GOLDBERG SIMPSON

Gregory T. Dutton
9301 Dayflower Street
Prospect, KY 40059
Telephone: (502) 589-4440
Facsimile: (502) 581-1344
gdutton@goldbergsimpson.com

RECEIVED
APR 21 2017
PUBLIC SERVICE
COMMISSION

April 20, 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 Dr. Mathews,

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") Provider. In light of PSC Staff Opinion 2017-004 and the pleadings filed into Case No. 2017-00129, I am providing the Commission with information detailing why EERs are factually and legally distinct from Demand Response ("DR") resources.

Background

In PSC Staff Opinion 2017-004, the staff generally relied on the history of the Commission's authority over DR resources in concluding "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."[1] In its analysis, Staff relied on a January 11, 2011 letter from PJM prohibiting demand response programs except under special contract or filed tariff as "explicit acknowledgement by PJM of the Commission's authority to impose such restrictions."[2] Additionally, the Staff took notice of a recent U.S. Supreme Court decision finding that the Federal Energy Regulatory Commission's ("FERC") Order No. 719 "allows any State regulator [in organized wholesale markets] to prohibit its consumers from making demand response bids in the wholesale market."[3] Following this legal analysis, the Staff made an unsupported factual conclusion that "[i]n basic terms, energy efficiency produces a similar result as demand response."[4] Additionally, Staff found that "both [DR resources and EERs] have the same impact

[1] Opinion at 7.
[2] Id. at 6.
[3] Id., referencing FERC v. Electric Power Supply Ass'n, et al., 136 S. Ct. 760, 763 (2016).
[4] Opinion at 6.

by reducing the load of the supplying utility and by doing so the generating capacity that the utility is obligated to purchase is reduced."[5] Thus, Staff inaccurately concluded that because the Commission currently has authority over DR programs, it must also hold authority over EERs.

Based on the Staff Opinion, East Kentucky Electric Power Cooperative ("EKPC") submitted its Petition in this proceeding, asking the Commission to declare that EER Providers may only participate in the PJM capacity market pursuant to a Commission-approved tariff or special contract. In addition to relying on the Staff Opinion, EKPC claims in its Petition that the participation of EERs in the PJM capacity market interferes with its ability to accurately estimate and bid load into that market, and will result in the procurement of more capacity resources than are necessary to serve its customers.

PJM Interconnection, L.L.C. ("PJM"), submitted a letter to the Commission in response to EKPC's Petition. In that letter, PJM states that it "acknowledges" that concerns expressed regarding the participation of DR resources in its markets "similarly apply to EE products," and reports that it is initiating a stakeholder process to develop tariff revisions that would allow retail regulators to prohibit EERs in their jurisdictions from participating in its wholesale market "in a similar fashion" to how the Commission determines whether DR in Kentucky may participate today.[6]

While Staff's legal analysis of the Commission's DR authority was reasonable, I must respectfully disagree with the Staff's factual conclusions, EKPC's reliance on those conclusions in its Petition, and PJM's claim that concerns regarding DR participation "similarly apply" to EERs. Simply put, EERs are not similar enough to DR resources to extend the Commission's authority to EERs or to EER Providers. Moreover, EKPC's assertion that EERs and EER Providers interfere with its ability to plan for resource adequacy is unsupported by the facts.

Demand Response Resources are Very Different from Energy Efficiency Resources

To be sure, DR resources and EERs both involve reductions in load. Critically, the similarities end there. DR resources and EERs are distinct from one another in the following manners:

1. DR resources and EER are offered into the PJM wholesale markets in very different manners,
2. Each resource is distinct in its technical attributes, and
3. The creation of each resource presents distinct implications for Commission-regulated retail electric service.

To begin, wholesale DR resources are created through affirmative actions by retail customers to reduce their retail energy consumption from expected levels in response to either high prices or incentive payments. DR resources thus must be "dispatched" through communications to retail customers by the wholesale market operator, or by a wholesale market participant (such as an aggregator), that directs those customers to curtail their retail energy

---

[5] Id.

[6] PJM Letter to the Commission (Mar. 31, 2017) at 1-2.

consumption below their normal usage levels during a specific time period. Customers participating in such DR programs are expected to return to normal consumption patterns once the event triggering their load reduction passes.

In contrast, EERs provide wholesale capacity through permanent reductions in energy demand without being "dispatched" by an entity. EERs reduce electricity demand without the need for any communication between retail customers and the wholesale market participant who sells the electricity reductions into the PJM wholesale energy markets. EERs are developed and offered into the wholesale market in a manner that does not involve or affect the state-regulated retail electric utility services received by retail customers. For example, a seller can develop EERs and offer them into the wholesale market without engaging in any retail sales or purchases of electricity or taking any other action that has a nexus to state-regulated retail electricity service.

Given these differences in the technical attributes of DR resources and EERs, and in the role of Commission-regulated retail utility service in their creation, attempts to equate them for purposes of applying regulatory requirements and prohibiting wholesale market participation necessarily fail, as explained below.

FERC Order No. 719 Does Not Apply to EERs

The Staff Opinion, EKPC's Petition, and the letter to the Commission from PJM in response to the Petition, all appear to rely principally on FERC Order No. 719[7] as authority for the Commission to restrict wholesale market participation by EERs. In that order, FERC adopted an "opt in/opt out" procedure that allows retail regulators to affirmatively prohibit their retail customers from providing DR in the wholesale market. This procedure does not apply to EERs, both because Order No. 719 by its own terms is not applicable to EERs, and because the rationale FERC used in instituting an "opt in/opt out" procedure for DR resources does not apply to EERs.

FERC adopted the "opt in/opt out" procedure in Order Nos. 719 and 719-A based on the unique characteristics of DR resources. Specifically, FERC stated that the procedure would address concerns that allowing the demand response capability of retail customers to be aggregated to participate in the wholesale markets would "interfere with the operation of successful demand response programs, place an undue burden on state and local retail regulatory entities, or . . . raise new concerns regarding federal and state jurisdiction."[8] Recognizing that it is the unique attributes of DR resources that were driving those potential concerns, however, FERC expressly stated that these provisions were part of "a very narrowly-focused rule with respect to Demand Response resources."[9] Significantly, FERC expressly stated that EERs were

---

[7] Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 FERC ¶ 61,071 (2008), order on reh'g, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, order on reh'g, Order No. 719-B, 129 FERC ¶ 61,252 (2009).
[8] Order No. 719, P 155.
[9] Order No. 719-A at P 48.

not within the scope of Order No. 719.[10] Thus, FERC Order No. 719 – and the "opt in/opt out" procedure adopted there – does not by its own terms apply to EERs.

Moreover, the rationale used to adopt the "opt in/opt out" procedure for DR does not exist with respect to EERs. Simply put, none of the concerns regarding the participation of retail DR in wholesale markets that prompted adoption of this opt in/ opt out procedure are triggered by EERs. As explained above, EERs are developed separate and apart from purchases or sales of retail electricity, and they have no nexus or connection with state-regulated retail electric utility service. Unlike DR resources, EERs provide capacity through reductions in energy demand without being "dispatched" and without the need for any communication between retail customers and the entity who sells the reduction in the wholesale market. As a result, there is no potential that EERs will "interfere with the operation of successful demand response programs . . . [or] place an undue burden on state and local retail regulatory entities."[11] Further, since EERs are developed and offered into the wholesale market by a seller that does not engage in retail sales or purchases or any other state-regulated activity, no "new concerns regarding federal and state jurisdiction" are implicated by EER participation in wholesale markets.[12]

In short, Order No. 719 and the "opt-in/opt out" procedure adopted therein are expressly inapplicable to EERs, lack the same logical basis necessary to extend the Order to EERs, and thus cannot be relied upon by the Commission to adopt restrictions on EERs wholesale market participation.

EERs Do Not Interfere with Resource Adequacy Planning

EKPC erroneously claims that the wholesale market participation of EERs within its service territory will interfere with resource adequacy planning. However, these claims are unsupported and should be dismissed. First, EKPC does not explain how barring EERs from participating in the wholesale market would allow it to better plan reductions in the amount of capacity that it must buy to fully serve its load. If EERs were not permitted to participate in the PJM wholesale energy markets, EKPC would purchase the same amount of capacity that it does today to meet its peak demand obligations. As a result, restricting EERs in Kentucky would do nothing more than deny consumers of the costs savings provided by EERs, including the savings they provide by subsidizing the purchase of energy efficiency products and the saved capacity costs that result from the energy efficiency improvements they create.

Second, PJM's market rules regarding the wholesale market participation of EERs and its load forecasting practices are designed to account for the impact of EE resources on capacity needs.[13] In particular, PJM limits the participation of specific EE resources to a maximum of four capacity delivery years, which corresponds to the time needed for the reduction in demand

---

[10] Order No. 719, P 276 ("Energy efficiency and distributed generation are valuable resources, as commenters point out; however, *the scope of this rule is limited to removing barriers to comparable treatment of demand response resources in the organized markets.*") (Emphasis added).

[11] Order No. 719 at P 155.

[12] *Id.*

[13] PJM Manual 18B, Section 1.1.

caused by those resources to be reflected in load forecasts and translated into reduced system capacity requirements.[14] Thus, far from interfering in planning, EERs in fact facilitate the ability of the PJM capacity market to account for energy efficiency improvements and translate them into reduced capacity requirements and lower capacity costs for consumers.

Per PJM, The Commission Cannot Rely on Previous PJM Letters for EER Authority

To the extent that DR resources and EER share any factual similarities, the Staff's analysis of Commission authority over DR resources, and whether that authority can be extended to EERs, fails to appropriately recognize a critical element: EERs were not considered by PJM in the Orders the Staff relies on for extending Commission authority to EERs. Specifically, the Kentucky Integration Orders do not address the participation of EERs located within Kentucky in the PJM wholesale markets. PJM's March 31 comment letter submitted into the record of this case acknowledges this fact, explaining that "[t]he emergence of transferable [EE] resources . . . as a recognized product in wholesale electricity markets is a relatively new development," and as a result, "they were not considered or discussed in the Integration Orders."[15]

Costs Savings Achieved by Energy Efficient Products

EERs are an overwhelmingly positive addition to the economic provision of energy to consumers. The Commission should take note of the significant costs savings EERs provide, especially in light of its recent comments in Case No 2016-00289 expressing concern over the increasing number of utility DSM program and the associated costs.[16] EERs both subsidize the cost of everyday consumer products and encourage deferment of the construction of additional generation resources at no cost to the utility ratepayer.

For example, in May 2016, PJM held its annual Base Residual Auction ("BRA"), for the 2019-2020 delivery year. Over 1,500 MW of EERs cleared the auction, the largest amount to date, coinciding with a 40% drop in capacity prices year over year. System planners have increased confidence in the reliability of these resources due to the introduction of "capacity performance" requirements in the 19/20 BRA. Clearing prices vary by geographic zone, but with EERs generally regarded as the least cost energy option, many zones would have undoubtedly faced higher prices if EERs were barred from participating and other resources (such as additional power generation) cleared the market in their place.

We recognize that Kentucky's utilities have initiated programs to incorporate EERs with great success, saving consumers millions of dollars by subsidizing the cost of the programs through line-items on electricity bills. While utilities have made an effort to incorporate EERs

---

[14] *Id.*

[15] PJM Letter at 1.

[16] In Re: Electronic Application of Duke Energy Kentucky, Inc. to Amend its Demand Side Management Programs, Opinion dated January 24, 2017, at 15. ("The Commission is concerned about the increasing number of utility DSM programs and the associated increase in costs to ratepayers, particularly as the costs of the programs are borne by all customers in a rate class and are not limited to the participants in the DSM programs. Therefore, the Commission will apply greater scrutiny in its review of all future DSM filings, with a particular emphasis on reviewing the cost-effectiveness of each program and measure.")

into their traditional business model, EER providers can achieve efficiency reductions in the areas where utilities do not operate programs and without public ratepayer funds. Thus, EERs are clearly a valuable tool that benefits the citizens of Kentucky, and should remain part of the portfolio of resources used to meet the Commonwealth's energy needs.

Conclusion

In summary, EERs and DR resources are factually and legally distinct. Their creation, technical attributes, and relationship to retail customers and Commission-regulated utility service are much different. Most importantly, EERs are a net positive tool in meeting energy demands within the Commonwealth and should not be discouraged.

Thank you for the opportunity to submit these written comments.

Gregory T. Dutton

/s/ Gregory T. Dutton

Goldberg Simpson, LLC
9301 Dayflower Street
Prospect, Kentucky 40059
Telephone: 502-589-4440
gdutton@goldbergsimpson.com

Enclosure

Cc: Richard A. Drom