

REPORT OF THE DEMAND-SIDE RESOURCES & SMART GRID COMMITTEE

This report summarizes a selection of regulatory developments at the federal level in the areas of smart grid and demand-side resources from January 1 through December 31, 2014.*

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I. SMART GRID DEVELOPMENTS

A. Federal Activity

1. Department of Energy

a. Privacy Voluntary Code of Conduct

In 2014, the Federal Smart Grid Task Force (Task Force), led by the Department of Energy's (DOE) Office of Electricity Delivery, continued its stakeholder initiative to develop a privacy voluntary code of conduct (VCC) for the protection of consumer smart grid data by the utility and third party users.¹ The underlying premise of the VCC is based upon the White House's Bill of Rights Report, which was released in February 2012.² In line with the White

* The following attorneys contributed to this update: Linda R. Evers, Jacquelyn Huges, Adie Kurtanich, and Tishekia Williams. These authors' contributions were based exclusively upon publicly disseminated documents.

1. *Data Privacy and the Smart Grid: A Voluntary Code of Conduct*, SMARTGRID.GOV, <http://www.smartgrid.gov/privacy> (last visited Jan. 19, 2015) [hereinafter *Data Privacy and the Smart Grid*].

2. EXEC. OFFICE OF THE PRESIDENT, THE WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (2012) [hereinafter WHITE HOUSE REPORT], available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>. The White House Report set forth a Consumer Privacy Bill of Rights based on the following principles:

[(1)] Individual Control: Consumers have a right to exercise control over what personal data companies collect from them and how they use it; [(2)] Transparency: Consumers have a right to easily understandable and accessible information about privacy and security practices; [(3)] Respect for Context: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data; [(4)] Security: Consumers have a right to secure and responsible handling of personal data; [(5)] Access and Accuracy: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data

House's Bill of Rights Report, the Task Force requested input from stakeholders.³ The Task Force proposed new draft principles in August and subsequently solicited comments from the public in response to the DOE's Federal Register Notice.⁴ The Task Force then proposed a new set of draft principles that incorporated input from the public.⁵

The November draft of the VCC provides additional clarifications about adoption, notice, and consent.⁶ The November draft of the VCC principles is intended to be adopted in its entirety with narrow exceptions.⁷ As the draft details,

[t]he intent is for utilities and third parties to consider adopting the VCC in its entirety. However, a utility or third party could adopt the concepts and principles of the VCC with some limited exceptions (such as when laws, regulatory guidance or frameworks, governing documents, policies, and/or consensus-driven state, local, or utility industry practices require a different approach). Such exceptions, however, should be consistent with the overall purposes of the VCC and should be explicitly noted and explained in any depiction of VCC adoption, such as in a privacy policy or other notice. Nothing in this VCC is intended to change, modify, or supersede federal, state, or local laws or regulatory guidance.⁸

The limited exceptions referenced above do not provide for the ability of a utility or third party to generally opt out of certain provisions of the VCC.

The November draft of the VCC clarifies requirements for notice and consent when changes in the use of their information occur.⁹ Customers should receive notice "at the start of service, on some reoccurring basis (e.g., annually) thereafter, and at the customer's request. Notice also should be given when there is a substantial change in procedure or ownership that may impact customer data."¹⁰ The VCC establishes a clear consent requirement for the use of customer data by contracted agents that desire to use customer data for their own purposes by requiring them to be treated as though they are third parties that must obtain additional consent.¹¹ Additionally, the VCC addresses certain standards as to the

is inaccurate]; (6) Focused Collection: Consumers have a right to reasonable limits on the personal data that companies collect and retain; and (7) Accountability: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

Id. at 1.

3. *Id.* at 25.

4. Data Privacy and the Smart Grid: A Voluntary Code of Conduct, 79 Fed. Reg. 54,695 (Sept. 12, 2014), available at <http://energy.gov/sites/prod/files/2014/09/f18/FRN-091214-VCC.pdf>.

5. *Data Privacy and the Smart Grid: A Voluntary Code of Conduct (VCC)*, SMARTGRID.GOV (Aug. 12, 2014), available at https://www.smartgrid.gov/sites/default/files/VCC_principles_2014_08_12_final_draft_v2.pdf.

6. *Data Privacy and the Smart Grid: A Voluntary Code of Conduct (VCC)*, SMARTGRID.GOV (Nov. 24 2014), available at https://www.smartgrid.gov/sites/default/files/VCC_public_comment_edits_integration_group_2014_12_04_reddline.pdf.

7. *Id.* at 1.

8. *Id.*

9. *Id.* at 5.

10. *Id.*

11. *Id.* at 3.

minimum amount of information that must be included in an acceptable notice to the customer.¹² At a minimum, notice must include:

- i. An effective date for the initial notice and any subsequent policy changes[;]
- ii. A point of contact for customer questions about the Service Provider's privacy-related policies and data access procedures[; and]
- iii. A summary of changes to the previous version, as applicable, or a means by which previous versions can be obtained.¹³

The Task Force convened a webinar in December 2014 to address the public comments, focus group results, and the resultant final draft VCC, which was anticipated to be finalized by January 2015.¹⁴ The webinar also addressed revisions to the VCC taking place on a two-year schedule or earlier if certain criteria requiring an immediate change are met (e.g., changes in technology or regulations).¹⁵ The November 2014 draft, discussed at the December 2014 webinar, was adopted as the final version of the VCC. On January 12, 2015, President Obama announced that the VCC principles were finalized.¹⁶

II. DEMAND-SIDE RESOURCE DEVELOPMENTS

A. Federal Activities

1. Electric Power Supply Association v. FERC

On May 23, 2014, in the case of *Electric Power Supply Association v. FERC* (*EPSA*), the United States Court of Appeals for the D.C. Circuit, in a split ruling, vacated and remanded the Federal Energy Regulatory Commission's (FERC or the Commission) Order No. 745.¹⁷ Per the directive of Order No. 745, consumers that provided demand response were to be paid according to the locational marginal price (LMP).¹⁸ The FERC ruled that such payment would help to ensure the competitiveness of organized wholesale energy markets, and remove barriers to the participation of demand response resources, thereby helping to create just and reasonable wholesale rates.¹⁹ On appeal, the D.C. Circuit agreed with petitioners, the Electric Power Supply Association (EPSA), holding that the FERC's new rule encroaches on states' exclusive jurisdiction to regulate the retail market and vacating Order No. 745 in its entirety.²⁰

The D.C. Circuit denied petitions for rehearing en banc on October 20, 2014, but granted the FERC's motion to stay the issuance of the mandate until December

12. *Id.* at 6.

13. *Id.*

14. *Data Privacy and the Smart Grid*, *supra* note 2.

15. *Voluntary Code of Conduct: Multistakeholder Initiative*, SMARTGRID.GOV (Dec. 11, 2014), available at https://www.smartgrid.gov/sites/default/files/doc/files/VCC-Webinar-2014_12_11-Wood%20Implementation_Adoption.pdf.

16. U.S. DEP'T OF ENERGY, A VOLUNTARY CODE OF CONDUCT (VCC): FINAL CONCEPTS AND PRINCIPLES (2015), available at https://www.smartgrid.gov/sites/default/files/VCC_Concepts_and_Principles_2015_01_08_FINAL_1.pdf.

17. *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 218 (D.C. Cir. 2014).

18. *Id.* at 219.

19. *Id.* at 223.

20. *Id.* at 218.

16, 2014, or, in the event that a petition for writ of certiorari is filed, until the United States Supreme Court's final disposition.²¹ On December 5, 2014, the U.S. Department of Justice announced that the Solicitor General authorized the filing of a petition for a writ of certiorari seeking review of the decision by the Supreme Court.²² On January 15, 2015, the Solicitor General, on behalf of the FERC and EnerNoc, Inc., et al., filed petitions for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit, stating, among other arguments, that the D.C. Circuit wrongly vacated the FERC's demand response rule through a misinterpretation of the agency's jurisdiction under the Federal Power Act.²³

2. FirstEnergy v. PJM

On May 23, 2014, FirstEnergy Service Company (FirstEnergy) filed an Emergency Complaint and Request for Fast Track Processing against PJM Interconnection, L.L.C. (PJM) under section 206 of the Federal Power Act.²⁴ In its complaint, FirstEnergy requested that the FERC render a decision requiring PJM to remove all portions of the PJM Tariff that allowed or required PJM to clear bids from providers of demand response in PJM's Reliability Pricing Model (RPM) capacity market, with a refund effective date of May 23, 2014.²⁵ The basis for the complaint was the vacation of Order No. 745 by the D.C. Circuit in an order issued that same day.²⁶ FirstEnergy further requested "that the Commission issue an order requiring PJM to delay the release of its auction results pending rehearing of the D.C. Circuit's Order,"²⁷ and that to the extent PJM's May 2014 Base Residual Auction for the 2017/2018 Delivery Year cleared demand response resources, that the auction results "be considered void and legally invalid because the inclusion of demand response in the auction parameters was unlawful and those parameters are void *ab initio*."²⁸ FirstEnergy also reserved the right to amend its complaint at a later time given the limited amount of time it had to prepare the complaint.²⁹

On September 22, 2014, FirstEnergy filed an Amended Complaint in which it sought the same relief requested in the original complaint, but provided additional information and further arguments to support its case.³⁰ Specifically,

21. Motion to Extend Stay of the Mandate Pending Filing and Disposition of Petition for a Writ of Certiorari at 2, *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (No. 11-1486, *et al.*) (Dec. 8, 2014) [hereinafter Motion to Extend Stay]; FED. ENERGY REGULATORY COMM'N, ASSESSMENT OF DEMAND RESPONSE & ADVANCED MEETING STAFF REPORT 18 (2014) [hereinafter STAFF REPORT], available at <https://www.ferc.gov/legal/staff-reports/2014/demand-response.pdf>.

22. STAFF REPORT, *supra* note 21, at 18.

23. Petition for a Writ of Certiorari at 2, 4, *EnerNOC, Inc. v. Elec. Power Supply Ass'n* (Jan. 15, 2015) (No. 14-840 and No. 14-841).

24. Complaint of FirstEnergy Service Company, *FirstEnergy Serv. Co. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL14-55-000 (May 23, 2014) [hereinafter Complaint].

25. *Id.* at 1.

26. *Elec. Power Supply Ass'n*, 753 F.3d at 216.

27. Complaint, *supra* note 24, at 2.

28. *Id.* at 1.

29. *Id.*

30. Amended Complaint of FirstEnergy Service Company, *FirstEnergy Serv. Co. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL14-55-000 (Sept. 22, 2014) (citing *Elec. Power Supply Ass'n*, 753 F.3d at 219, 221-22, 225).

inter alia, in the Amended Complaint, FirstEnergy not only argues that Order No. 745 is invalid, but further argues that Order No. 719 and Order No. 755 are invalid based on the rationale of the court of appeals in the *EPSA* decision—the Commission has no jurisdiction over demand response because it is not a sale for resale under Federal Power Act section 201.³¹ Therefore, FirstEnergy reiterated its request that the Commission direct PJM to recalculate the May 2014 Base Residual Auction with all cleared demand response removed from the auction results.³² FirstEnergy averred that removal of demand response from the auction would provide greater reliability at a just and reasonable price.³³

Various protests, comments, motions and letters, both in support of and against the complaint, were filed on the docket by state public service commissions, PJM Members, environmental advocates, concerned citizens, and a host of other entities.

PJM filed its answer to the Amended Complaint on October 22, 2014, arguing that the Commission should not adopt the remedies proposed by FirstEnergy because the relief sought “is not just and reasonable, and would be extremely damaging to the market certainty that is critical to sustaining investment in electricity infrastructure.”³⁴ In that regard, PJM opined that FirstEnergy’s request that the Commission direct PJM to recalculate the results of the 2014 Base Residual Auction should be denied because there is no way to recreate how demand response capability would have been reflected in its market in the absence of the participation demand resource in that auction.³⁵ Further, PJM maintained that “demand response that cleared RPM auctions under rules that were approved in final, unchallenged orders before *EPSA* remain obligated to perform for the RPM Delivery Years for which they have already been committed, and remain eligible to receive compensation for those commitments,”³⁶ and that the *EPSA* decision does not require that cleared demand response commitments be abrogated.³⁷ Therefore, PJM suggested that the Commission should apply its remedial discretion, as it has consistently done in similar situations, and refrain from re-running settled markets after-the-fact and altering settled market outcomes.³⁸

PJM asked the Commission to deny FirstEnergy’s Amended Complaint, and instead, consider a two-faceted alternative that PJM anticipated filing that “would (1) respect markets outcomes and commitments that are already established, while (2) additionally proposing rules for upcoming auctions to permit demand response participation in PJM’s capacity market in a manner firmly grounded in the Commission’s jurisdiction.”³⁹ PJM indicated that its approach should minimize or eliminate litigation risk for future market transactions until there is more clarity

31. *Id.* at 8.

32. *Id.* at 23-24.

33. *Id.* at 27-28.

34. Answer of PJM Interconnection, L.L.C. to Complaint at 3, *FirstEnergy Serv. Co. v. PJM Interconnection, L.L.C.*, FERC Docket No. EL14-55-000 (Oct. 22, 2014) [hereinafter PJM Answer].

35. *Id.* at 3-4.

36. *Id.* at 4 (emphasis added).

37. *Id.* at 3.

38. *Id.* at 3-4.

39. PJM Answer, *supra* note 34, at 5.

from the courts and the Commission concerning the *EPSA* litigation.⁴⁰ PJM proposed to file this “stop-gap” proposal with the Commission under section 205 of the Federal Power Act to address the uncertainty regarding demand response participation in its capacity market; the proposal would only remain in effect for the period of time until the Commission and industry stakeholders had an opportunity to consider and develop generic and more considered options for the participation of demand response in organized wholesale electricity markets once the jurisdictional questions are finally resolved.⁴¹ PJM indicated that this approach is necessary “to avoid the chaos that would likely ensue if requests for Supreme Court review of *EPSA* were denied in the spring of 2015, on the eve of PJM’s May 2015 [Base Residual Auction (BRA)].”⁴² PJM intends to submit its stop-gap filing with the Commission in mid-January 2015.⁴³

40. *Id.*

41. *Id.*

42. *Id.*

43. Revisions to the Reliability Pricing Market (RPM) and Related Rules in the PJM Open Access Transmission Tariff (Tariff) and Reliability Assurance Agreement Among Load Serving Entities (RAA), PJM Interconnection, L.L.C., FERC Docket No. ER15-852-000 (Jan. 14, 2015).

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