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PSC STAFF OPINION 2017-004

Goss Samford, PLLC
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Eckert Seamans Cherin & Mellott, LLC
Attn: Richard A. Drom
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Washington, D.C. 20006

Re: Request for Advisory Opinion clarifying Commission Order dated December 20, 2012 in Case No. 2012-00169

Dear Messrs. Samford and Drom,

The Commission received on November 18, 2016, a letter from Mr. Samford on behalf of East Kentucky Power Cooperative, Inc. ("EKPC") requesting a Commission Staff Opinion regarding the ability of retail customers on the EKPC system to participate directly or indirectly in any demand response, energy efficiency, or other load control program established by PJM Interconnection, LLC ("PJM"). Citing prior Commission precedent, Mr. Samford asserts that under Commission precedent and Kentucky law, retail customers on EKPC's system are prohibited from participating directly, or indirectly through a third-party, in any demand response, energy efficiency, or load control program without first entering into a contract with EKPC and then filing that contract with the Commission for review and acceptance or approval.

On January 25, 2017, a letter was received by electronic mail from Mr. Drom on behalf of an unnamed entity that operates under the terms of a PJM tariff to work with retail customers to provide energy efficiency resources ("EER") into the PJM wholesale market. Mr. Drom asserts that providers of EER operate in interstate commerce and are neither subject to the Commission's jurisdiction nor required to obtain any Commission approval before participating in any PJM energy efficiency program.

This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Public Service Commission should the issues be formally presented for Commission resolution.

As background for Mr. Samford's request, he provides the following facts:

EKPC is a not-for-profit generation and transmission rural electric cooperative corporation, formed under KRS Chapter 279, which provides wholesale electricity to its sixteen Owner-Member distribution cooperatives, which in turn serve approximately 525,000 Kentucky homes, farms and commercial and industrial customers in eighty-seven (87) Kentucky counties.

By Order entered December 20, 2012, [in Case No. 2012-00169¹] (the "PJM Integration Order"), the Commission approved EKPC's application to transfer functional control of certain transmission facilities to PJM, effective June 1, 2013. The Order states in relevant part that "EKPC has requested ... each of its customers' interruptible loads under contract and under its Direct Load Control program be authorized to be included in PJM's Demand Response program as of the date of membership. The Commission recognizes that EKPC is not requesting authority for the retail customers who participate by contract or tariff in an interruptible load control program to participate, either directly or through a third party, in any PJM Demand Response program. Rather, the request is for authorization for EKPC, as the generation supplier, to be the participant in the PJM Demand Response programs so that EKPC can bid into PJM the interruptible load that is available to EKPC under contract or tariff. The Commission recognizes that the PJM Demand Response program can be an effective planning tool with potential benefits for both EKPC and PJM, and we encourage EKPC to have a dialogue with its customers to utilize this tool in such a way as to maximize those benefits. We find that EKPC's participation in the PJM Demand Response program on behalf of its 16 member cooperatives and their retail customers is reasonable, provided that each existing or new interruptible load contract or tariff has been filed with and accepted or approved by the Commission. In the event that EKPC determines in the future that it will be beneficial to its system to allow retail interruptible customers to participate, directly or through third parties, in the PJM Demand Response program, EKPC and its member cooperatives will need prior Commission approval of new contracts or amendments to existing contracts and tariff. ... Any customer on the EKPC system that seeks to participate directly or through a third party in the PJM Demand Response program shall do so under the terms of an EKPC special contract or tariff that has been approved by the Commission." [citation omitted.]

¹ Case No. 2012-00169, *Application of East Kentucky Power Cooperative, Inc. to Transfer Functional Control of Certain Transmission Facilities to PJM Interconnection, LLC* (Dec. 20, 2012).

At the time the Order was entered, EKPC was not prepared to bid energy efficiency capacity available throughout its system into the PJM capacity market. Moreover, the rules for bidding energy efficiency as capacity were still uncertain in light of issues relating to the appropriate standards for evaluation, measurement and verification of energy efficiency opportunities. In light of this, the Commission's Order is silent as to whether the same prohibitions that apply to a customer's direct or indirect participation in PJM's Demand Response program would also apply to customers seeking to participate directly or indirectly in PJM's Energy Efficiency program.

In Case No. 2010-00203,² the Commission approved an application by Duke Energy Kentucky, Inc. ("Duke") to integrate into full membership in PJM. In granting approval, the Commission imposed a similar restriction on retail customers participating in the PJM markets. The Duke Order stated that, "No customer should be allowed to participate directly or through a third party in any PJM demand-response program until that customer has entered into a special contract with Duke Kentucky which has been filed with, and approved by, the Commission, or until Duke Kentucky has an approved tariff authorizing customer participation."³

In response to the restriction in the Duke Order on retail customers participating in the PJM demand-response program, PJM filed a letter with the Commission stating that, "PJM acknowledges that under the Conditions set forth in the Commission's Order, no retail customer of Duke Kentucky is allowed to participate in any PJM demand response program until that customer has entered into a special contract with Duke Kentucky which has been filed with, and approved by, the Commission, or until Duke Kentucky has an approved tariff authorizing customer participation."⁴

The Commission imposed a similar restriction in 2004 when it approved Kentucky Power Company's (Kentucky Power") application to integrate into full membership in PJM. In that Order the Commission stated that, "Any PJM-offered demand side response or load interruption programs will be made available to Kentucky Power for its retail customers at Kentucky Power's election. No such program will be made available by PJM directly to a retail customer of Kentucky Power. . . . Any such

² *Case No. 2010-00203, Application of Duke Energy Kentucky, Inc. for Approval to Transfer Functional Control of its Transmission Assets from the Midwest Independent System Operator to the PJM Interconnection Regional Transmission Organization and Request for Expedited Treatment* (Dec. 22, 2010).

³ *Id.*, at 18.

⁴ Letter from Terry Boston to Jeff Derouen, Case No. 2010-00203, Post-Case Correspondence File (Jan. 11, 2011).

programs would be subject to the applicable rules of the Commission and Kentucky law.⁵

As background for Mr. Drom's position, he asserts that:

The activities of an EER provider are subject to the exclusive jurisdiction of the federal Energy Regulatory Commission ("FERC").

The Commission lacks the legal authority to review the activities of non-utility, third-party retailers, including EER providers.

The Commission's December 20, 2012 Order in Case No. 2012-00169 approving EKPC's integration into PJM contains no discussion or finding with respect to energy efficiency programs and that Order does not preempt PJM's tariff providing for EER programs. The provision in the Commission's December 20, 2012 Order that prohibits retail customers from participating directly or through a third party in a PJM demand response program except under the terms of an EKPC contract or tariff applies only to the activities of a Commission jurisdictional utility and not to a non-jurisdictional entity such as an EER provider.

By Order entered on April 13, 2016 in case No. 2015-00134, the Commission approved EKPC's last integrated resource plan ("IRP") and included therein a Staff Report that discussed EKPC's intent to aggressively implement high efficiency lighting programs that were to be promoted and marketed by third-party EER providers. The Staff Report noted that retailers were expected to develop marketing and incentive initiatives to promote these programs and nothing in the Staff Report conditions the participation by retailers upon receiving approval from either EKPC or the Commission. The April 13, 2016 Order in Case No. 2015-00134 prevents EKPC from now challenging EER providers from operating in EKPC's territory.

Staff begins its analysis with KRS Chapter 278. Under KRS 278.040(2), "The jurisdiction of the commission shall extend to all utilities in this state [and] [t]he commission shall have exclusive jurisdiction over the regulation of rates and service of utilities...." A "utility" is defined as "any person ... who owns, controls, operates, or manages any facility used or to be used for or in connection with: (a) the generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses." EKPC is a provider of electric generation and transmission

⁵ Case No. 2002-00475, *Application of Kentucky Power Company db/a American Electric Power, for Approval, to the Extent Necessary, to Transfer Functional Control of Transmission Facilities Located in Kentucky to PJM Interconnection, L.L.C. Pursuant to KRS 278.218* (May 19, 2004), at 9 and Appendix A at Paragraph 4.

services; it is a “generation and transmission cooperative” as defined in KRS 278.010(9); and it is a utility subject to the Commission’s jurisdiction. Each of EKPC’s 16 member distribution cooperatives is a provider of retail electric service; each is a “distribution cooperative” as defined in KRS 278.010(10); and each is a utility subject to the Commission’s jurisdiction.

Ever utility subject to the Commission’s jurisdiction “shall furnish adequate, efficient and reasonable service....” KRS 278.030(2). In furtherance of its role as a provider of electric generation and transmission service, EKPC has a long-term power contract with its 16 member distribution cooperatives. That contract obligates EKPC to supply, and the 16 member distribution cooperatives to purchase from EKPC, no less than 95 percent of the member distribution cooperatives’ collective total load.⁶

As providers of retail electric service, each of EKPC’s 16 member distribution cooperatives has a certified territorial boundary under the Territorial Boundary Act, KRS 278.016-278.018. That act grants a provider of retail electric service an exclusive territory, or franchise, with the right to be free from competition within its certified boundary. More specifically, that act provides that, “[E]ach retail electric supplier shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory....” KRS 278.018(1). Significantly, the Kentucky General Assembly has not enacted any statute that allows retail electric customers to choose their generation supplier or to participate in any fashion in wholesale electric markets. Thus, there is no competition in Kentucky’s electric supply market and it remains fully regulated.

In authorizing EKPC to integrate as a full member of PJM, the Commission explicitly prohibited retail electric customers from participating in any PJM demand response program in the absence of an EKPC tariff or customer contract on file with the Commission. The same prohibition was set forth in the Commission’s Orders authorizing Duke and Kentucky Power, respectively, to integrate into PJM. While the Commission’s Orders do not include a discussion of the reasons for this prohibition, the fact that Kentucky has not restructured its electric markets and does not allow retail customers to choose their generation supplier fully supports the prohibition. Absent restructured electric markets, EKPC, as the wholesale power supplier to its 16 member distribution cooperatives, has a statutory obligation to have at all times sufficient electric capacity and energy to meet the load requirements of its member distribution cooperatives. As a participant in PJM’s Reliability Pricing Model (“RPM”), EKPC is obligated to purchase sufficient generating capacity from the PJM capacity market to meet its forecasted load requirements while, in turn, EKPC sells its available generating capacity into the PJM capacity market. In the event that a retail customer on EKPC’s system wishes to participate in a demand response program, such participation needs

⁶ Case No. 2012-00503, *Petition and Complaint of Grayson Rural Electric Cooperative Corporation for an Order Authorizing Purchase of Electric Power at the Rate of Six Cents per Kilowatts of Power vs A Rate in Excess of Seven Cents Per Kilowatt Hour* (Dec. 18, 2015).

to be through either a tariff or a contract on file with the Commission so that EKPC has accurate knowledge of the level of the load expected on its system. Only by knowing this information about its load can EKPC adequately plan to have sufficient generating capacity to meet its statutory obligation to serve its load, while at the same time avoiding the cost (which would ultimately be passed on to retail customers) of, and need to purchase, excess capacity for load that it will not have to serve due to a customer's participation in a demand response program.

Staff is of the opinion that PJM's January 11, 2011 letter to the Commission, sent in response to the provision in the Duke integration Order prohibiting retail customers' participation in PJM's wholesale demand response program except under a special contract with Duke or a Duke filed tariff, is an explicit acknowledgement by PJM of the Commission's authority to impose such restrictions. The restrictions established by the Commission in the EKPC, Duke, and Kentucky Power integration Orders, respectively, with respect to retail customers' participation in any PJM demand response program are squarely within the Commission's regulatory authority over jurisdictional utilities and are not preempted by any statute, regulation, rule, or tariff under the jurisdiction of the FERC. The Commission has not by establishing such restrictions asserted any jurisdiction over non-utility, third-party retailers, including EER providers.

Staff also takes notice that in the recent case of *FERC V Electric Power Supply Ass'n, et al.*, 136 S. Ct. 760, 763 (2016), the United States Supreme Court, in discussing FERC Order No. 719 on demand response participation in organized wholesale markets, stated that, "[T]he Rule allows any State regulator to prohibit its consumers from making demand response bids in the wholesale market." Thus, this Supreme Court decision fully supports the Commission's authority to establish prohibitions in the EKPC integration Order relating to the conditions under which retail customers may participate in a PJM demand response program.

In basic terms, energy efficiency produces a similar result as demand response: they both reduce a customer's load which, in turn, reduces demand on the utility supplier's system. They differ in the respect that energy efficiency is typically a permanent reduction in load, while demand response is typically a temporary reduction or shifting of load during certain hours of the day. However, they both have the same impact by reducing the load of the supplying utility and by doing so the generating capacity that the utility is obligated to purchase is reduced.

While none of the prior Commission Orders authorizing a jurisdictional utility to integrate into PJM addressed the issue of retail customers' participating in a PJM Energy Efficiency program, it is unclear whether those programs were in place at the time any of those integration Orders were issued. However, based on the Commission's consistent requirement that the integration into PJM by EKPC, Duke, and Kentucky Power, respectively, be expressly conditioned on a prohibition against retail customers participating in a PJM demand response program, it is clear that such prohibitions reflect Kentucky's statutory scheme for regulating electric service. Kentucky statutes do

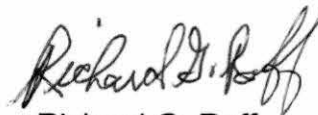
not permit competition in the provision of retail electric service and they require retail electric suppliers to meet the load of their respective customers. There is no provision authorizing retail electric customers to participate directly, or through a third party, in any wholesale electric market, be it a demand response program or an energy efficiency program.

Finally, Staff notes that the Commission did not "approve" EKPC's last IRP in case No. 2015-00134, nor has the Commission ever approved any IRP filed by an electric utility. Pursuant to Commission regulation, 807 KAR 5:058, Section 11(3), the procedures for review of an IRP state that, "Based on its review of a utility's plan and all related information, the commission staff shall issue a report summarizing its review and offering suggestions and recommendations to the utility for subsequent filings." In accordance with that regulation, the Staff issued its report on EKPC's IRP in Case No. 2015-00134, and after issuing that report and allowing an opportunity for comments, the Commission issued an Order acknowledging that the "Staff Report represents final substantive action in this matter," and closed the case. An electric utility's IRP merely represents a snapshot in time of the future actions intended to be taken based on forecasted conditions. As circumstances change over time, so do the utility's intended actions. Nothing in a utility's IRP or in the Staff's report thereon creates a basis to claim that the utility cannot revisit those issues or seek a written legal opinion from staff on issues addressed therein.

In summary, Staff is of the opinion that since Kentucky has not restructured its electric markets and there is no statute authorizing electric competition, the prohibitions set forth in prior Commission Orders on retail customers participating in any PJM demand response programs would apply with equal force to any PJM energy efficiency programs. In imposing those restrictions, the Commission was exercising its regulatory authority under Kentucky law, KRS Chapter 278, and was not, and is not, asserting any jurisdiction over any non-utility, such as an EER provider.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Richard Raff, Commission General Counsel, at (502) 782-2588.

Sincerely,



Richard G. Raff
General Counsel

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