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March 31, 2017

Talina Mathews
Executive Director
Public Service Commission
PO Box 615
Frankfort, Kentucky 40602-0615

RE: Application of East Kentucky Power Cooperative; Case No. 2017-00129

Dear Sir or Madam,

In accordance with Rule 11(e) of the Kentucky Public Service Commission's Rules of Procedure, 807 KAR 5:001, I am filing written comments regarding the subject proceeding on behalf of an Energy Efficiency Resource ("EER")[1] Provider. This EER Provider isn't a Kentucky utility, doesn't have a Commission tariff, and isn't requesting leave to intervene in the subject East Kentucky Power Cooperative ("EKPC") Application proceeding as a party.

Background

The EER Provider that I represent is operating pursuant to the terms and conditions of the PJM Interconnection, L.L.C. ("PJM") Tariff. My client works with retailers to develop and sponsor energy efficient product programs. It engages in interstate commerce by acquiring the rights to certain EERs from energy efficiency manufacturers and distributors (*e.g.*, large hardware stores or consumer products retailers) of energy efficient products that are located across the PJM multi-state territory. My client then offers such EERs into the PJM wholesale electricity capacity market, pursuant to the terms of the PJM Tariff, as approved by and on file with the Federal Energy Regulatory Commission ("FERC").

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[1] EERs are fundamentally different from Demand Response resources. For example, under PJM's Demand Response program, defined and registered resources that are able to reduce demand upon being dispatched by PJM (and in certain instances a local distribution utility) are compensated for possessing such capabilities. In stark contrast, EERs are defined by PJM as resources that are <u>not</u> dispatchable; they permanently reduce the need for the grid to produce additional electricity by being energy efficient. (*Cf.* KRS 278.285, which defines "demand-response management" to mean a "load management, or other <u>utility</u> activity. . ."). (Emphasis added). My client is engaged in EER activities, and as explained further herein, it develops these EERs in a manner that doesn't involve either the sale or the purchase of retail electricity and has no nexus to regulated retail electric service; my client isn't engaged in "demand-response management" and or any other "utility activity" in Kentucky. Accordingly, my client's EER activities don't impact electric distribution utility reliability or in any way interfere with utility operations.

Comments

I am respectfully submitting the following comments in response to EKPC's March 10th Application, for consideration by the Kentucky Public Service Commission ("Commission") in the subject proceeding:

1. On behalf of my client, I must respectfully disagree with EKPC's request that the Commission issue an order declaring that EER Providers may only participate in the PJM energy markets pursuant to a Commission-approved tariff or a special contract. The Federal Power Act, 16 U.S.C. §824, *et al.*, grants FERC exclusive jurisdiction over the wholesale activities of an EER Provider that develops EERs, providing that the EER Provider acts in compliance with PJM tariff conditions approved by FERC .[2] My client's EERs are developed and offered into the wholesale energy market in a manner that is unrelated to any state-regulated retail electric utility services.
2. I am enclosing a copy of the comments that Richard A. Drom filed with the Commission staff in response to EKPC's November 18, 2016 request for a Staff Opinion. The enclosure discusses FERC's jurisdiction over EER Providers.
3. The Commission lacks authority under Kentucky law to determine whether EER Providers may lawfully enter into contracts with manufacturers and distributors of energy efficient products to purchase the environmental attributes associated with energy efficient products, because neither my client, the manufacturers, nor the distributors of such products are "retail electric suppliers" or "retail electric customers" or "utilities" that are subject to the Commission's jurisdiction pursuant to KRS Chapter 278. For example, the Commission cannot regulate whether Kroger may enter into a contract with an EER Provider to offer Kroger customers an incentive for buying an energy efficient appliance (an appliance that wouldn't otherwise be incentivized by any other program) in return for transferring the environmental attributes (which can then be offered into a wholesale energy market such as PJM). My client also isn't an Aggregator of Retail Customers ("ARC"), or a Curtailment Service Provider ("CSP") that might be subject to a state commission's jurisdiction.
4. FERC Order No. 719,[3] which gave state commissions the ability to prohibit Demand Response resources from participating in wholesale electric markets, doesn't apply to EERs. By its own terms, Order No. 719 applied only to Demand Response resources and doesn't explicitly or implicitly apply to EERs. Order No. 719 only permits states to opt out of having their retail customers participating in wholesale Demand Response; it didn't authorize states to condition or approve the operation of wholesale Demand

[2] The U.S. Supreme Court held in *EPSA v. FERC*, 136 S. Ct. 760 (2016) that FERC has jurisdiction to regulate Demand Response resource participation in wholesale markets. Although this Supreme Court decision addressed FERC's authority over Demand Response resources in the wholesale markets, the holding applies equally to the participation of EER Resources to the extent that these resources also directly affect the wholesale electricity market that FERC regulates. Where EER Resources are developed in a manner that doesn't involve retail sales or purchases of electricity and has no nexus or connection to state-regulated electricity utility service, FERC is the only entity with authority to determine whether and how they may participate in wholesale markets. *See* Comment 4, *infra.*

[3] *See*, 73 Fed. Reg. 64119, ¶154 (codified 18 C.F.R. §35.28(g)(1) (2015)).

Response resource activities. Moreover, the concerns that led FERC to allow states to bar Demand Response resources from the wholesale market – including the potential impact on state demand-side management programs, potential burden on state regulators, and potential for new jurisdictional issues – aren't applicable to EERs that are developed through incentivizing the sale of energy efficient products.

5. EER Providers provide many valuable services for the citizens of Kentucky by: (i) increasing the visibility of EER activities within Kentucky; (ii) reducing PJM capacity requirements for Kentucky utilities, by reducing the electric load; and (iii) potentially reducing PJM capacity prices, by increasing the supply of capacity resources, which would ultimately reduce the costs that Kentucky retail electric customers must pay through PJM for resource adequacy.
6. EER Providers don't create electricity reliability problems, and they don't create "phantom load" by entering into contracts to incentivize the sale of energy efficient products. EER Providers don't interfere with the operations of Kentucky utilities or compete with them in providing electricity or incentive programs to Kentucky customers.
7. My client is very willing to negotiate a special contract with EKPC, as EKPC proposed in Paragraphs 39 and 49 of the subject Application. In fact, my client would be willing to fly to Frankfort next week to meet with EKPC and discuss the elements of such a contract. My client believes that it is possible to equitably resolve all concerns that EKPC may have regarding my client's operation of EERs through the terms and conditions in such a special contract.
8. My client would appreciate it if the Commission agreed to hold the subject Application in temporary abeyance to: (i) provide my client with a reasonable opportunity to attempt to enter into such a special agreement with EKPC, to avoid unnecessary regulatory and/or legal actions; and (ii) await potential FERC input regarding its jurisdictional authority.

In additional to all of the above, EER Providers benefit Kentucky citizens by reducing the amount they have to pay for products they need, and EER Providers benefit Kentucky manufacturers and distributors by helping them provide cost-competitive energy efficient products to consumers.

Thank you for the opportunity to submit these written comments.

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Enclosure

Cc: Richard A. Drom

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January 25, 2017

VIA EMAIL AND FACSIMILE

Mr. Richard G. Raff
General Counsel
Commonwealth of Kentucky Public Service Commission
211 Sower Blvd.
Frankfort, Kentucky 40602-0615
FAX: (502) 564-3460

Re: Response to East Kentucky Power Cooperative's Request for Legal Opinion on Energy Efficiency Resources

Dear Mr. Raff,

I understand that the East Kentucky Power Cooperative ("EKPC") has requested a Legal Staff Opinion concerning the provision of Energy Efficiency Resources[1] ("EERs") within the jurisdictional service territory of EKPC. I respectfully request that you review and consider the following information, prior to rendering an opinion in this matter.

Background

I am an attorney who represents an EER Provider that is operating pursuant to the terms and conditions of the PJM Interconnection, L.L.C. ("PJM") Tariff. The EER Provider operates under the PJM Tariff to work with retailers to develop and sponsor energy efficient lighting programs. It engages in interstate commerce by acquiring the rights to certain EERs from retail suppliers located across the PJM territory (*e.g.*, large hardware stores) and then offering such EERs into the PJM federal wholesale electricity capacity market, pursuant to the terms of the PJM Tariff. This EER Provider intends to participate in the PJM capacity resource markets by submitting EERs, some of which may be located in the EKPC service territory. This EER Provider is not a Kentucky utility and does not have a KPSC tariff.

[1] Capitalized terms used and not otherwise defined herein have the meaning set forth in PJM's Tariff or its Reliability Assurance Agreement.

My client became aware of the subject issue after a PJM employee forwarded my client a copy of the Kentucky Public Service Commission's ("KPSC") December 20, 2012 Order in Case No. 2012-00169 ("12/20/12 Order") that addresses EKPC's entry into PJM. This PJM employee indicated that EKPC believed that the 12/20/12 Order might somehow require an EER Provider to obtain the approval of the KPSC before the EER Provider could participate in PJM's energy efficiency programs with EERs that were located within the jurisdictional service territory of EKPC.

On January 20, 2017, I participated in a conference call with, among others, Ms. Jennifer Tribulski (Counsel for PJM), Mr. David S. Samford (EKPC Regulatory Counsel), and Mr. David Crews (EKPC Senior V.P. of Power Supply). Mr. Samford stated that EKPC had requested that your office provide EKPC with a Legal Staff Opinion concerning the correct interpretation of the 12/20/12 Order.

As discussed herein, Paragraph 4 on page 21 of the 12/20/12 Order[2] does not authorize the KPSC to approve an EER Provider's activities in complying with the PJM Tariff, unless such EER Provider is otherwise subject to the jurisdiction of the KPSC. The activities of an EER Provider pursuant to the PJM Tariff are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").

KPSC Only Has Authority over Kentucky Electric Utilities

The Kentucky Legislature granted the KPSC authority, in part, over "all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities."[3] The Legislature did not grant the KPSC jurisdiction over contracts between retailers and participants under the PJM Tariff.

In a July 24, 2012 KPSC Order in Case No. 2008-00408, the KPSC examined PURPA standards, as well as standards set forth in the Energy Independence and Security Act of 2007, to address Kentucky's Integrated Resource Plan ("IRP") requirements ("7/24/12 Order"). The KPSC noted in the 7/24/12 Order, in part, that "the requirements of the Kentucky IRP standards as currently stated may go beyond our existing authority."[4] As part of the 7/24/12 Order, the KPSC acknowledged that it has the legal authority to approve energy efficiency programs that are conducted by jurisdictional "electric utilities", including EKPC. The KPSC revised Kentucky's IRP standards (including, but not limited to, those addressing energy efficiency resources) in the 7/24/12 Order to apply to electric utilities, as follows:

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[2] "4. 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." (12/20/12 Order, p. 21).

[3] KRS § 278.040.

[4] "While the Commission has the authority to inquire into and review the activities of the utilities regarding energy efficiency in conjunction with certificate cases, rate cases, and other investigations, we agree that the requirements of the Kentucky IRP standards as currently stated may go beyond our existing authority." 7/24/12 Order, p. 9.

> Each electric utility shall integrate energy efficiency resources into its plans and shall adopt policies establishing cost-effective energy efficiency resources with equal priority as other resource options. In each integrated resource plan, certificate case, and rate case, the subject electric utility shall fully explain its consideration of cost-effective energy efficiency resources as defined in the Commission's IRP regulation (807 KAR 5058).[5]

The 7/24/12 Order also concluded, in part, that "[i]n requiring all jurisdictional electric utilities to adopt this Kentucky IRP Standard, the Commission reaffirms its support for greater energy efficiency and also reaffirms its position that no new administrative regulations are required to do so since we are not modifying any existing regulations."[6] Consistent with the 7/24/12 Order, jurisdictional utilities (such as EKPC and Duke Energy) periodically have sought KPSC approval to participate in energy efficiency activities and have submitted IRP reports to the KPSC that have addressed energy efficiency programs.

EERs Submitted Pursuant to the PJM Tariff are Subject to FERC's Exclusive Jurisdiction

Oversight of (and participation in) PJM's EER program is exclusively subject to the jurisdiction of FERC, which has the sole authority to approve the terms and conditions found in the PJM Tariff. The EER program does not involve the sale or resale or transmission of electricity; PJM Members work with retailers to develop and sponsor energy efficient lighting programs to create permanent, continuous reduction in electric energy consumption. This is a federally-approved program involving contracts between entities in multiple states that participate in a regional resource adequacy market. The U.S. Supreme Court has concluded, for example, that state actions which interfere with FERC's regulation of the wholesale power market, including participation in PJM capacity auction, are preempted by the Federal Power Act.[7]

The 12/20/12 Order Does Not Require an EER Provider to Secure KPSC Approval in Order to Comply With the PJM Tariff.

The 12/20/12 Order addressed the KPSC's approval of EKPC's transfer of functional control of certain facilities to PJM. On page 17 of the Order, the KPSC only discussed the authority of EKPC to participate in PJM's Demand Response Program, as follows:

> EKPC has requested that, in conjunction with membership in PJM, each of its customers' interruptible loads under contact 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 EPKC is not requesting authority for the

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[5] 7/24/12 Order, p. 10 (emphasis added).

[6] 7/24/12 Order, p. 10.

[7] *See, e.g., Hughes v. Talen Energy Marketing, et al.* (S.Ct. April 19, 2016). (The Federal Power Act "allocates to FERC exclusive jurisdiction over "rates and charges . . . received . . . for or in connection with" interstate wholesale sales. §824d(a). Exercising this authority, FERC has approved the PJM capacity auction as the sole rate setting mechanism for sales of capacity to PJM, and has deemed the clearing price *per se* just and reasonable.") (slip at 12)

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. (Emphasis added).

The KPSC also clarified that the need for any future KPSC approval would only be required if EKPC elected to participate in the PJM's Demand Response programs, stating that: "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."[8]

Moreover, ordering paragraph 4 of the 12/20/12 Order did not discuss EERs; it only addressed the obligations of EKPC, a KPSC jurisdictional utility, to participate in PJM's Demand Response programs. The 12/20/12 Order does not even include a mention of EERs, which are entirely separate from PJM's Demand Response program. For example, under PJM's Demand Response program, defined and registered resources that are able to reduce demand upon being dispatched by PJM (and in certain instances a local distribution utility) are compensated for possessing such capabilities. In stark contrast, EERs are defined by PJM as resources that are **not** dispatchable; they permanently reduce the need for the grid to produce additional electricity by being energy efficient.[9] EERs, which do not involve the sale or resale of electricity or the dispatch of PJM Demand Resources, are not addressed in the 12/20/12 Order and therefore this Order cannot have created obligations on EERs.

The 12/20/12 Order cannot and does not preempt PJM Tariff language that has been approved by the FERC as part of its regulation of the competitive wholesale electricity market. Oversight of (and participation in) PJM's EER program is exclusively subject to the jurisdiction of FERC, which has approved the PJM Tariff.

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[8] 12/20/12 Order, p. 18 (emphasis added) (citations omitted).

[9] *See, e.g.*, PJM Business Manual 18b, p. 5 ("An Energy Efficiency (EE) Resource is a project that involves the installation of more efficient devices/equipment, or the implementation of more efficient processes/systems, exceeding then-current building codes, appliance standards, or other relevant standards, at the time of installation, as known at the time of commitment, and meets the requirements of Schedule 6 (section M) of the Reliability Assurance Agreement. The EE Resource must achieve a permanent, continuous reduction in electric energy consumption (during the defined EE Performance Hours) that is not reflected in the peak load forecast used for the Auction Delivery Year for which the EE Resource is proposed. The EE Resource must be fully implemented at all times during the Delivery Year, without any requirement of notice, dispatch, or operator intervention.")

KPSC's April 13, 2016 Approval of EKPC's IRP Precludes EKPC from Now Challenging Third-Party EER Provider Participation in PJM Programs

As previously discussed, the KPSC does not possess the legal authority to review the activities of non-utility, third-party retailers, including EER Providers. However, **even if** the 12/20/12 Order were to be somehow interpreted to give the KPSC the authority to review the activities of EER Providers operating pursuant to the PJM Tariff in Kentucky, EKPC would still be precluded from challenging such activity because EKPC has already sought and has received the KPSC's approval to allow EER Providers to operate in its territory via its 2015 IRP.

EKPC submitted its 2015 IRP to the KPSC in Case No. 2015-00134. On April 13, 2016, the KPSC issued an Order approving this IRP, thereby completing a "final administrative action" on the EKPC's IRP ("IRP Order"). The IRP Order included a KPSC "Staff Report" that specifically summarized the KPSC Staff's review of the EKPC IRP. The IRP Order declared that the staff review "represents the final substantive action" regarding the IRP.[10]

Of particular importance in the Staff Report is the express discussion of EKPC's plans with respect to its "Residential Efficient Lighting with Retailers Program", the service in which third-party EER Providers participate pursuant to the PJM Tariff. If the IRP Order is not an explicit approval of EER Providers' ability to operate under the PJM Tariff, this Order provides an implicit endorsement of third-party EER Providers work to increase energy efficiency via retail store marketing programs.

Specifically, the Staff Report described EKPC's intent to "transform the market for residential lighting <u>by facilitating a shift in consumer purchasing decisions for the market baseline efficiency to higher efficiency lighting products</u>."[11] The Staff Report also noted that EKPC planned to sponsor "aggressive marketing and promotion activities", which EKPC expected third-party EER providers to promote. The Staff Report expressly stated that "[i]t is expected that retailers will develop their own marketing <u>as well as sponsor local advertising initiatives</u>" [to promote energy efficient lighting.][12] Nothing in the Staff Report conditioned such "retailer" programs upon receipt of approval form either the EKPC or the KPSC. It is this activity (anticipated by EKPC, subsequently approved by the KPSC, and now challenged by EKPC) that EER Providers provide in the PJM region.

Thus, notwithstanding the fact that any challenge to EER Providers' activities is federally preempted, the KPSC's April 13, 2016, Order prevents EKPC from challenging EER Providers operations in its territory.

[10] *See*, IRP Order, p. 1.
[11] *See*, IRP Order, p. 23.
[12] *See*, IRP Order, p. 23 (Emphasis added).

Permitting EER Providers to Comply with the PJM Tariff Does Not Interfere with EKPC's Exclusive Right to Provide Electricity Service in its Jurisdictional Service Territory.

There is no question that EKPC has the exclusive right to sell retail electricity in its jurisdictional service territory under the supervision of the KPSC.[13] The activities of an EER Provider and retailers, however, do not involve the sale or resale of electricity within the Commonwealth of Kentucky and thus do not fall within the purview of the KPSC. EER Providers conduct activities pursuant to the PJM Tariff involving bilateral contracts for the sale of energy efficient products; there is no retail electricity component to these activities.

Conclusion

Ordering Paragraph 4 of the 12/20/12 Order only applies to the activities of a jurisdictional electric utility, such as EKPC. These approval requirements cannot be applied to a non-jurisdictional entity, such as an EER Provider (which is not a Kentucky electric utility) that is complying with a FERC-approved Tariff to participate in PJM's competitive wholesale energy markets.

Please feel free to contact me if you have any questions regarding these matters, or would like to discuss these issues.

Sincerely,

<u>/s/ Richard A. Drom</u>
Richard A. Drom

Cc: Jenifer Tribulski, Counsel for PJM
David S. Samford, Regulatory Counsel for EKPC (no facsimile number)
David Crews, EKPC Senior V.P. for Power Supply

[13] *See, e.g.*, KRS § 278.018.