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February 22, 2011

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: EnerNOC, Inc.
Docket No. EL11-_______-000

Dear Ms. Bose:

Pursuant to Rule 207 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. Sec. 385.207 (2009), enclosed for filing is a Petition for Declaratory Order ("Petition") submitted electronically on behalf of EnerNOC, Inc. Copies of the Petition have been sent to:

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In connection with this Petition, EnerNOC paid the filing fee electronically in the amount of $23,140.00, which is the current filing fee for a petition for declaratory order.

Sincerely,

Donald J. Sipe

Donald J. Sipe
Counsel for EnerNOC, Inc.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

EnerNOC, Inc.	)))	**Docket No. EL11-____-000**

PETITION FOR DECLARATORY ORDER
AND REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to Rule 207(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"), 18 C.F.R. § 385.207(a)(2) (2010), EnerNOC, Inc., ("EnerNOC") hereby files this Petition for Declaratory Order ("Petition") seeking clarification that EnerNOC may continue to manage its portfolio of PJM Interconnection, LLC ("PJM") demand response resources as it has in the past, and continue to receive settlement in accordance with the PJM tariff on file with the Commission. This clarification is requested wholly without prejudice to the right of PJM or any other party to seek amendment to the PJM tariff prospectively pursuant to either Section 205 or 206 of the Federal Power Act (FPA).

For the reasons set forth herein, EnerNOC respectfully requests that the Commission: (1) require answers in response to the Petition be filed on or before February 25, 2011; and (2) issue an order on or before March 3, 2011. The request for expedited consideration is driven by the March 4, 2011 closing of the Third Incremental Auction, as well as the April 1, 2011 deadline for participation in PJM's Interruptible Load for Reliability (ILR) program for the upcoming delivery year and the associated commercial requirements necessary to meet this deadline.

I. EXECUTIVE SUMMARY

EnerNOC, acting as an Aggregator of Retail Customers ("ARC"),[1] is an active market participant in PJM's load management programs. Pursuant to PJM's currently effective tariff

[1] ARCs are also referred to in the PJM market as Curtailment Service Providers, or CSPs.

and business rules, EnerNOC aggregates customers to deliver emergency demand response when dispatched. As explicitly provided for under the applicable tariff rules, EnerNOC is compensated for the aggregated capacity and energy it provides, with over-performing resources allowed to net against the underperformance of other resources.

On February 4, 2011, PJM and Monitoring Analytics, LLC, the PJM Market Monitor ("Market Monitor"), issued a joint statement ("Joint Statement")[2] concerning settlements in PJM's load management programs for participants using the Guaranteed Load Drop ("GLD")[3] baseline method of measurement and verification for demand response. The Joint Statement noted that PJM's Markets and Reliability Committee is actively considering issues regarding the measurement and verification of compliance by demand side resources. Further, the Joint Statement noted that "[a]pproval of rule changes to address the issue was deferred until May 2011, to allow stakeholders additional time to consider alternatives." [4]

Nevertheless, the Joint Statement declared that certain existing market practices were no longer appropriate or acceptable. Specifically, PJM and the Market Monitor unilaterally declared that compensation should no longer be determined by actual measured reductions in customers' load. Rather, going forward, compensation should be based only on performance below a customer's peak demand from the prior year. The Joint Statement also stated that current practices (*i.e.*, compensation based on actual load reductions) were an exploitation of market rules that "could result in referrals to the FERC Office of Enforcement."

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[2] *See* Attachment 1.
[3] The Guaranteed Load Drop is one of three baseline methods prescribed in PJM business rules for measuring event compliance. Compliance using the GLD baseline is "determined by comparing actual load dropped during [an] event to the nominated amount of load drop." PJM Manual 18: PJM Capacity Market, Revision 10, June 1, 2010, at p.108. http://www.pjm.com/~/media/documents/manuals/m18.ashx
[4] The decision to defer these issues was the result of unanimous agreement among PJM and Stakeholders that further policy discussions were required before the PJM market rules were amended. PJM not only agreed, but both its Senior Vice President of Markets and Senior Vice President of Operations actively spoke in favor of such deferral at the meeting in which it was adopted. The Market Monitor, also present at the same meeting, did not object to the deferral.

As discussed more fully *infra*, PJM and the Market Monitor have inappropriately escalated a policy disagreement by threats of enforcement action. The policy dispute at issue here is whether demand response resources that respond to system emergencies should be compensated for actual, verifiable load reduction as under the current tariff, or whether a new cost allocation structure should be adopted that would undervalue emergency demand response. Through nearly a year of stakeholder discussions about the policy issue, neither PJM nor the Market Monitor raised even the slightest notion that the "issue" identified in the Joint Statement could be considered market manipulation.

By threatening enforcement action against participants who continue to utilize the GLD baseline as allowed under the currently effective tariff and business rules, PJM and the Market Monitor have directly affected compensation for services in the market. Moreover, by their extra legal actions, PJM and Market Monitor have effectively amended the PJM tariff without FERC authorization as required by the FPA. In doing so, PJM and the Market Monitor have precluded stakeholder review of proposed tariff changes, and circumvented the normal procedural rights afforded to parties to protest proposed tariff changes in a proceeding before the Commission. These acts are unjust and unreasonable and violate the requirement that utilities abide by their filed tariffs until new tariffs are filed and approved by the Commission. Moreover, these actions create uncertainty as to how or even if customers are to be, or can be registered, or their performance measured and settled under the existing tariff without resulting in threatened or actual enforcement actions. Under these circumstances no party may make commercially reasonable use of this tariff for what EnerNOC contends was its intended purpose.

While there are legitimate policy issues regarding the appropriate mechanism for compensating demand resources, these issues should be determined in the context of FERC proceedings where all parties have an opportunity to present arguments to the Commission.

EnerNOC categorically rejects any assumption that its market practices are "inappropriate and unacceptable;" they fully conform to letter and spirit of the existing market rules. If PJM and the Market Monitor have issues with these market rules and the practices resulting therefrom, the proper alternative is to seek amendment of the PJM tariff.

EnerNOC respectfully requests expedited consideration of this Petition to eliminate uncertainty by March 3, 2011 for several urgent reasons set forth below. Without a resolution of the uncertainty that PJM and the Market Monitor have created, ARCs utilizing the GLD baseline method are left with two unreasonable and untenable options. An ARC can either (1) register customers pursuant to the current tariff and risk allegations of market manipulation; or (2) allow the PJM and Market Monitor's threat of enforcement actions -- wholly unsupported by any due process -- to alter its market participation and cause demand resources to be undervalued in the market. Under these circumstances, the Commission is well justified in exercising its authority to resolve this matter on an expedited basis.

II. COMMUNICATIONS

All correspondence and communications to EnerNOC in this docket should be addressed to:

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III. FACTUAL AND PROCEDURAL HISTORY

Under PJM's filed tariff, demand response resources using the GLD baseline receive compensation for their performance of demand response services based on their *actual* reduction in demand. The alleged enforcement issue now raised by PJM and the Market Monitor has never been raised before, despite extensive stakeholder processes and discussion by four stakeholder bodies holding ten meetings over nine months about the very matter at issue here. The Joint Statement was a complete surprise as neither stakeholders nor PJM nor the Market Monitor previously premised its arguments on allegations of market manipulation in stakeholder proceedings. From the first, this has been a difference of opinion about a policy matter that should have been debated and resolved in the context of the PJM stakeholder process and tariff amendment proceeding before the Commission.

The Joint Statement claims that the identified practice “results in overpayment for curtailment and may ultimately jeopardize reliability.” However, the issue the Joint Statement identifies is neither an overpayment nor a reliability issue. It is, perhaps, a cost allocation issue upon which reasonable minds can differ (referred to as “addbacks” in PJM parlance).[5] PJM and the Market Monitor did offer alternative tariff changes for a different cost allocation in the Stakeholder process, but the effect of the Joint Statement is far more radical than anything propounded therein. The Joint Statement effectively eliminates the GLD baseline and demand response aggregation.

As for the claim that the “issue” identified in the Joint Statement “may ultimately jeopardize reliability”, it should be noted that the November deferral recommendation was endorsed by PJM’s Senior Vice President of Operations, who is chiefly responsible for system reliability at PJM. That fact in and of itself seems to confirm that PJM saw no immediate reliability concern.

[5] “Addback” refers to the PJM practice of adding demand response capacity to a load serving entities’ peak load contribution when demand response dispatches coincide with one of the five peak system hours that determines the load serving entities’ annual peak load contribution. Under the current tariff, approved for use in 2009, the amount of addback to the LSE is the amount of the customer’s performance or capacity commitment, whichever is lower.

PJM stakeholders have already agreed to address the policy question in an expeditious fashion. The Joint Statement seeks to preempt legitimate policy debate amongst stakeholders with misplaced and market destabilizing pronouncements. PJM stakeholders now cannot reasonably and fairly address this issue in the atmosphere of threats and uncertainty created by these inadvised actions.

As noted in the Joint Statement, the details concerning settlements under PJM's load management programs and load serving entities' capacity obligations have been discussed at great length through the PJM stakeholder process.[6] The issue first arose in a discussion by the PJM's Load Management Task Force (LMTF)[7] on March 11, 2010 in that PJM stakeholder task force's first meeting.[8] There was a brief discussion about including the PLC[9] in the calculation of performance under the GLD baseline. Notably, the issue was not raised by PJM, nor included in the prepared meeting materials. More importantly, the LMTF's approved charter never included consideration of *eliminating* the GLD option, which, as noted and discussed later herein, is the practical result of the Joint Statement.

The LMTF addressed the issue more fully at its second meeting, on March 26, 2010.[10] Stakeholders considered changes recommended by PJM to address the alleged "issue" PJM believed it had identified in settlements. The minutes from that meeting reflect that members

[6] PJM describes the key role its stakeholder process plays in administering transparent markets: "PJM Interconnection committees and groups are integral to developing and refining PJM's rules, policies and processes. These groups provide a forum for members to share their positions and resolve difficult issues. Market committees are essential to PJM's governance structure for administering an open grid and transparent markets." See PJM, "Committees and Groups", available at http://www.pjm.com/committees-and-groups.aspx.

[7] PJM describes the LMTF as "established to enhance market rules for load management resources … based on recommendations and observations from the first load management test conducted during the summer of 2009 and outlined in the Load Management Performance Report (PDF). The LMTF reports to the Market Implementation Committee (MIC).

[8] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100326/20100326-item-01-draft-minutes-20100311.ashx[8]

[9] "PLC" refers to the LSE's Peak Load Contribution that is based upon a specific customer's load. The LSE's PLC is the sum of its customers' demand during the average of the five peak system hours occurring on separate days in the prior year.

[10] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100408/20100408-item-01a-draft-minutes-20100326.ashx

were in disagreement as to whether the programs were inconsistent or in fact properly incentivized behavior that reduced the market's costs:

> The LMTF also discussed the provision added by PJM based on a member suggestion at the prior LMTF to cap over compliance by end use customer at the PLC. This change will address the issue where a customer that has managed their PLC down in the prior summer does not receive double credit for their activity. For example, if a 10 MW end use customer does a great job at managing their PLC down to 0.1MW and then the CSP nominates the end use customer for 0.1MW of capacity they should not be allowed to receive credit for a 9.9 MW reduction within their portfolio since the end use customer already received this credit in the form of a low PLC. This is consistent with the way the GLD nominated capacity is determined and with the way FSL nomination and compliance works. Some members disagreed with this approach and felt the example outlined above was a perfectly reasonable outcome and that the entire current construct regarding PLC should be examined.

The LMTF discussed the issue again at its third meeting on April 8, 2010.[11] Members of the task force continued to disagree as to whether there was any inconsistency or problem with the filed tariff language and programs:

> LMTF continued discussion. Some CSPs indicated they do not agree with using the PLC to cap over performance to address the issue outlined by PJM. PJM clarified that the PLC cap will only be used as a cap for measuring compliance but that emergency energy revenue will continue to be paid based on the full quantity of the load drop. PJM also agreed to provide numerical examples at the next meeting.

The issue received further discussion at its fourth meeting. On April 22, 2010, the LMTF discussed proposed manual changes to the GLD baseline, including placing a limit on any given customer's payment for performance in excess of the nominated amount. PJM proposed to change Manual 19, page 23, by *inter alia* adding the following sentence:

> Over compliance for each customer will be limited to the addback that will be used in the determination of the subsequent delivery

[11] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100422/20100422-lmtf-draft-minutes-20100408.ashx

> year's retail PLC and the determination of the unrestricted peak load as defined in the PJM Manuals.[12]

This proposal still faced opposition from many stakeholders.

> LMTF continued discussion. PJM reviewed Manual changes based on the proposal previously discussed and highlighted change to proposal whereby capacity compliance would be limited to the "add back" to ensure proper recognition from the consumption during the summer that established the end use customer peak load contribution (PLC) through to add back which impact the subsequent year's PLC. This proposal eliminates the issue identified and still provides the choice to recognize the value of demand response either through a reduced end use customer PLC or through offering DR directly into the market. PJM also recommended a correction due to an over site [sic] in M-19 whereby test events are also included in the add-back process.
>
> Many CSPs expressed concern over this approach since it will in effect eliminate the ability for one end use customer to over comply during a test or event and offset another customer that under complied. CSPs may develop a separate proposal to address the fundamental issue identified where a customer may over perform, offset under compliance by another customer and receive a lower PLC for the subsequent delivery year. As expressed by PJM, this is not a hypothetical situation.[13]

The issue was discussed at a fifth LMTF meeting held on May 20, 2010.

> The LMTF continued discussion on the existing proposal. Similar issues as discussed in the past were again discussed.[14]

Following votes held at the May 20, 2010 and June 4, 2010 LMTF meetings, two proposals to modify the GLD baseline were reported by the LMTF to be sent to the Market Implementation Committee (MIC) for consideration.[15]

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[12] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100422/20100422-item-02-m19-redline.ashx

[13] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100520/20100520-draft-minutes-lmtf-20100422.ashx

[14] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100604/20100604-item-01a-draft-minutes-lmtf-20100520.ashx

[15] http://www.pjm.com/~/media/committees-groups/task-forces/lmtf/20100617/20100617-item-01b-draft-minutes-20100604.ashx. Under PJM's stakeholder process, the Market Implementation Committee (MIC) initiates and develops proposals to advance and promote competitive wholesale electricity markets in the PJM region for consideration by the Markets and Reliability Committee (MRC).

The MIC took up the issue at its September 14, 2010 meeting. PJM staff member Peter Langbein, who had led the LMTF process, presented various proposed changes to PJM's tariff and business rules as developed by the LMTF. While the MIC agreed with some of the LMTF's recommendations, "[n]o consensus was reached in the LMTF for the following topics: M&V methods for GLD, and replacement capacity criteria. Members were encouraged to provide feedback to Mr. Langbein in order to plan a vote at either the October or November Committee meeting."

The MIC picked the issue up once again at its October 12, 2010 meeting. The minutes demonstrate that the MIC discussed the matter now dubbed by PJM as the "double counting" issue at length:

> Three proposals were made regarding the double counting issue related to measurement and verification for GLD resources. PJM's proposal defined compliance and add back relative to PLC, Hess's proposal defined compliance and add back relative to observed reduction, but limited to the current year PLC, and Enernoc's [sic] proposal defined compliance and add back relative to observed reduction and did not have a limit with respect to the current year PLC.
>
> The Committee discussed the three proposals in length. A motion was filed by Hess, and a second received, to defer vote on the measurement and verification clarifications regarding Guaranteed Load Drop (GLD) methods until after the pilot study was conducted. The Committee voted on the motion to defer with 37 in favor, 55 against, and 26 abstentions. As a result, the motion did not pass.
>
> The Committee voted on each of the separate add back proposals together with the remaining package of changes. The PJM proposal received a majority with 78% in favor, 82 in favor, 22 against, and 24 abstentions; the Hess proposal and Enernoc [sic] proposals did not receive a majority receiving 44% in favor, 50 in favor, 62 against, and 3 abstentions and 6% in favor, 5 in favor, 78 against, and 13 abstentions respectively. The PJM proposal will be brought to the Markets and Reliability Committee for consideration.[16]

[16] http://www.pjm.com/~/media/committees-groups/committees/mic/20101109/20101109-draft-minutes-mic-20101012.ashx

Disagreement continued over whether PJM's tariff should be changed to eliminate or reform the settlement feature complained of by PJM. The stakeholder process continued at the Markets and Reliability Committee[17] level with a presentation by Mr. Langbein at the MRC's October 20, 2010 meeting. During the MRC's consideration of the issue at its November 17, 2010 meeting, Katie Guerry of Hess Corporation proposed to defer the proposed rule changes related to this issue until May 2011 to allow further time for stakeholder discussion.

> Ms. Guerry proposed a friendly amendment as follows: Remove three portions of the proposed revisions (changes to the add-back, comparable day, and GLD election of point of registration) and complete a stakeholder process on these three issues by May 1, 2011 on these issues. If the stakeholder process is not finished by May 1, 2011 PJM will take action to respond to the issues. There were no objections and therefore the proposal was incorporated into the main motion. Following discussion, the Members **endorsed** the proposed changes by acclamation with no objections or abstentions.[18] [Emphasis added]

Thus, a majority of stakeholders, fully cognizant of the contours of the contested settlement feature after dozens of hours of discussion in ten committee and task force meetings, agreed that the PJM tariff should not be changed at this time. The issue was also discussed at the November 17, 2010 meeting of the Members Committee (MC), at which time the MC was told that the MRC had deferred the issue until May 2011. PJM's senior management vocally supported the deferral, including the decision to defer further consideration of tariff changes for reasons including a desire not to create uncertainty and confusion as to the rule that would apply to registrations for participation in the upcoming delivery year.

At no point in this extensive stakeholder process did any party raise the question of whether compliance with the tariff-driven settlement procedures at issue constituted market

[17] PJM describes the Markets and Reliability Committee (MRC) as "ensur[ing] the continuing viability and fairness of the PJM markets as well as the reliable operation and planning of the PJM grid," "assur[ing] the continued ability of member organizations to operate reliably and economically," and "review[ing] proposed changes to the rules and procedures of the PJM Operating Agreement and the PJM Manuals." http://www.pjm.com/committees-and-groups/committees/mrc.aspx

[18] http://www.pjm.com/~/media/committees-groups/committees/mrc/20101215/20101215-item-01-draft-minutes-mrc-20101117.ashx

manipulation. Particularly telling in this regard is the fact that at no point during this process did the Market Monitor suggests, even once, that any ARC who complied with the rules as currently written would be considered to be engaging in any sort of improper behavior.[19]

IV. ARGUMENT

A. PJM AND THE MARKET MONITOR'S JOINT STATEMENT EFFECTIVELY AMENDS PJM'S TARIFF WITHOUT COMMISSION APPROVAL

Code of Federal Regulations, 18 CFR § 35.2 (c)(1) defines a tariff as follows:

> "a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) <u>all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges</u>. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number." (Emphasis added)

A filed tariff carries the force of federal law. *See Bryan v. Bell South Communications,* 377 F.3d 424, 429 (4th Cir. 2004); *citing MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992)(observing that "tariffs are the law, not mere contracts").

The Commission employs the "rule of reason" to determine what practices affecting rates, terms, or conditions of service must be included in a utility's tariff filed under Federal Power Act ("FPA" section 205).[20] Under the Commission's "rule of reason," any <u>provisions that significantly affect the rates, terms, and conditions of service must be included in a tariff</u> and

[19] In fact the singular focus of the Market Monitor during the entire nine month process was to propose a complex and controversial regression analysis regime on all ARCs using the GLD approach. Little thought appears to have been given to the issue that is the subject of this Petition. This is ironic since the net effect of the Joint Statement approach would be to effectively eliminate the GLD approach *altogether*, rendering the disputed merits of a regression approach a moot point.

[20] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1649). See generally *Public Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448, 454, 259 U.S. App. D.C. 86 (D.C. Cir. 1987); *Midwest Indep. Transmission Sys. Operator, Inc.*, 98 FERC P 61,137, at 61,401 (2002).

filed at the Commission.[21] Only practices or provisions that do not significantly affect rates, terms and conditions fall outside the directive to be filed as part of a tariff under the FPA.[22]

The D.C. Circuit has interpreted the statutory directive in FPA section 205 that rate filings with the Commission that set forth "the ... practices ... affecting such rates and charges" must be read as requiring "the recitation of only those practices that affect rates and service significantly, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous."[23]

The Commission applies the rule of reason on a case-by-case basis, evaluating whether the practices in question significantly affect rates, terms, or conditions of service. For example, the Commission has concluded that customer baseline calculation methodologies significantly affect rates, terms, and conditions, and thus cannot be filed only in a compliance filing; rather, such customer baseline calculation methodologies must be filed and reviewed in a Section 205 filing.[24] Likewise, the Commission has concluded that bidding parameters for demand response resources also significantly affect rates, terms, and conditions, and cannot be given effect without being filed in a Section 205 filing.[25]

The Joint Statement impacts the bidding parameters for demand response in PJM, as well as the baseline calculation methodologies that can be settled for under the PJM tariff. It directly impacts compensation (at least for those in the market who do not wish to be embroiled in enforcement proceedings), and in fact seeks to prohibit certain settlements that are explicitly permitted by the currently effective tariff. These are certainly "classifications, practices, rules, or

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[21] *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (requiring utilities to file "only those practices that affect rates and service significantly, that are reasonably susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous"); *Cal. Indep. Sys. Operator Corp.*, 122 FERC ¶ 61,271 (2008) (assessing whether certain business practice manual provisions significantly affect rates, terms and conditions, and, therefore, must be included in a tariff).
[22] *Id.*
[23] *City of Cleveland v. FERC*, supra at 1376.
[24] *Cal. Indep. Sys. Operator Corp*., 132 F.E.R.C. P61,045.
[25] *Southwest Power Pool, Inc*., 129 F.E.R.C. P61,163.

regulations which . . . affect or relate to the aforementioned service, rates, and charges." As such, the Joint Statement represents an unlawful amendment to PJM's existing tariff which has neither been filed with the Commission, approved by the Commission, or presented to or reviewed in the appropriate stakeholder process. Participants who had previously participated in the market and reported their loads in a fashion allowed by the tariff, now find themselves in a position of needing to change their behaviors and reject the tariff-permitted settlements, or run the risk of substantial civil fines and penalties or, at the very least, the expense and unwanted publicity of vindicating their actions before the Office of Enforcement. These changes in compensation for participants in the market, and the significant changes made to the measurement of customer response to exclude certain customer responses explicitly permitted by the tariff, are clearly a significant change in rates, terms and conditions that affect compensation, thus triggering the requirement of a Section 205 tariff filing – and the need for the Commission's review and approval.

The failure to pursue the proper procedural route is significant because in a 205 filing to change a tariff, the utility has the burden of demonstrating the change it proposes is just and reasonable, a burden PJM cannot meet in this instance. By avoiding the FERC filing process, PJM is imposing upon EnerNOC or others the burden of proving that PJM's ad hoc, non-filed and non-Commission approved rate change, made after the stakeholder process resulted in the decision not to make a Section 205 tariff filing at this time, is unjust and unreasonable. This burden may be appropriate when the Commission has actually reviewed and approved such a rate change, but it is not appropriate when the utility has simply acted on its own motion to achieve a result that was rejected by the stakeholder process, as here. PJM's and the Market Monitor's actions are unlawful, harmful to the market and have already resulted in unwarranted significant harm to EnerNOC. They represent nothing less than an attempt to circumvent the PJM stakeholder process and the requirements of the FPA.

B. IN THE FIRST INSTANCE, THE PJM STAKEHOLDER PROCESS IS THE PROPER FORUM TO RESOLVE THE POLICY ISSUES REGARDING MEASUREMENT AND VERIFICATION OF GLD RESOURCES

1. PJM's Actions Improperly Undercut the Ongoing Stakeholder Process

As explained in Section III above, the settlement feature for GLD resources received extensive discussion and analysis through PJM's stakeholder process. Participants in the stakeholder process had a clear understanding of how measurement and verification of GLD resources operates in practice. After extensive stakeholder discussions, stakeholders disagreed over whether the PJM tariff should be changed to eliminate or reform this settlement feature. Numerous PJM bodies, including the Load Management Task Force, Market Implementation Committee, and PJM's two senior committees, the Markets and Reliability Committee and the Members Committee, all devoted significant meeting time to discuss this settlement feature. Indeed, these four stakeholder bodies held ten meetings over nine months to discuss the interplay between load serving entities' PLC and end-use customer compensation under the GLD baseline and whether the resulting settlement feature was proper. The end result of this extensive stakeholder process was that PJM stakeholders unanimously agreed that the tariff should <u>not</u> be changed at this time, in order to allow "additional time for stakeholders' consideration."[26]

Consistent with this deference to the stakeholder process is the decision of PJM and the Market Monitor not to file, as either could have, a complaint under Section 206 of the Federal Power Act to allege that the tariff provisions regarding the settlement of GLD resources are unjust or unreasonable and that the Commission should revise them prospectively. PJM fully understood the activities permitted by the tariff when it actively supported deferral and chose not

[26] Joint Statement at page 3.

to file under Section 206. The Market Monitor likewise offered no objection to the proposed deferral and also chose not to exercise its Section 206 filing rights. There was no ambiguity in the stakeholder process as to what the tariff allowed. Notably, there was never even a suggestion that accepting settlements as permitted by the tariff would allow "market manipulation." Various participants simply had differing opinions as to whether the tariff should eventually be changed to settle the market differently, or whether the settlement feature in question properly reflected good market design.

This is not a case where the tariff is or was ambiguous; it is the sort of policy dispute that routinely arises when market rules and tariff changes are considered. The debate surrounding what type and level of reduction should be compensated under the tariff involves questions of policy, not enforcement. PJM endorsed the recommendation not to seek a tariff change at this point, because the policy issues involved required further discussion among the stakeholders. EnerNOC finds it both remarkable and implausible that stakeholders, the Market Monitor or PJM should think it appropriate to defer for further discussion activities permitted by the tariff that any one of these parties considered to be market manipulation. Following the November deferral and through the date of issuance of the Joint Statement, neither PJM nor the Market Monitor sought any formal stakeholder dialogue on this matter. The Joint Statement inappropriately stigmatizes what had previously been recognized as a legitimate policy debate about which activities should be compensated under the tariff.

The Commission has encouraged and required PJM and other RTOs to engage the stakeholder process on policy issues and proposed tariff changes. The importance the Commission places on transparency and responsiveness in the stakeholder process has recently been re-emphasized by the Commission in Order 719.[27] In this case, PJM supported a decision to defer further consideration of tariff changes until May of this year.[28] This decision was justified in part by a desire not to create uncertainty and confusion as to the rule that would apply to registrations in the upcoming delivery year. As such, the Joint Statement has created the very confusion the deferral was intended to avoid, thus frustrating the orderly resolution of an ongoing stakeholder process.

Market participants must be able to rely on the filed tariff to guide their actions. Existing policy debates on whether and how to change existing tariff provisions cannot be arbitrarily resolved by unilateral statements and unsubstantiated allegations.. The Joint Statement results in a *de facto* change to the tariff and preempts future dissenting voices of stakeholders now to be branded as alleged market manipulators. This is a far cry from the Commission's vision of a transparent and responsive governance process for RTOs and ISOs as outlined in Order 719.

2. PJM and the Market Monitors' Actions Have Improperly Sought to Determine by Fiat a Policy Debate About Different Demand Response Paradigms That Must Ultimately Be Addressed By The Commission

The Joint Statement conflates two unrelated issues: the mechanism by which capacity costs are allocated to load serving entities by PJM, and customers' real and verifiable ability to perform in a demand response event in real time. Demand response participating in both the emergency and economic load response programs may utilize the GLD baseline that measures actual load reduction from customer usage close in time to a demand response event. Load serving entities are allocated capacity costs based upon the five PJM coincident peak hours in the previous year. Many customers seek to manage demand charges that may be passed on from

[27] *Wholesale Competition in Regions With Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008).
[28] PJM Markets and Reliability Committee, November 17, 2010, http://www.pjm.com/committees-and-groups/committees/mrc.aspx#13.

their LSE by voluntarily reducing usage during system peaks; doing so may reduce their demand charges in the following year.

Real time demand response actions and peak load management are both universally good things that should be encouraged, and until now have been entirely harmonious in the PJM market design. The Joint Statement, however, now characterizes as manipulative customer efforts to do both.

The PJM and Market Monitor position is that if a customer's real time demand drops from 25 MW to 5 MW, but the PLC attributable to the customer from the previous year is only 10 MW, then none of the load drop from 25 MW down to 10 MW will be allowed to count for performance during an emergency. The Joint Statement says that claiming performance credit for this performance is inappropriate, even though the practice complies exactly with what the rules provide. In fact, there is no mechanism under the current rules related to the GLD baseline to avoid claiming credit for this performance. Limiting performance credit is another way of saying that the customer must purchase capacity before it can resell it as demand response, regardless of whether the customer actually demonstrates clear performance in an event.

The debate highlights two opposing paradigms of demand response; the demand side and the supply side approaches. PJM and the Market Monitor have made clear their position that demand response should be viewed as a demand side resource. In the wholesale markets, this means merely the non-use of pre-purchased energy and capacity. EnerNOC and others believe a fully functioning competitive market yielding safe and reliable service at just and reasonable rates will only be realized when the service that demand response provides is fully integrated as a supply side resource that gets paid fair value for the resource. These are differing views of both demand response and how wholesale markets should function. Whatever one's position on these approaches, they should be resolved by the Commission after careful deliberation, not by unilateral declaration by PJM or the Market Monitor.

Just as importantly, the immediate effect of PJM's action is to fundamentally undermine aggregation, which depends upon overperformance of some customers to offset underperformance by others. End use consumption is subject to a variety of influences from weather, business cycles, labor rules, availability of raw materials and other factors which are difficult to predict and are not subject to the control of the ARC or even always of individual customers. The ability to aggregate customers into a diverse portfolio allows these varying response capabilities to be managed in order to deliver emergency or other required services to the grid with a high degree of reliability. The "portfolio as a resource" allows the capabilities of customers that could not be effectively scheduled or managed on a stand-alone basis to be harnessed for the good of the market, customers, and society at large. Even if we assume, *arguendo,* that the demand side treatment of demand response is the right policy, it does not follow that *bona fide* demand response capability above a customer's PLC should be discarded as during system emergencies. Before simply "throwing away" such potential, the Commission should have the opportunity to address this policy question.

Finally, PJM's action effectively eliminates a far more accurate dynamic baseline measurement and verification methodology, one that measures actual reductions in load in response to a dispatch notice. This is so because if the customers' actual performance would not be allowed to count, the GLD baseline will become entirely subordinate to PJM's static baseline method known as the Firm Service Level (FSL) baseline. If demand response performance above a customer's PLC is not allowed to count, the GLD baseline measure will yield creditable performance that would not be higher than what could be measured using the FSL baseline, but could be substantially lower. Therefore, no rational ARC would ever select the GLD baseline as a result.

While the FSL baseline may be appropriate for some customers, it is unworkable for many others. Customers such as hospitals and many others do not have the means to reliably predict or the means to control the level of demand they can reduce *to* for events that can occur any time of the day or year. The GLD method works better for these customers because they can predict more accurately the amount of load they can reduce from a curtailment strategy. Many of these customers will find participation through an FSL baseline unattractive because these customers will have to be nominated very conservatively in order to avoid penalty exposure should an event get called when their actual demand levels are high. So, despite having substantial and defined demand response capability, the customer's compensation will be locked in at a lower level. This customer's performance could otherwise be aggregated with other customers who may have different load shapes and more value could be extracted. But if customers' overperformance cannot be counted in a portfolio, there is no value in aggregation and the fundamental value proposition offered by ARCs is lost. Eliminating the GLD, or effectively doing so as has been done by the Joint Statement, will mean that customers with the greater capability and interest in participation will remain dormant.

In Order 719, the Commission created a new term to describe entities such as EnerNOC: Aggregators of Retail Customers, or ARCs. It is somewhat ironic that the Joint Statement would essentially eliminate the ability of ARCs to actually "Aggregate." If the ARC cannot count most or all over-performance toward portfolio compliance, it cannot effectively aggregate; customers' ability to over-perform essentially becomes valueless. ARCs will have no mechanism to induce the maximum performance capability of a customer's demand response resource – during emergencies no less. To be clear, <u>EnerNOC is not asking the Commission to rule on the merits</u>

of this policy debate in response to this Petition. EnerNOC presents these arguments solely to illustrate why any such reform should be carefully considered by the stakeholders and the Commission before enacted. These market design and policy questions cannot be decided simply on the basis of a statement by PJM and the Market Monitor that attempts to paint current lawful conduct as manipulative.

C. CLAIMS THAT CURRENT SETTLEMENT FEATURES FOR GLD RESOURCES RESULT IN MARKET MANIPULATION HAVE NO MERIT AND CREATE UNACCEPTABLE UNCERTAINTY IN THE MARKET

Because the Joint Statement refers to settlement features for GLD resources that are expressly contemplated by the PJM tariff, it is obvious that conduct implementing those provisions does not constitute market manipulation.[29] The "over-performance" of assets under PJM's tariff has nothing to do with inaccurate measurement or fraudulent misrepresentation of actual load drop. The demand response performance activity at issue here is actual, verified, real time load reductions by demand response resources that just happen to exceed the level of demand that an individual site may have consumed in the prior year. The value of such real time performance to the system may be, perhaps, subject to honest disagreement as a matter of policy, but this is not and never has been an issue of market manipulation.

An analysis of the Joint Statement reveals that the claims of market manipulation lack any basis. Further, it highlights the market uncertainty created by PJM and the Market Monitor's

[29] The Commission explained that instances of market manipulation involve entities that: (1) use a fraudulent device, scheme or artifice, or make a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of electric energy or transmission of electric energy subject to the jurisdiction of the Commission. See Prohibition of Energy Market Manipulation, Order No. 670, 71 Fed. Reg. 4,244 (Jan. 26, 2006), 114 FERC ¶61047 at P 49 (2006) (Order No. 670). The Commission also determined that "actions or transactions 'explicitly contemplated in Commission-approved rules and regulations' . . . do not constitute fraud" and do not violate the Commission's market manipulation rule. D.C. Energy, 124 FERC ¶ 61,295 at 62,658 (2008) and attached OE Staff Report, Non-Public Investigation into DC Energy's Allegations of Market Manipulation by HQ Energy in the New York Independent System Operator Energy and Transmission Congestion Contract Markets at pp. 16, 21-22 (Sep. 29, 2008); see also Order 670 at P 67.

actions; uncertainties the tariff filing and approval process before the Commission is designed to protect customers and the public from. The first paragraph of the Joint Statement effectively declares that anyone who pays for electricity, and so would "save" if they didn't buy it (i.e. everyone), is a potential market manipulator if they participate in demand response under the GLD baseline. Such nefarious characters include the following range of customers:

> A customer's contribution to its LSE's wholesale capacity obligation, and thus, its LSE's capacity charge, is determined by its peak load contribution (PLC), or consumption during the five coincident peak hours in the prior year. A customer may have an incentive to reduce consumption during these peak hours either through a retail rate contract that is directly linked to the wholesale market, as is the case for many large customers, or through an LSE program. In either case, the customer may actively reduce its peak consumption, and thus its contribution to the LSE's PLC and wholesale capacity obligation for the following year, in response to an incentive independent of the PJM Load Response Programs.
>
> Joint Statement, ¶2

As the quote above from Joint Statement makes clear, ARCs who would risk using the GLD baseline are now charged with discriminating among their customers who participate in load response programs based upon whether or not those customers may have an "incentive independent of the PJM Load Response Programs" to reduce consumption. The Joint Statement is entirely vague on what such incentives may be. Does a seasonally differentiated rate constitute an "incentive" not to consume in the summer? Certainly it does. Does a per-kWh inclining block rate provide an incentive not to consume such that a participant under such a rate manipulates the market when they are paid for performance according the GLD baseline under the tariff? Apparently so. Does a flat rate contract which passes through anticipated capacity charges as part of a customer charge or fixed charge, but may be re-negotiated based on experience with specific customer load factors, constitute a "incentive independent of the PJM Load Response Programs" to reduce consumption? Is it worth risking enforcement action to find out? In fact, even a flat "all in" per-kWh charge provides an incentive independent of PJM's programs. After all, such customers save when they don't consume. Clearly, any price for capacity that can vary in any fashion based on usage provides an "incentive independent of the PJM Load Response Program" and so apparently no customer using the GLD baseline is clear of suspicion.

And yet, PJM's tariffs, by PJM's own admission, currently "allow" over-performance to be credited. Despite PJM's self serving claim that this is a "loophole" it is actually integral to how the GLD measurement and verification regime is structured under the tariff. PJM concedes that the "Guaranteed Load Drop option defines compliance as the reduction in real time consumption which is measured by comparing actual consumption to a baseline load estimate, which is based on recent days."[30] This is not an accidental feature of the tariff; it is an accurate measure of real time load response provided to the system in emergencies. Regardless, there is no other standard under the existing tariff to measure GLD compliance. So PJM is either altering its tariff to eliminate the GLD baseline altogether (since, as we have seen there are no customers who would be above suspicion for using it) or is amending it without bothering to file for changes.

The Joint Statement neither explains how an ARC is to discriminate between customers who have "other incentives" and those who do not, nor what alternative measure other than the tariff approved compliance methodology the ARC should use to measure performance of such customers in order to avoid a charge of "market manipulation." PJM and the Market Monitor provide the following example of their objection to the current tariff in their Joint Statement:

1. 5,000 kW PLC (10/11 Delivery Year) – PLC represents how much capacity has been purchased for customer to ensure reliability. Since the customer actively reduces load during the peaks ("peak shaver") the PLC is significantly lower than normal amount of load for the customer, which is 28,000 kW.

[30] Joint Statement, ¶5, page 1.

2. 4,000 kW Nominated Installed Capacity – CSP commitment for quantity of customer load reduction when PJM needs during an emergency. The nominated amount may not exceed the PLC based on current market rules.

3. Real time estimated load reduction = 25,000 kW measured as the difference between a baseline estimate based on recent days, 28,000 kW, less actual consumption during the event, or 3,000 kW.

4. 21,000 kW over compliance – CSP resource will be deemed to have met nominated Installed
Capacity commitment of 4,000 kW AND also receive an additional 21,000 kW of over compliance credit which may be used to offset resources within the zone than did not perform.

Joint Statement, ¶7, Page 2.

As we have seen, the nefarious activity of "peak shaving" could be being carried on by anyone with an "incentive", i.e. anyone who pays for electricity. PJM apparently knows who these people are with PLCs "significantly lower than 'normal' amount of load for the customer" and will, apparently, be happy to share that information with ARCs after PJM or the Market Monitor refers them to enforcement. But even accepting that all customers are potentially guilty, it is unclear what the new compliance regime for Guaranteed Load Drop looks like (if there still is one).

For instance, using PJM's example, if the customer drops 15,000 kW instead of 25,000 kW, does the ARC report and claim only the nominated amount or "0"? If the ARC is not allowed to claim anything until and unless the customer's actual operating level is below the PLC, then "0" is the correct answer. If, however, the ARC is permitted to claim the first kW of reduction <u>from</u> the baseline <u>up to</u> the nominated amount, then the program is clearly still designed to measure reductions from a baseline (which, apparently, would not be "normal"), not reductions to a nominated amount based on last year's peak load contribution. The only possible logic for this later position is that the customer is re-selling capacity purchased for it by an LSE in the prior year. This characterization of demand response has, however, been rejected by the

Commission, so cannot or should not form a basis for not compensating further reductions from the same baseline. Conversely, if the logic is that the reduction to a specific level of consumption is needed, then the customer is being asked to provide up to 20,000 kW of real time response for "free." In any event, in such instances, the GLD baseline has simply been repealed by PJM and the Market Monitor's fiat. If neither of these is the case, then the restriction is simply arbitrary. ARCs are charged under the Joint Statement with determining who has or doesn't have an undefined "incentive." Then the ARC must apply one or the other of at least three possible measurement regimes, neither of which is specified in the tariff or business rules or in the Joint Statement itself.

Using the wrong one of any of these as yet unspecified methods of figuring out what PJM and the Market Monitor may mean in the Joint Statement may subject a market participant to claims of market manipulation. Had PJM and the Market Monitor actually brought a complaint or otherwise allowed these matters to be considered, this unworkable ambiguity would have become obvious.

Threats of potential civil penalties for market manipulation cannot hinge on such ambiguities. While the illustration PJM and the Market Monitor provide shows the phenomenon in dispute, what PJM calls a problem is in fact a policy issue. The policy issue is whether PJM should be paying for operating flexibility of dynamic demand response capability, or whether the load response program is purely a planning tool. More importantly, PJM does not explain how this "issue" is to be solved consistent with the tariff across the range of possible customer responses. For instance, in PJM's example, if the customer is operating at 28,000 kW, the question of whether or not they should be compensated for dropping 25,000 kW off of the system when called is one of policy. PJM's example suggests nothing whatsoever fraudulent about the setting of the baseline at 28,000 kW. If PJM does not want to pay the customer for dropping this load, the system is unlikely to get the operational response. PJM does not explain why the operational flexibility provided by dropping 25,000 kW upon request is not valuable; it merely declares that getting paid for this performance is inappropriate because it exceeds the PLC attributable to this customer in the previous year.

Under PJM's current program construct, it is impossible for any ARC ever to be compensated for more capacity response than the combined PLC of its customers. ARCs are only compensated for actual load drop in real time in conformance with the measurement and verification protocols of the tariff and business rules. There is no "loophole" that ever allows a different result and compromises the PJM market or reliability. The current tariff may or may not be found to be just and reasonable if reviewed by the Commission in an appropriate proceeding, but PJM and the Market Monitor's attempt to criminalize its provisions rather than seek to change them in an appropriate fashion leaves all participants in the market unsure of their rights and obligations.

IV. REQUEST FOR EXPEDITED CONSIDERATION

The issues raised in this Petition justify expedited consideration in the same manner as provided for Fast Track processing under Rule 206(b)(11) and (h)[31] because of the exigencies described herein. Expedition is necessary for several reasons.

First, it is critical that ARCs have resolution on the aforementioned issue immediately in order to effectively register demand response end-users for the 2011/12 delivery year. The 2011/12 ILR registration deadline is April 1, 2011. In practice, to ensure their registration is properly received and accepted, this means ARCs and end-use customers should already be submitting their registration information.

[31] 18 C.F.R. §385.206(b)(11), (h).

ARCs must have registrations submitted well in advance of April 1 to ensure that they are approved and accepted into the market. EDCs, LSEs, and PJM have 10 business days to approve any ILR or DR registrations, so all registrations must be submitted by March 17 at the absolute latest. Practically speaking, however, EnerNOC needs at least two weeks to consolidate registration information, determine nomination amounts, and submit registrations into PJM's eLRS system. This means that it must have final registrations ready for submittal on or before March 3.

Further, delaying the ability of ARCs to submit registrations will lead to an overwhelming queue of registration approvals for EDCs and LSEs. It is feasible that, without immediate resolution, EDCs and LSEs may have literally thousands of registrations to approve all at once. With typically one or two people at each organization reviewing registrations, it could be impossible for them to review such a large number of registrations with the diligence to which they and the ARCs are accustomed.

Moreover, because PJM and the Market Monitor now appear to assert a claim that nomination and performance consistent with PJM's tariff somehow constitutes market manipulation, ARCs face great uncertainty with regards to how much capacity to register for and nominate. Unless these issues are resolved quickly, not only will ARCs and end-use customers be exposed to potential yet unproven allegations of market manipulation, but the PJM market as a whole will suffer from under-nomination as a result of the chilling effect wrought by the Joint Statement.

Second, the uncertainty resulting from the Joint Statement also significantly impacts ARCs' participation in the upcoming capacity auctions. The 3rd Incremental Auction (IA) closes on March 4, 2011, and is an RPM market participant's final opportunity (save for bilateral agreements) to true up their obligation positions prior to the delivery year. If there is any uncertainty about how much credit an ARC will receive for its current portfolio, it cannot effectively manage its participation in this auction. ARCs need resolution on the issue to make the correct bid/offer decisions that will allow them to get credit for their demand response capacity while not exposing themselves to deficiency penalties for not meeting their capacity obligation.

There are also tremendous implications for ARCs regarding the 2014/15 Base Residual Auction (BRA). Not having clarification on the issue will impact the amount of financial collateral ARCs must post to participate in the auction. An ARC or any other market participant can use existing enrolled capacity at the time of the BRA as collateral for offering MW into the auction. The pre-auction credit rate for the 2014/15 BRA is $37,474/MW. This means that every MW of capacity that a ARC enrolls before the BRA allows them to offer another MW into the auction without posting an additional $37,474 of collateral in the form of cash, Letter of Credit, etc. If, for example, the uncertainty resulting from the Joint Statement forces an ARC to register its portfolio for 50 MW less than it believes it is worth based on current PJM market rules, this means the ARC must post collateral equal to $1,873,700 simply to ensure that it clears sufficient capacity to enroll its entire portfolio (assuming it receives credit for its full worth) in the market in 2014/15.

Additionally, the Joint Statement calls into question the amount of credit an ARC will receive for the load reduction capability of its portfolio, making it impossible for the ARC to make an informed decision about how much capacity to offer/clear in the BRA. This is akin to a generator having to make an offer into the auction without knowing how PJM will define its nameplate capacity rating three years later, just before the delivery year. The uncertainty forces the market participant to make decisions based on imperfect information and subjects it to an unreasonable level of financial risk.

Finally, the Joint Statement has caused significant end-use customer concern about participation in demand response immediately proceeding the upcoming delivery year. Expedited relief is needed to address this concern and mitigate the chilling effect that the Joint Statement has had on the demand response industry as a whole.

For all of the above reasons, the Commission is well justified in exercising its authority to resolve this matter on an expedited basis.

V. CONCLUSION

For all of the reasons stated above, EnerNOC respectfully requests that the Commission:

a. Issue a Declaratory Order finding that Participants may continue to register customers and settle under PJM's GLD baseline methodology as they have in previous periods without enforcement action being threatened or taken on account thereof, and

b. That this shall be without prejudice to the position of any party in any future proceeding properly filed and noticed seeking to change prospectively such tariffs.

c. That the Commission require comments and answers to be filed on or before February 25, 2011 and issue an order in this matter expeditiously but in any event no later than March 3, 2011 to avoid further confusion and financial or other harm to EnerNOC and other participants.

Dated at Portland, Maine this 22nd day of February, 2011.

Respectfully submitted,

/s/ Donald J. Sipe

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

	)	
EnerNOC, Inc.	)	**Docket No. EL11-____-000**
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served by email and overnight mail the foregoing document upon PJM and Monitoring Analytics, LLC, the PJM Market Monitor.

Dated at Portland, Maine this 22nd day of February, 2011.

/s/ Donald J. Sipe

____
Donald J. Sipe, Esq.
Counsel for EnerNOC, Inc.

This is a joint statement by PJM and its Independent Market Monitor ("IMM") to clarify our position on the identified "double counting" issue related to the measurement and verification of compliance by demand side resources with emergency requests for interruption. The double counting issue was considered by the Markets and Reliability on November 17, 2010. Approval of rule changes to address this issue was deferred until May 2011, to allow stakeholders additional time to consider alternatives. However, both PJM and the IMM believe that Curtailment Service Providers (CSPs) that exploit the current market rules by double counting the compliance of demand side resources, are engaging in market manipulation that results in overpayment for curtailments and may ultimately jeopardize reliability. PJM staff has received questions from CSPs as to whether this behavior is permitted for the upcoming 2011/2012 Delivery Year given the stakeholder deferral of a vote on specific rule changes. PJM and IMM issue this statement to ensure that the PJM and IMM position is clear, and that all CSPs understand that this behavior is inappropriate and unacceptable and that future occurrences could result in referrals to the FERC Office of Enforcement.

The double counting issue

A customer's contribution to its LSE's wholesale capacity obligation, and thus, its LSE's capacity charge, is determined by its peak load contribution (PLC), or consumption during the five coincident peak hours in the prior year. A customer may have an incentive to reduce consumption during these peak hours either through a retail rate contract that is directly linked to the wholesale market, as is the case for many large customers, or through an LSE program. In either case, the customer may actively reduce its peak consumption, and thus its contribution to the LSE's PLC and wholesale capacity obligation for the following year, in response to an incentive independent of the PJM Load Response Programs.

A customer can also register as a capacity resource in the Load Management (LM) Program and receive credit for the amount of capacity it is willing to curtail in a given delivery year. The amount that can be registered in the Program is limited to the customer's PLC for the current year.

As a result, a customer cannot include its managed peak load reductions as part of its participation in the LM Program. The maximum amount of load reduction that can be registered and credited in the Program must therefore be less than the amount of load that can be reduced by the participant. This is appropriate because the customer has already reduced its capacity payments through its own actions to reduce PLC directly.

However, if this customer elects the Guaranteed Load Drop (GLD) measurement and verification option of the LM Program, it is possible that the customer will show substantial over compliance during an Emergency LM event. The over compliance results from the fact that the GLD option defines compliance as the reduction in real time consumption, which is measured by comparing actual consumption to a baseline load estimate, which is based on recent days. The baseline load may include full load levels rather than managed load levels. The reduction observed for compliance will show the full reduction capability of the customer, including the load that the customer reduced to manage its PLC. When this occurs, the reduction observed for compliance will be significantly higher than the amount nominated in the LM Program.

Although the customer itself does not receive any additional capacity benefit, a CSP is permitted to use this apparent over compliance to offset underperforming resources in its portfolio. The result is that the CSP is paid twice for a single load reduction, thus double counting the value of the compliance. It is no more appropriate to permit the CSP to credit this apparent over compliance against underperforming parts of its portfolio that it is to permit the customer to receive credit for this apparent over compliance. It is not performance under the LM Program and should not be treated as such.

The following example illustrates the issue:

1. 5,000 kW PLC (10/11 Delivery Year) – PLC represents how much capacity has been purchased for customer to ensure reliability. Since the customer actively reduces load during the peaks ("peak shaver") the PLC is significantly lower than normal amount of load for the customer, which is 28,000 kW.
2. 4,000 kW Nominated Installed Capacity – CSP commitment for quantity of customer load reduction when PJM needs during an emergency. The nominated amount may not exceed the PLC based on current market rules.
3. Real time estimated load reduction = 25,000 kW measured as the difference between a baseline estimate based on recent days, 28,000 kW, less actual consumption during the event, or 3,000 kW.
4. 21,000 kW over compliance – CSP resource will be deemed to have met nominated Installed Capacity commitment of 4,000 kW AND also receive an additional 21,000 kW of over compliance credit which may be used to offset resources within the zone than did not perform.

In addition to substantially overstating the demand side savings and overpaying CSPs, this behavior also provides a non-competitive advantage to CSPs in attracting customers. A CSP that is aware of this Program discrepancy may identify large customers with managed PLCs and offer such customers out of market revenues for any load reduction in excess of the nominated amount. This is profitable because once such a customer has been procured, the CSP has the ability to sign up customers in the same zone with no or only limited ability to reduce load when called upon and receive capacity revenues based on the apparent over compliance of the customers with managed PLCs. Conversely, a CSP that is acting competitively and in the spirit of the Program will only commit each customer to attainable load reductions and will have no basis for overpaying customers with managed PLCs.

Stakeholder Process

PJM raised this issue at the 4/22/10 Load Management Task Force (LMTF) meeting. This issue was discussed at length at the LMTF at six meetings. Four different proposals were developed and three proposals were escalated to the MIC for endorsement. Extensive examples were developed and discussed to ensure a common understanding on the issue and the proposed solutions. The MIC overwhelmingly (79 percent) endorsed the PJM proposal at the September 2010 meeting and therefore escalated such proposal to the MRC. The issue and proposed solution were introduced at the October

MRC and up for endorsement at the November MRC. The MRC decided to defer specific rule changes related to this item until May 2011, to provide additional time for stakeholders' consideration. This item was also incorporated in the material introduced at the November MC and the MC was updated that this item was deferred by the MRC.

Document Content(s)