RTO rules governing compensation for generators. The Final Rule failed to note this fact, or to offer an explanation as to why it will permit such regional differences for generators, but must eliminate them for DR.

G.[47] PJM concluded that compensation of LMP-G was revenue neutral to Load Serving Entities, ("LSEs") but that, assuming typical retail rate structures, paying LMP without a reduction for the retail rate would lead to total compensation for demand response that would exceed the market value of the energy reduction and would require load to bear additional costs.[48] Additionally, PJM's Independent Market Monitor ("PJM IMM"), in his initial comments, opposed the NOPR's proposal to pay full LMP.[49] The PJM IMM concluded that explicit agreement and coordination among the Commission, state public utility commissions, and RTOs is needed to achieve a fully functional demand-side market.

E. The Commission's Rejection of The LMP – G Alternative Is Arbitrary and Capricious and Not Supported by Substantial Evidence.

Commenters from across the spectrum,[50] including *all* of the ISOs/RTOs with economic DR programs,[51] supported the payment of LMP with an offset for

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[47] *See* P3 Reply Comments at 6. *See* PJM Interconnection, L.L.C., *Analysis of Load Payments and Expenditures under Different Demand Response Compensation Schemes*, May 12, 2010, available at http://www.pjm.com/markets-and-operations/demandresponse/~/media/markets-ops/dsr/analysis-of-load-payments-and-expenditures.ashx ("PJM Report for MD PSC") and also available at P3 Reply Comments Exhibit B.

[48] *See* P3 Reply Comments at 6-7; See PJM Report for MD PSC Report at 6.

[49] See P3 Reply Comments at 14; See *Demand Response Compensation in Organized Wholesale Energy Markets*, Comments of the Independent Market Monitor for PJM, Docket No. RM10-17-000 (filed May 13, 2010).

[50] *See* Reply Comments of the Electric Power Supply Association at 36-40 & n.70 , Docket No. RM10-17-000 (filed June 30, 2010) ("EPSA Reply Comments") (list of commenters that supported including an offset for avoided retail costs).

[51] Comments of the California Independent System Operator Corporation at 3, Docket No. RM10-17-000 (filed May 13, 2010) ("CAISO Comments"); Comments of ISO New England Inc. at 40-44, Docket No. RM10-17-000 (filed May 13, 2010) ("ISO-NE

avoided retail costs or "LMP-G." These commenters support payment of LMP-G because it is an appropriate, non-discriminatory level of compensation that would not require an unlawful and impractical net benefits test. This alternative was also supported by state regulators, independent market monitors and numerous other parties, including P3.[52]

The Commission's rejection of the LMP-G alternative proposed by commenters,[53] was arbitrary and capricious because it failed to give meaningful consideration to the LMP-G alternative[54] and because its rationale for rejecting this alternative is flawed. The reasons cited in the Final Rule are without merit. The Final Rule selectively requires "comparable" treatment of DR and generation where the uniform standard is favorable to DR (*i.e.*, requiring payment of full

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Comments"); Midwest ISO Comments at 3; NYISO Comments at 3; PJM Comments at 6.

[52] *See, e.g,* P3 Comments at 3; EPSA Comments at 36-40; Comments of the New England Power Generators Association, Inc. at 4-5, Docket No. RM10-17-000 (filed May 13, 2010) ("NEPGA Comments"); Comments of Independent Power Producers of New York, Inc. at 3, Docket No. RM10-17-000 (filed May 13, 2010) ("IPPNY Comments"); Comments of the Public Utilities Commission of Ohio at 3, Docket No. RM10-17-000 (filed May 13, 2010) ("PUC Ohio Comments").

[53] Commissioner Moeller also supported this stated that, while he opposed standardization of DR compensation, if he:

> were to now support any standardization of demand response compensation, it would be the LMP-G approach, which in my opinion, is the only economically efficient outcome for the markets.

Moeller Dissent at 11.

[54] *See, e.g., AGA,* 593 F.3d at 14 ("[w]here a dissenting Commissioner raises a reasonable alternative, the majority is required to consider it."); *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989) ("[w]here a party raises facially reasonable alternatives to [the Commission's] decision … the agency must ***either*** consider those alternatives ***or*** give some reason within its broad discretion … for declining to do so.") (emphasis in original).

LMP, which gives DR effectively compensates DR at LMP+G),[55] but permits disparate treatment when the double standard would work in DR's favor (*e.g.*, by permitting DR resources to participate in ISO/RTO subject to less stringent performance requirements and penalties than those at apply generators).

F. The Commission's Determination Violated the Requirements of the Regulatory Flexibility Act.

The Final Rule violates the requirements of the Regulatory Flexibility Act.[56] This Act requires a description and analysis of any federal rules that will have a significant economic impact on a substantial number of small entities (which are defined by the Small Business Administration as an electric utility that, together with its affiliates, did not generate more than four million MWh during the previous twelve months). Specifically, the Commission's determination that the Final Rule would affect only ISOs/RTOs, but not small entities, was erroneous.[57]

The Commission must act rationally in assessing the costs and burdens of its proposed rule, and in weighing those costs against any anticipated benefits .[58] The Commission's failure to do so violates this standard and requires that this request for rehearing be granted.

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55 *See* Moeller Dissent at 4.

56 5 U.S.C. §§ 601-612 (2006).

57 Final Rule, FERC Stats. & Regs. ¶ 31,322 at P 122.

58 *Thompson,* 741 F.2d at 405;..

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, P3 respectfully requests that the Commission grant rehearing of the Final Rule.

Respectfully submitted,

PJM POWER PROVIDERS GROUP

By: */s/ Glen Thomas*

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On behalf of the
PJM Power Providers Group

Dated: April 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 14th day of April, 2011.

/s/ Glen Thomas
Glen Thomas