

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY	)	
POWER COOPERATIVE, INC. FOR A	)	CASE NO.
DECLARATORY ORDER CONFIRMING	)	2017-00129
THE EFFECT OF KENTUCKY LAW AND	)	
COMMISSION PRECEDENT ON RETAIL	)	
ELECTRIC CUSTOMERS' PARTICIPATION	)	
IN WHOLESALE ELECTRIC MARKETS	)	

ORDER

On March 13, 2017, East Kentucky Power Cooperative, Inc. ("EKPC") filed a verified application, pursuant to 807 KAR 5:011, Sections 14 and 19, for a declaratory order addressing the legality of retail electric customers to participate in wholesale electric markets. Specifically, EKPC requests the Commission to declare that:

1. Under Kentucky law and Commission precedent, retail electric customers within EKPC's service territory are barred from participating in PJM's wholesale markets, either directly or indirectly through a third party, unless through a tariff or special contract approved by the Commission; and

2. Energy-efficiency resource providers within EKPC's service territory may participate in the PJM Capacity Market only pursuant to a Commission approved tariff or special contract, specifically to ensure that other retail electric customers within EKPC's service territory are not: (a) unfairly or unlawfully disadvantaged and discriminated against; (b) subjected to inefficient service; and (c) forced to unfairly, unjustly and unreasonably subsidize the energy-efficiency resource provider's participation in the PJM wholesale market; and

3. PJM is subject to the Commission's jurisdiction to enforce its prior Orders in cases in which PJM has been granted voluntary intervention and has given acknowledgements and consents;<sup>1</sup> and

4. PJM's decision to allow one or more retail energy-efficiency resource providers located within EKPC's service territory to participate in its Capacity Market in a manner inconsistent with Commission precedent is unlawful, unreasonable and a violation of Kentucky law; and

5. EKPC and/or its Owner-Members may terminate electric service to any energy-efficient resource provider who violates Kentucky law, a Commission Order, rule or regulation or Commission-approved tariff pursuant to 807 KAR 5:006, Section 15; and

6. Commission Staff Opinion 2017-004 is affirmed in all respects.<sup>2</sup>

Upon filing its application for a declaratory order with the Commission, EKPC served copies on PJM Interconnection, LLC ("PJM"); the Kentucky Attorney General's Office of Rate Intervention ("AG"); and Richard Drom, an attorney who had previously submitted a letter on behalf of an unnamed energy-efficiency resource ("EER") provider opposing the substance of EKPC's request. Motions to intervene, along with responses in support of EKPC's request for a declaratory order, were filed by Kentucky Power Company ("Kentucky Power") and Duke Energy Kentucky, Inc. ("Duke Kentucky"). The Commission granted both motions to intervene. Written comments were also filed by

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<sup>1</sup> Subsequent to PJM's filing of comments on March 31, 2017, EKPC filed on April 3, 2017, a motion to withdraw this issue from consideration by the Commission.

<sup>2</sup> Application at 2-3.

PJM and Gregory Dutton, an attorney representing an unnamed EER provider asserting the same opposition to EKPC's request as previously asserted by Mr. Drom.

### BACKGROUND

EKPC is a not-for-profit Generation and Transmission Cooperative organized under KRS Chapter 279 and is a utility subject to the Commission's jurisdiction pursuant to KRS 279.210(1) and KRS 278.010. Headquartered in Winchester, Kentucky, EKPC owns approximately 3,250 megawatts of generation and 2,950 miles of transmission lines. EKPC provides generation and transmission service at wholesale to its 16 Member-Owners ("Cooperatives") who, in turn, provide retail electric service to approximately 530,000 retail customers in Kentucky.

In 2012, EKPC filed with the Commission an application requesting approval to transfer functional control of certain transmission facilities to PJM. PJM is a regional transmission organization ("RTO") that coordinates the movement of wholesale electricity in all or parts of 13 states and the District of Columbia. PJM also operates an Energy Market and a Capacity Market. EKPC's decision to fully integrate into PJM was based on analyses showing significant economic, as well as non-quantifiable, benefits. PJM requested and was granted intervention in that case. By Order entered on December 20, 2012, in Case No. 2012-00169, the Commission approved EKPC's request for the transfer to PJM.<sup>3</sup> Prior to EKPC's request to transfer functional control of certain transmission facilities to PJM, the Commission approved a similar request by Kentucky Power in 2004 and by Duke Kentucky in 2010. PJM requested, and was granted intervention in both the Kentucky Power and Duke Kentucky cases.

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<sup>3</sup> Case No. 2012-00169, *Application of East Kentucky Power Cooperative, Inc. to Transfer Functional Control of Certain Transmission Facilities to PJM Interconnection, LLC* (Ky. PSC Dec. 20, 2012).

Prior to filing its application for a declaratory order, EKPC submitted a written request for the Commission Staff to issue a Staff Opinion on the issue underlying its pending application, i.e., whether retail electric customers could participate directly or indirectly in PJM markets. In response to EKPC's request, Staff Opinion 2017-004 was issued. That Staff Opinion, based on an analysis of relevant Kentucky statutes, Commission Orders, and PJM commitments, concluded that retail electric customers could not participate directly or indirectly as an EER in any PJM markets in the absence of a tariff or special contract approved by the Commission.

#### EKPC'S ARGUMENT

EKPC notes that Kentucky has not restructured its electric market and, under the provisions of KRS Chapter 278, EKPC has a statutory duty to supply electric generating capacity and energy sufficient to meet the respective demands of its 16 Cooperatives. Similarly, each of those 16 Cooperatives has a statutory duty to provide electric service to their respective retail customers, and, in addition, each of those 16 Cooperatives has an exclusive right to provide retail electric service within a territorial boundary established pursuant to KRS 278.016 to 278.018. PJM administers a Capacity Market under a construct then known as the Reliability Pricing Model ("RPM") and an Energy Market comprising a Day-Ahead Market and a Real-Time market. As a member of PJM and a participant in PJM's Capacity and Energy Markets, EKPC purchases from PJM all of the capacity and energy needed to serve its 16 Cooperatives and sells to PJM all of the capacity and energy generated or owned by EKPC.

As the wholesale supplier to the 16 Cooperatives, EKPC is required to forecast, plan, and execute capacity and energy purchases and sales in PJM. EKPC states that

in November 2016, it became aware that one or more persons were bidding or attempting to bid into PJM's Capacity Market EER-capacity products originating in EKPC's territory, but that PJM refused to disclose information about such bids. Absent knowledge of the quantity of EER being bid from its service territory into the PJM Capacity Market, EKPC asserts that it will be unable to accurately estimate its load for purposes of bidding into PJM's Capacity Market and will most likely overbid its load. This will result in EKPC's acquiring more capacity than is actually needed, with the cost of the excess capacity being paid for by all of the retail customers on EKPC's system, while EKPC's payment to PJM for the excess capacity will flow back to the EER provider. EKPC calls this result an unjust enrichment of the EER provider at the direct expense of all other retail customers on EKPC's system. To prevent this unjust enrichment, and to avoid potential reliability issues due to inaccurate estimates of the amount of EER on EKPC's system being bid into the PJM markets, EKPC states, the direct or indirect participation by a retail customer in PJM markets must be through either a tariff or a special contract on file with the Commission.

EKPC's application includes extensive citations, as discussed below, to prior Commission Orders stating that retail customers are prohibited from directly or indirectly participating in PJM's Demand Response ("DR") programs, and PJM's acknowledgement and acceptance of those prohibitions. EKPC claims that under Kentucky utility law, EER is for all practical purposes treated the same as DR, and as a state that has not restructured its electric markets, the prohibition of retail customers from participating directly or indirectly in any PJM DR program applies equally to any EER programs.

## KENTUCKY POWER'S ARGUMENT

Kentucky Power is engaged in the generation, transmission, and distribution of electricity in all or portions of 20 counties in eastern Kentucky and is a utility as defined in KRS 278.010(3)(a). Kentucky Power's Response to EKPC's application, filed on March 29, 2017, states that in 2002, it filed an application for approval to transfer functional control of certain transmission facilities to PJM, but that the Commission initially denied that request in 2003, based on concerns that the transfer could erode its jurisdiction. Kentucky Power's application for approval of the transfer was subsequently approved in 2004, after PJM made specific commitments with respect to the Commission's jurisdiction.<sup>4</sup> Kentucky Power's Response states the approval of that transfer of control to PJM was based in part upon representations set forth in a stipulation entered into by PJM and all other parties to that case. Kentucky Power notes that Paragraph 4 of the stipulation provided that:

Any PJM-offered demand side response or load interruptions program 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. Kentucky Power may, at its election, offer demand side response programs to its retail customers. Any such program would be subject to the applicable rules of the Commission and Kentucky law.<sup>5</sup>

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<sup>4</sup> Case No. 2002-00475, *Application of Kentucky Power Company D/B/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* (Ky. PSC May 19, 2004).

<sup>5</sup> Kentucky Power's response at 2-3.

Further, Kentucky Power references the Commission's approval of the transfer upon a finding that PJM had committed that "[n]o such [DSM] program will be offered directly by PJM to Kentucky retail customers."<sup>6</sup>

In describing its demand-side management ("DSM") programs, Kentucky Power cites the statutory definition of DSM as encompassing "any conservation, load management, or other utility activity intended to influence the level or pattern of customer usage or demand, including home energy assistance programs."<sup>7</sup> Relying on the broad scope of this definition, Kentucky Power asserts that an EER falls squarely within Kentucky's definition of DSM. Kentucky Power states that it currently offers multiple tariffed DSM programs and has specific tariffed provisions for interruptible electric service provided to eligible customers under a contract to be filed with the Commission.

Kentucky Power argues that allowing retail customers to directly or indirectly participate in the PJM Capacity Market would be contrary to Kentucky law and unreasonably prejudice it and its retail customers. If Kentucky retail customers participate in PJM's market, they would be bidding supply resources that cannot be legally offered. According to Kentucky Power, participation by Kentucky retail customers in either PJM's DR programs or its EER programs could be detrimental to other customers by eliminating Kentucky Power's ability to use those resources to meet its supply obligations as a member of PJM.

#### DUKE KENTUCKY'S ARGUMENT

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<sup>6</sup> Id. at 3.

<sup>7</sup> Id., citing KRS 278.010(17).

Duke Kentucky is engaged in the generation, transmission, and distribution of electricity in all or portions of five counties in northern Kentucky and is a utility as defined in KRS 278.010(3)(a). The Commission approved the transfer of control of limited transmission facilities of Duke Kentucky to PJM by Order entered on December 22, 2010, in Case No. 2010-00203.<sup>8</sup> Duke Kentucky's Response to EKPC's application, filed on March 31, 2017, states that PJM was a party to that transfer case and, in approving the transfer of limited transmission assets to PJM, the Commission imposed certain conditions, one of which was a prohibition against retail customers from participating directly or indirectly in any PJM DR program.

In its Response, Duke Kentucky explains its obligation as a member of PJM to have sufficient capacity to meet its forecasted load requirements and the reserve requirements for that load as established by PJM. Its forecasted load includes the impact of DSM programs it offers to its retail customers through tariffed programs. The impacts of Duke Kentucky's DSM programs are reflected in its Integrated Resource Plan, which is used to determine its least-cost strategy for meeting its customers' load. Allowing retail customers to directly or indirectly participate in PJM's Capacity Market would result in Duke Kentucky's losing access to those resources, and forcing Duke Kentucky to acquire alternative resources, which will have to be paid for by all of its other customers.

#### EER PROVIDER COMMENTS

The unnamed EER provider, by counsel, filed two sets of comments, but did not request to intervene and participate as a party. The comments set forth numerous factual

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<sup>8</sup> Case No. 2010-00203, *Application of Duke Energy Kentucky, Inc. for Approval to Transfer Functional Control of its Transmission Assets from the Midwest Independent Transmission System Operator to the PJM Interconnection Regional Transmission Organization and Request for Expedited Treatment* (Ky. PSC Dec. 22, 2010).



allegations and legal arguments in support of its opposition to EKPC's request for a declaratory order. Basically, the comments assert that EER provides multiple benefits to Kentucky's electric customers, has characteristics different from those of DR, and is a different product from DR. Further, the comments claim that EER providers are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"), that they are not subject to the Commission's jurisdiction, and that the Commission's prohibitions against retail customers from participating directly or indirectly in PJM's markets for DR programs do not apply to EER programs.

#### PJM COMMENTS

PJM states that it has met with EKPC to discuss the issues raised in its request for a declaratory order. PJM also acknowledges the conditions set forth in the Commission's Orders approving the transfer of transmission assets to PJM and the concerns expressed in EKPC's application and in Staff Opinion 2017-004. EER is described by PJM as a relevantly new product, but PJM states that it "acknowledges that the concerns expressed by the Commission and Kentucky utilities regarding customer participation in the DR programs would similarly apply to EE products originating in Kentucky."<sup>9</sup> Further, PJM notes that since its EER program has been approved by FERC under terms that allow third-party EERs to participate in PJM's wholesale markets, PJM intends to comply with the commitments made to the Commission by "initiating a stakeholder process to amend its FERC tariff to further clarify how and under what conditions EE may participate in PJM markets."<sup>10</sup> The comments filed by PJM also acknowledge that "the actions of Kentucky

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<sup>9</sup> PJM letter to Commission Executive Director filed March 31, 2017, at 1.

<sup>10</sup> Id.

utility retail customers in purchasing or selling transferable EE products derived from utility service or impacting retail rates are matters of Kentucky state law,” and that “PJM does not have the ability nor jurisdiction to enforce Kentucky law regarding the actions of third party EE aggregators in Kentucky . . . .”<sup>11</sup>

### COMMISSION FINDINGS

In reviewing EKPC’s request for a declaratory order, the Commission finds that while only EKPC is the applicant, the issues raised similarly impact Kentucky Power and Duke Kentucky, and for that reason the decisions we reach in this Order apply equally to each of them. All of the electric utility parties to this case fully support EKPC’s application.<sup>12</sup>

The Commission begins its analysis of the legal issues presented in EKPC’s application by reference to Kentucky’s utility law as set forth in KRS Chapter 278. Under KRS 278.040(2), “[t]he 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 in KRS 278.010(3)(a) 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.” The term “service” is broadly defined under KRS 278.010(13) to mean, “any practice or requirement in any way relating to the service of any utility . . . .”

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<sup>11</sup> Id. at 2.

<sup>12</sup> Nucor Steel Gallatin is also a party to this proceeding but provided no comments in response to EKPC’s application.

EKPC is a provider of electric generation and transmission 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 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. Kentucky Power and Duke Kentucky are also providers of electric generation, transmission, and distribution services, and each is a utility as defined in KRS 278.010(3)(a).

Every utility subject to the Commission’s jurisdiction “may demand, collect and receive fair, just and reasonable rates for the services rendered . . . .,” and “shall furnish adequate, efficient and reasonable service . . . .”<sup>13</sup> In furtherance of its role as a provider of electric generation and transmission service, EKPC has a long-term power contract with its 16 Cooperatives. That contract obligates EKPC to supply, and the 16 Cooperatives to purchase from EKPC, no less than 95 percent of the Cooperatives’ collective total load.<sup>14</sup> Kentucky Power and Duke Kentucky own generating facilities that were constructed or acquired specifically to serve the load of their respective retail customers.

As providers of retail electric service, each of EKPC’s 16 Cooperatives, as well as Kentucky Power and Duke Kentucky, has a certified territorial boundary under the Territorial Boundary Act, KRS 278.016-278.018. That act grants a provider of retail

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<sup>13</sup> KRS 278.030(1) and (2).

<sup>14</sup> *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 Purchased from East Kentucky Power Cooperative Under a Wholesale Power Contract as Amended Between Grayson Rural Electric Cooperative Cooperation and East Kentucky Power Cooperative Inc.* (Ky. PSC Dec. 18, 2015).

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 . . . .”<sup>15</sup> 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.

Prior to transferring functional control of transmission assets to PJM, applications were filed with the Commission for approval of the transfer of control, pursuant to KRS 278.218, by Kentucky Power, Duke Kentucky, and EKPC. KRS 278.218(1) provides that, “[n]o person shall acquire or transfer ownership or control, or the right to control, any assets that are owned by [an electric utility] without prior approval of the Commission, if the assets have an original book value of one million dollars (\$1,000,000) or more . . . .” When such an application is filed, the Commission is required by KRS 278.218(2) to “grant its approval if the transaction is for a proper purpose and is consistent with the public interest.” In approving each of the three PJM-related transfer applications, the Commission established explicit conditions to preserve our statutory jurisdiction over the sale of electricity by bundled retail rates to end-use customers in Kentucky. Those conditions are recited in detail in the application filed by EKPC and in the Responses filed by Kentucky Power and Duke Kentucky, respectively, and they are discussed and referenced below.

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<sup>15</sup> KRS 278.018(1).

During the Commission's investigation of Kentucky Power's transfer of functional control of transmission assets to PJM, the Commission initially denied the request by Order entered June 17, 2003, but granted rehearing to further consider the issues presented. Subsequently, the parties to that case executed and filed on April 19, 2004, an Agreed Stipulation ("Stipulation"). In Paragraph 4 of that Stipulation, PJM acknowledged 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 programs would be subject to the applicable rules of the Commission and Kentucky law.<sup>16</sup>

Prior to granting unconditional approval of Kentucky Power's request for the transfer to PJM, the Commission required that the Stipulation be submitted to FERC for its review and approval. FERC granted its approval to the terms of the Stipulation in an Order issued June 17, 2004.<sup>17</sup> In describing the Stipulation, FERC stated as follows:

Paragraph 4 provides that any PJM-offered demand side response or load interruption programs will be made available to AEP-Kentucky for its retail loads (at AEP-Kentucky's election) and that no such program will be made available by PJM directly to a retail customer of AEP-Kentucky.

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Paragraph 7 provides that nothing in the Kentucky Stipulation alters Kentucky laws, rules, or policies that service to retail customers be provided through the provisions of bundled retail electric service.

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<sup>16</sup> Case No. 2002-00475, Order dated May 9, 2004, Appendix A, Paragraph 4.

<sup>17</sup> *In the Matter of New PJM Companies and PJM Interconnection, LLC*, Order, Docket No. ER03-262009, p. 4, 107 FERC Paragraph 61,272 (FERC June 17, 2004). A copy of the FERC Order is attached to EKPC's Application as Exhibit 4.

In approving Kentucky Power's application for the proposed transfer to PJM, the Commission stated:

Another major concern expressed in the July 17, 2003 Order was that approving the transfer of control of Kentucky Power's transmission assets to PJM could erode this Commission's existing authority to protect Kentucky retail customers. The Commission notes that Paragraph 4 of the Stipulation is consistent with existing state authority and preserves our right, pursuant to KRS 278.285, to review any demand-side management programs that may be offered by PJM to Kentucky Power. No such program will be offered directly by PJM to Kentucky retail customers.<sup>18</sup>

In May 2010, Duke Kentucky filed an application to transfer functional control of limited transmission assets from the Midwest Independent System Operator ("MISO") to PJM. Intervention was requested by, and granted to, PJM. In its post-hearing brief filed on November 19, 2010, in that case, PJM included a discussion of "[a]spects of FERC Order 719-A bearing upon the offering by Duke Kentucky or its end-use customers of demand response and energy efficiency resources in PJM's markets, and establishing the Commission's discretion as a Retail Electric Regulatory Authority [sic] (RERRA)."<sup>19</sup> In concluding its discussion of demand-response and energy-efficiency programs, PJM acknowledged that "the Commission may still 'opt out' under the FERC rules by specifically prohibiting the participation of end use customers in the Duke Zone in those programs."<sup>20</sup>

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<sup>18</sup> Case No. 2002-00475, Order dated May 19, 2004, at 9.

<sup>19</sup> Case No. 2010-00203, PJM Post-Hearing Brief, filed November 19, 2010, at 11.

<sup>20</sup> *Id.* at 13.

In granting conditional approval of Duke Kentucky's application, the Commission explicitly referenced the prohibition of retail customers from participating directly in PJM absent a Commission approved tariff or special contract. The Commission's Order stated:

To ensure clarity for all parties concerning the need for the Commission's prior approval, we will condition the approval of membership in PJM upon Duke Kentucky's commitment that no retail customer will be allowed to participate directly or through a third party in a PJM demand-response program until either: (1) the customer has entered into a special contract with Duke Kentucky and that contract has been filed with, and approved by, the Commission; or (2) Duke Kentucky receives Commission approval of a tariff authorizing such customer participation. In addition, we will require PJM to file a written acknowledgment of this requirement and require PJM to publicize this requirement according to its demand-response program rules.

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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.<sup>21</sup>

After the entry of this Order, PJM filed a letter setting forth its agreement to be bound by the conditions of the Commission's Order, except that with respect to the prohibition of retail customers from participating in PJM's DR programs, PJM agreed only that the prohibition applied to Duke Kentucky.<sup>22</sup> The Commission then entered a

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<sup>21</sup> Case No. 2010-00203, Order dated Dec. 22, 2010, at 16–18.

<sup>22</sup> Case No. 2010-00203, PJM letter filed December 29, 2010.

subsequent Order, referencing the commitment made by PJM in conjunction with the Kentucky Power transfer of transmission assets, and stated that absent PJM's agreement to the prohibition, the transfer would not become unconditional.<sup>23</sup> PJM then filed an express acknowledgement of the condition imposed by the Commission on the transfer. That letter stated:

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.<sup>24</sup>

Based on this unconditional acknowledgement by PJM, the Commission granted unconditional approval of Duke Kentucky's transfer of transmission assets to PJM.<sup>25</sup>

Then, on May 3, 2012, EKPC filed an application for approval to transfer functional control of certain transmission assets to PJM. As in the two prior transfer cases, PJM requested and was granted intervention. As part of the proceedings, the Commission considered the issue of retail customers' participation in PJM's DR programs. Since the prohibition of retail customers from participating directly or indirectly in PJM's markets was by then a settled issue, EKPC proposed that the prohibition apply to the retail customers served by its 16 Cooperatives. In approving EKPC's application, the Commission set forth the following findings:

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<sup>23</sup> Case No. 2010-00203, Order dated Jan 6, 2011.

<sup>24</sup> Case No. 2010-00203, PJM Letter filed January 11, 2011.

<sup>25</sup> Case No. 2010-00203, Order dated January 25, 2011, at 2-3.



EKPC has requested that, in conjunction with membership in PJM, 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 tariffs.<sup>26</sup>

The Commission's Order also included, as ordering paragraph no. 4, the explicit requirement that "[a]ny 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

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<sup>26</sup> Case No. 2012-00169, Order dated Dec. 20, 2012, at 17-18.

terms of an EKPC special contract or tariff that has been approved by the Commission.”<sup>27</sup>

Thus, all of the Commission Orders approving transfers of functional control of transmission facilities to PJM contained multiple, explicit statements that absent a tariff or a contract filed with or approved by the Commission, Kentucky retail customers are prohibited from participating in PJM markets. 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. Although EKPC bids all of its generation into PJM’s RPM Capacity Market, while Kentucky Power and Duke Kentucky participate under the Fixed Resource Requirement, each utility must have sufficient generating resources available to meet its load and the PJM-determined reserve requirements. The Kentucky utilities that are members of PJM must know the amount of DR or EER being bid by a Kentucky retail customer into PJM. Absent that information, the utilities are unable to meet their respective statutory obligations under KRS 278.030(2) to adequately plan to meet load requirements. This will likely result in the utilities’ overestimating their respective load requirements, resulting in unneeded generating capacity whose costs will be passed on to retail customers.

As noted above, KRS 278.010(17) defines DSM as “any conservation, load management, or other utility activity intended to influence the level or pattern of customer usage or demand, including home energy assistance programs. Under Kentucky law, the definition of “DSM” is broad, and it includes not only the DR programs offered by PJM,

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<sup>27</sup> Id. at 21.

but also the EER programs offered by PJM. In basic terms, energy efficiency produces a similar result as demand response: both reduce a customer's load, which, in turn, reduces demand on the utility supplier's system. They differ only 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, both have the same impact by reducing the load of the supplying utility. Since Kentucky utilities are statutorily obligated to meet the load requirements of retail customers, any DR or EER program that reduces the customers' load must be reflected as a reduction in the serving utility's need for generating capacity. Unless this reduction in customer load is reflected in the serving utility's need for generating capacity, the customer reducing its load will be unjustly enriched at the expense of all retail customers.

While the prior Commission Orders focused exclusively on prohibiting Kentucky retail customers from participating directly or indirectly in PJM DR programs, the comments filed in this case by PJM note that EER programs are relatively new in the PJM markets. PJM has acknowledged that the "concerns expressed by the Commission and Kentucky utilities regarding customer participation in DR programs would similarly apply to EE products originating in Kentucky," and that "the actions of Kentucky utility retail customers in purchasing or selling transferable EE products derived from utility service or impacting retail rates are matters of Kentucky state law."<sup>28</sup>

In summary, the Commission finds that the reasoning and legal conclusions set forth in Commission Staff Opinion 2017-004 should be adopted and affirmed in all respects. Kentucky has not restructured its electric markets; Kentucky retail electric

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<sup>28</sup> PJM Comments, filed March 31, 2017, at 1-2.

suppliers have an exclusive right to sell electricity in their respective service areas; Kentucky retail electric customers have no right to participate directly or indirectly in any wholesale electric market absent authorization under a tariff or contract on file with the Commission; and Kentucky retail electric customers have no right to sell to PJM or to third parties load reductions resulting from DSM programs, irrespective of whether those programs are classified by PJM as DR or EER. The Commission is not asserting any jurisdiction over third parties involved in aggregating or bidding EER in PJM's markets. The Commission's jurisdiction extends only to those utilities within the scope of KRS Chapter 278. Any Kentucky retail customer that participates directly or indirectly in any wholesale electric market in the absence of authorization under a tariff or contract on file with the Commission is in violation of Kentucky statutes and Commission Orders and is subject to termination of service by its retail electric supplier under 807 KAR 5:006, Section 15.

PJM was a party to the three transfer of control cases involving Kentucky Power, Duke Kentucky, and EKPC, respectively. PJM made unconditional commitments and acknowledged that the transfer of control to PJM would not diminish the Commission's jurisdiction and that Kentucky retail customers would not participate directly or indirectly in PJM's DR programs absent a tariff or special contract on file with the Commission. While PJM's comments refer to EER programs as relatively new products in PJM's markets, those comments set forth no explanation of how the rules for those products were developed in contradiction of PJM's unconditional commitments and acknowledgments to the Commission.

Furthermore, PJM's proposed remedy for failing to honor its commitments to this

Commission appears to be weak and hollow. Rather than stating a definitive plan whereby PJM itself will quickly correct this situation, PJM seems to be content to pass the problem off to a committee of PJM's stakeholders for their review and determination of whether any remedy is warranted. Our prior approvals of the transfer of transmission assets to PJM were based upon findings that the transfers would be for a proper purpose and that, under Kentucky's regulated electric market, no retail customer would be able to participate directly or indirectly in the PJM wholesale markets absent prior Commission approval. The issues raised in this case cause us to question whether it will be necessary to initiate an investigation to determine whether a change needs to be made in the functional control of transmission assets due to PJM actions that are inconsistent with Kentucky's regulated electric market. The decision as to the need for an investigation will be made after we have received a status report to be filed individually or jointly by EKPC, Kentucky Power, and Duke Kentucky on the actions of PJM to comply with the commitments and provisions of our prior Orders approving the transfer of functional control of transmission assets to PJM. Based on this decision, we find good cause to grant EKPC's motion to withdraw from consideration at this time the issue of whether PJM is subject to the Commission for purposes of enforcing the Orders entered in cases that PJM was a party.

IT IS THEREFORE ORDERED that:

1. No retail electric customer is authorized to participate directly or indirectly in any PJM wholesale market, including but not limited to DR programs and EER programs, except under a tariff or special contract on file with the Commission.
2. Every retail electric supplier has the authority under 807 KAR 5:006, Section

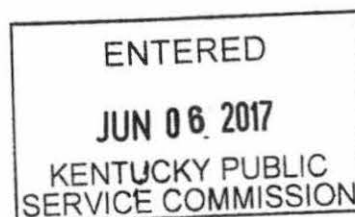
15, to terminate electric service to a retail electric customer when the customer is not in compliance with KRS Chapter 278, the regulations promulgated under 807 KAR Chapter 5, or the retail electric suppliers' tariffed rules.

3. EKPC's motion to withdraw from consideration at this time the issue of whether PJM is subject to the Commission for purposes of enforcing the Orders entered in cases that PJM was a party is granted without prejudice.

4. Six months from the date of this Order, EKPC, Kentucky Power, and Duke Kentucky shall individually or jointly file a status report describing the actions taken by PJM to comply with the commitments and provisions of our prior Orders approving the transfer of functional control of transmission assets to PJM.

5. Any documents filed pursuant to ordering paragraph No. 4 of this order shall reference the number of this case and shall be retained in the utility's general correspondence file.

By the Commission



ATTEST:

  
Executive Director

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