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May 9, 2017

**VIA HAND DELIVERY  
RECEIVED**

**MAY 09 2017**

**PUBLIC SERVICE  
COMMISSION**

Ms. Talina Mathews, Ph.D.  
Executive Director  
Kentucky Public Service Commission  
P.O. Box 615  
211 Sower Boulevard  
Frankfort, KY 40602

Re: PSC Case No. 2017-00129

Dear Dr. Mathews:

Please find enclosed for filing with the Commission in the above-referenced matter an original and ten copies of a Notice of Filing. Please return file-stamped copies of this filing to my office.

Sincerely,



David S. Samford

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

THE APPLICATION OF EAST KENTUCKY )  
POWER COOPERATIVE, INC. FOR A )  
DECLARATORY ORDER CONFIRMING THE )  
EFFECT OF KENTUCKY LAW AND )  
COMMISSION PRECEDENT ON RETAIL )  
ELECTRIC CUSTOMERS' PARTICIPATION IN )  
WHOLESALE ELECTRIC MARKETS )

Case No. 2017-00129

RECEIVED  
MAY 09 2017  
PUBLIC SERVICE  
COMMISSION

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**EAST KENTUCKY POWER COOPERATIVE, INC.'S  
NOTICE OF FILING**

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Comes now East Kentucky Power Cooperative, Inc. ("EKPC"), by counsel, and hereby provides notice of its filing of the attached presentation made by Mr. Richard Drom<sup>1</sup> on behalf of an undisclosed client before the PJM Interconnection, LLC ("PJM") Market Implementation Committee ("MIC") on May 3, 2017.

Mr. Drom's presentation is available on PJM's website and is directly relevant to the issues in this proceeding.<sup>2</sup> Indeed, it appears that the presentation was made specifically to undercut PJM's pledge to the Commission to follow Kentucky law and require any Kentucky-sourced energy efficiency resources (EER) participating in the PJM wholesale market to do so

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<sup>1</sup> Mr. Drom is an attorney who has previously filed comments with the Commission in opposition to the declaration of law sought by EKPC. *See* Letter from Richard Drom to Richard Raff (Jan. 25, 2017).

<sup>2</sup> A copy of the presentation is attached hereto and incorporated herein by reference as Exhibit 1. *See* <http://www.pjm.com/~media/committees-groups/committees/mic/20170503/20170503-item-07c-eer-problem-statement-powerPoint.ashx>

through an approved utility program that has been reviewed and approved by the Commission. The shortcomings of the presentation and the positions it espouses provide further support for the relief EKPC requests herein.

The subject presentation, given by Mr. Drom in a recent PJM teleconference involving MIC members, is provocatively entitled, “A Flawed Solution Seeking a Problem.” Ironically, however, the solution proposed by PJM is not so radical or catastrophic that the anonymous interest behind this impertinent denunciation of PJM’s Problem Statement would even feel compelled to identify itself.<sup>3</sup> As a matter of fact, the EER aggregator seeking to use PJM’s tariff to violate Kentucky law has failed to identify itself: (1) when initially opposing the Commission’s February 2, 2017 Staff Opinion; (2) when requested by the undersigned after having specifically sought a meeting with EKPC to discuss an EE special contract;<sup>4</sup> (3) when filing non-evidentiary public comments in this proceeding; and (4) when asked to be identified in the course of the May 3, 2017 MIC meeting. The Drom presentation is little more than the administrative equivalent of anonymous social media trolling.

The title of the presentation given to PJM is inconsistent with the substance of EKPC’s application, which spells out in great detail the many legal, operational and economic problems associated with allowing an EER aggregator to completely bypass a utility in a traditionally-regulated jurisdiction such as Kentucky. Moreover, the presentation’s characterization of the PJM

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<sup>3</sup> Mr. Drom was allowed by PJM to make his presentation to MIC members without disclosing the stakeholder whose interest he was representing, in violation of both the letter and spirit of PJM’s own rules and, on information and belief, over the objection of several MIC members. See PJM Manual 34: PJM Stakeholder Process, Section 11: Additional Rules of Procedure, Rule 9.3 (“The Chair shall indicate the person who has the floor. When two or more Members seek recognition at once, the Chair shall decide who is entitled to the floor. *Speakers, after identifying themselves and the company(s) they represent*, shall speak in turn (when there is a queue), and the Chair shall recognize speakers prior to them speaking.”) (emphasis added).

<sup>4</sup> See Email exchange between Richard Drom and David Samford (Mar. 30, 2017). A copy of the email exchange is attached hereto and incorporated herein as Exhibit 2.

Problem Statement as “flawed” is based upon an assumption that state law has no role to play in determining whether regulated utilities may ignore their customers’ participation in PJM markets in contravention of express Commission precedent and established Kentucky law.<sup>5</sup>

Many of the presentation’s subsequent arguments are merely based upon a self-serving perception of what policy should be with regard to EERs, not what the state of the law currently requires for EERs in Kentucky. Moreover, these policy arguments are asserted without any factual support or analysis; making matters worse, the presentation’s factual assertions are themselves misleading. For instance, Mr. Drom claims that “only one electric utility has proposed that a State commission should have jurisdiction over EERs.” While EKPC is the only applicant in this proceeding, the assertion conveniently ignores the fact that both Kentucky Power Company and Duke Energy Kentucky, Inc., have also asserted identical interests and advocated for similar relief. To date, no utility has proposed that a state commission should *not* have jurisdiction over EERs in a fully-regulated state such as Kentucky. Likewise, the presentation’s assertion that there has not been a “plausible demonstration that there is a market or reliability problem” associated with PJM’s existing tariff improperly subordinates the economic and operational aspects of the PJM market to the legal construct which first applies. Mr. Drom’s claim rings hollow in light of the fact that PJM has itself identified the infirmity in its existing tariff and has proposed a reasonable and appropriate solution.<sup>6</sup> Through artful resort to strawman arguments, burden shifting, circular reasoning and appeals to probability, the presentation given at PJM’s MIC meeting seeks to delay any action on the part of PJM to resolve the conflict it has created arising from its commitments

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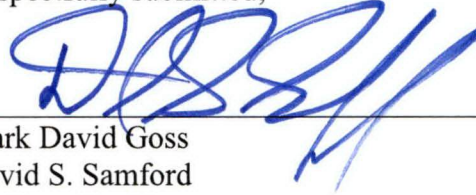
<sup>5</sup> A copy of the PJM Energy Efficiency Resource Aggregation Requiring State Approval for PJM Participation Problem Statement and Issue Charge is attached hereto and incorporated herein by reference as Exhibit 3. *See* <http://www.pjm.com/~media/committees-groups/committees/mic/20170503/20170503-item-07a-ee-draft-problem-statement-and-issue-charge-clean.ashx>

<sup>6</sup> *See id.*

to the Commission. The presentation is little more than a catalog of *non sequiturs* and *argumentum ad lapidem*. EKPC respectfully requests that the Commission reject the unfounded positions of Mr. Drom's anonymous client and enter a Declaratory Order consistent with law and reason.

Dated this 9<sup>th</sup> day of May, 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'DSSB', is written over a horizontal line.

Mark David Goss  
David S. Samford  
M. Evan Buckley  
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mdgoss@gosssamfordlaw.com  
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ebuckley@gosssamfordlaw.com

*Counsel for East Kentucky Power Cooperative, Inc.*

**CERTIFICATE OF SERVICE**

Although intervention has not been granted to any party, the undersigned hereby certifies that a true and correct copy of the foregoing has been served, as a courtesy, by depositing same in the custody and care of the U.S. Mails, postage pre-paid, on this 9<sup>th</sup> day of May, 2017, addressed to the following:

Mr. Rocco D'Ascenzo  
Duke Energy Kentucky, Inc.  
139 East Fourth Street, 1303 Main  
Cincinnati, OH 45202

Mr. Mike Kurtz  
BOEHM, KURTZ & LOWRY  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202

Mr. Mark Overstreet  
STITES & HARBISON, PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634

Ms. Denise Foster  
Vice President, State and Member Services  
PJM Interconnection, LLC  
2750 Monroe Boulevard  
Audubon, PA 19403

Mr. Kenneth J. Gish, Jr.  
STITES & HARBISON, PLLC  
250 West Main Street, Suite 2300  
Lexington, KY 40507



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*Counsel for East Kentucky Power Cooperative, Inc.*



# EER Problem Statement: “A Flawed Solution Seeking a Problem”

May 3, 2017  
MIC Meeting

Rick Drom  
Eckert Seamans Cherin & Mellott, LLC  
rdrom@eckertseamans.com  
(202) 659-6645

# The EER Problem Statement Should Be Rejected

- No evidence that any EER problem exists that needs “fixing”.
  - EERs benefit retail customers, the capacity market, and PJM.
  - Tariff changes would be antagonistic to competitive market principles.
  - Could lead to an inequitable balkanization of energy markets.
  - The FPA grants FERC exclusive jurisdiction over the participation of EERs in wholesale markets.
  - Consumers would be harmed by the Problem Statement.
  - Under FERC policy and applicable law, any Tariff changes must be prospective.



## There is Not an EER Problem to be Fixed

- To date, only one electric utility has proposed that a State commission should have jurisdiction over EERs.
- That State commission has declined, to date, to approve the utility's proposal.
- To our knowledge, no other PJM Members have suggested that there is a "problem" with EERs that needs to be "fixed".
  - Moreover, neither the one electric utility in question or any other PJM member has made any kind of plausible demonstration to PJM that there is a market or a reliability problem associated with the current EER Tariff provisions.
- As a result, this Problem Statement is premature, and the MIC should not be asked to vote on it.

## EERs Provide Real Benefits to PJM

- EERs:
  - Benefit consumers by encouraging the purchase of energy efficient products.
  - Increase the visibility of energy efficiency activities throughout the PJM States.
  - Incrementally reduce PJM's resource adequacy capacity requirements and improve system reliability.
  - Incrementally reduce PJM's capacity prices, providing additional benefits to loads.
- EERs are not dispatched by an ARC or by a utility, unlike Demand Response resources, and thus EERs also provide benefits during non-emergency conditions.

# Tariff Changes Would Harm Competitive Markets

- Competition requires **consistent** and **predictable** market rules:
  - “Competition means that decisions about whether to enter the market, to exit the market and to remain in the market are made by suppliers based on market fundamentals. Suppliers must believe that the market fundamentals will determine the success or failure of their investment or they will not invest, the market will not sustain adequate supply and the federal regulatory approach will fail.” (Emphasis added) (3/16/17 Comments of PJM IMM in Illinois proceeding).
- Order No. 719 mandates that RTOs: (1) be inclusive; (2) be fair in balancing diverse interests; (3) represent minority positions; and (4) be responsive.
- If market rules are changed for only one segment of the market, competition is harmed.
  - *Will PJM’s next Problem Statement suggest that RERRAs should be given jurisdiction over: energy storage or solar rooftop generation or . . .??*
- **Potential Balkanization of energy market** is inconsistent with reliability.

## Authorizing RERRAs to Exclude EERs Would Weaken Competitive Markets & Create Uncertainty

- Markets depend upon consistency across geographic boundaries
- Market rules should avoid “carve outs” of particular resources.
- Other capacity suppliers and utilities could give themselves an unfair competitive advantage through this process.
  - Other capacity suppliers could eliminate a competitor.
  - Danger that State utilities could have an unfair competitive advantage over the use of EERs if negotiating EER contracts is required.
- Danger that a State could exercise parochial authority to potentially benefit its customers over the best interests of all PJM Members.

## The Federal Power Act Grants FERC Exclusive Jurisdiction Over EER Participation in PJM

- *FERC v. EPSA* held that FERC has exclusive authority over participation of load management activities in wholesale markets - - despite any potential impact on retail electricity rates -- if the resource directly impacts wholesale competitive markets.
- FERC voluntarily delegated authority over DRs to RERRAs in Order No. 719.
- FERC expressly excluded EERs from the Order No. 719 delegation to RERRAs.
  - *EERs are “valuable resources . . . however, the scope of [Order No. 719] is limited to removing barriers to comparable treatment of demand response resources in the organized markets.”* Paragraph 276 of Order No. 719.
- It is illogical to suggest that RERRAs somehow should have any jurisdiction or similar authority over EERs, given lack of nexus with or impact on retail electric service.

## Consumers would be harmed by any Tariff change

- Consistent EER Tariff provisions benefit EERs and other capacity resources by encouraging the uniform regional development of valuable capacity resources.
- Granting RERRAs the ability to restrict the commitment of EERs in the PJM wholesale capacity markets would harm consumers.
- Reducing amount of capacity supply in market results in higher consumer costs.
- Potentially conflicting and/or inconsistent State EER programs:
  - inhibit development of EERs.
  - restrict the ability of consumers to take advantage of purchasing more affordable energy efficient products.

## Any Tariff Change Must be Prospective, Per FERC Policy and the Filed-Rate Doctrine

- Any PJM Tariff changes must only be prospective in nature.
- EERs have invested significant capital resources in acquiring EERs (and have cleared those resources in the capacity auction and met all verification requirements for participation); that capital would be lost if Tariff changes are applied retroactively
- Retroactive application of any Tariff changes would cause significant disruption to settled market outcomes and produce no offsetting benefits
  - Sets a bad precedent for all other capacity resources.
- Also would change the prices of past RPM auctions, after-the-fact

## Observations

- The EER Problem Statement is a “flawed solution that is seeking a problem to solve”.
- If the EER Problem Statement is correct, then the RERRA that is concerned about EERs should make a Section 206 filing; not PJM.
- It would be a violation of the Sherman Antitrust Act for PJM Market Participants (who are capacity resource competitors) to “combine” or “conspire” to restrain the trade of a competing capacity resource.
- The EER Problem Statement should not be approved.



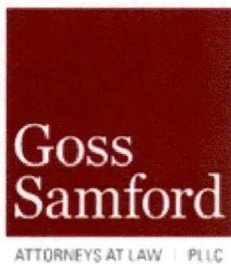
**David Samford**

**From:** David Samford  
**Sent:** Thursday, March 30, 2017 5:57 PM  
**To:** 'Richard A. Drom'  
**Subject:** RE: Offer of Compromise

Mr. Drom,

I will be happy to forward your request for a meeting to my client. If you could please identify who your client is so that we know who we would be meeting with, it would be helpful and appreciated.

Have a good day,

**David S. Samford**

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(859) 806-6567 (c)  
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**From:** Richard A. Drom [mailto:[rdrom@eckertseamans.com](mailto:rdrom@eckertseamans.com)]  
**Sent:** Thursday, March 30, 2017 5:43 PM  
**To:** David Samford  
**Cc:** Evan Buckley  
**Subject:** RE: Offer of Compromise

Mr. Samford,

Thank you for responding to my client's March 21<sup>st</sup> letter to Mr. Crews. I would, of course, be happy to communicate directly with you in the future.

My client appreciates EKPC's offer to discuss entering into a special contract regarding Energy Efficiency Resources. My client would be pleased to fly to Frankfort to carry the conversation forward with EKPC officials. If of interest, could your client please suggest some dates/times that would be convenient for a meeting?

Sincerely,

**Rick Drom** – Member  
Eckert Seamans Cherin & Mellott, LLC  
1717 Pennsylvania Avenue, 12<sup>th</sup> Floor  
Washington, D.C. 20006  
[rdrom@eckertseamans.com](mailto:rdrom@eckertseamans.com)  
(202) 659-6645 – office  
(610) 348-2667 - cell

## Energy Efficiency Resource Aggregation Requiring State Approval for PJM Participation Problem Statement and Issue Charge

### Problem Statement

Prior to participating in PJM, providers of demand response resources must have their registration reviewed by the applicable electric distribution company to ensure the end use customers' aggregation into a demand response resource is done in accordance with the Relevant Electric Retail Regulatory Authority's ("RERRA") order, ordinance or resolution regarding how the aggregation of the customer load response capability may participate in PJM's markets. The RERRA may determine that the end use customers' aggregation must be offered into PJM's markets by the electric distribution company or may allow third party Curtailment Service Providers ("CSP") to offer the aggregated resource. These provisions are commonly referred to as the "opt in/opt out" provisions and have been in effect since 2010. While providers of demand response resources are subject to this requirement, providers of Energy Efficiency Resources are not. Energy Efficiency Resources became a product eligible for participation in the PJM Base Residual Auction for Delivery Year 2012/13, but the "opt in/opt out" provisions were not modified to include a reference to Energy Efficiency Resources nor was a new separate provision created establishing a review of RERRA determinations regarding Energy Efficiency Resource aggregation registrations .

As additional background, in 2016, after stakeholder discussion, PJM changed the long term load forecasting methodology to incorporate expected load reductions from energy efficiency and required for any Energy Efficiency Resources that cleared in the RPM auction that an equal amount of load be added back to the obligation of the zone in which those resources are located.

It has come to PJM's attention that a certain RERRA is now considering placing requirements regarding how energy efficiency programs may be aggregated into Energy Efficiency Resources for PJM market participation similar to the requirements that the RERRA has placed on demand response. As such, it is appropriate for PJM stakeholders to consider whether the participation of Energy Efficiency Resources in the PJM markets should be modified. Specifically, because PJM currently does not have explicit rules concerning RERRA determinations regarding energy efficiency, there is interest in having stakeholders consider possible changes to PJM rules to require Energy Efficiency Resource compliance with any RERRA orders, ordinances or resolutions on how aggregated end-use customers' permanent load reduction effectuated by energy efficiency may be offered into PJM's capacity market. Additionally, any discussion should consider what role the applicable electric distribution company should play in any review of Energy Efficiency Resource registrations verifying that the registrations comply with any applicable RERRA requirements.

An additional complexity is that some Energy Efficiency Resources have cleared in past capacity auctions and have obligations to perform in future Delivery Years.

### Issue Charge

Given the foregoing, PJM is proposing that stakeholders consider reforms for Energy Efficiency Resources including:

- 1) the establishment of rules requiring that the providers of Energy Efficiency Resources comply with any RERRA orders, ordinances or resolutions relating to the participation of energy efficiency in the PJM markets;
- 2) if necessary, the establishment of rules requiring review of whether proposed Energy Efficiency Resources comply with RERRA orders, ordinances or resolutions; and
- 3) if necessary, the treatment of Energy Efficiency Resources that have already cleared a past capacity auction and have a position for a future Delivery Year.

Stakeholder Group Assignment: MIC

Expected Deliverables: Possible Tariff, RAA and/or manual changes.

Expected Overall Duration of Work: 4-6 months