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October 4, 2017

Ms. Gwen R. Pinson
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602

Re: *In the Matter of the Application of East Kentucky Power Cooperative, Inc. for a Declaratory Order Confirming the Effect of Kentucky Law and Commission Precedent on Retail Electric Customers' Participation in Wholesale Electric Markets – Case No. 2017-00129 – Post-Case Correspondence Filing*

Dear Ms. Pinson:

Please find enclosed a courtesy copy of PJM Interconnection LLC's Request for Limited Tariff Waiver that was filed with the Federal Regulatory Energy Commission on October 2, 2017. This document should be filed in the post-case correspondence file for the above-styled matter. Please return a file-stamped copy to me.

Please contact me with any questions you may have.

Sincerely,


David S. Samford

Enclosure

cc: Richard Raff
Quang Nguyen
Rocco D'Ascenzo
Mark Overstreet

consideration of the integration into PJM of three vertically integrated Kentucky utilities, specifically Kentucky Power Company (“AEP-Kentucky”), Duke Energy Kentucky, Inc. (“Duke Kentucky”), and East Kentucky Power Cooperative (“EKPC”) (collectively the “Three Kentucky Utilities”).

PJM further requests that the Commission issue an order on this requested waiver by December 1, 2017, consistent with the Commission’s prior notice requirements, in order to allow PJM to implement the waiver prior to the next capacity market auction.³ In addition, PJM is requesting timely Commission action so that the Three Kentucky Utilities can submit a report to the KY PSC by December 6, 2017, regarding PJM’s compliance with the commitments made by PJM to the KY PSC in the context of the KY PSC’s review and approval of the transfer of functional control to PJM of the transmission assets of each of the Three Kentucky Utilities.

A related matter is currently pending before the Commission in Docket No. EL17-75-000 initiated by the June 2, 2017 Petition for Declaratory Order (“Petition”) filed by Advanced Energy Economy (“AEE”). In that docket, PJM requested that the Commission provide guidance on the role of the applicable retail regulatory authority regarding the authorization of EERs and the participation of EERs in the wholesale market. However, the scope of that proceeding is of national application, and it may not be resolved before PJM administers its next capacity market auction. In contrast, the scope of this waiver petition is narrow, focused on the future participation of unauthorized EER in Kentucky and on PJM’s contractual commitments made to the KY PSC. PJM is entitled to a waiver in order to conduct future capacity auctions in

³ See 18 C.F.R. § 35.3(a).

compliance with the KY PSC Order, as well as with PJM's prior commitments to the Three Kentucky Utilities and the related orders of the KY PSC.

I. BACKGROUND

Energy Efficiency Resources are defined in the PJM Tariff, Attachment DD-1 as follows:

An Energy Efficiency Resource is *a project*, including installation of more efficient devices or equipment or implementation of more efficient processes or systems, exceeding then-current building codes, appliance standards, or other relevant standards, *designed to achieve a continuous* (during peak summer and winter periods as described herein) *reduction in electric energy consumption at the End-Use Customer's retail site*⁴

EERs have participated in PJM's capacity market since the 2012/2013 Delivery Year. EKPC realized that EERs in its certified service territory were being bid into the PJM's capacity market, called the Reliability Pricing Model ("RPM"), by a third party supplier at the same time and as a result of EKPC's realization it was obligated to pay for an amount of capacity from the RPM auction greater than its load forecasts. This amount of EKPC's capacity obligation above EKPC's load forecasts is due to the EER. The EER increases EKPC's capacity obligation above the amount of the load forecast because the load forecast already reflects decreases due to energy efficiency. EKPC's load zone is entirely in Kentucky so EKPC could therefore reasonably conclude that the EER participation that was in its service territory must be in Kentucky (whereas AEP-Kentucky and Duke Kentucky both have load zones that cross state boundaries which explains why the issue first arose with EKPC).

⁴ Tariff, Attachment DD-1, section L(1) (*emphasis and bold added*).

EKPC sought the view of the KY PSC staff on whether EKPC's retail customers were permitted to indirectly participate in the supply of EER. On February 2, 2017, the KY PSC staff issued an advisory opinion recognizing that PJM had committed to not allowing retail customers to participate in PJM's markets as demand response resources. KY PSC Staff then opined that demand response and energy efficiency are effectively the same under Kentucky law, and that although PJM made commitments restricting the participation of demand response in the PJM markets in each of the integration proceedings, PJM was allowing EER participation from Kentucky:

[B]ased 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. ...

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.⁵

On March 13, 2017, EKPC sought further confirmation from the KY PSC with respect to Kentucky law by filing a petition for declaratory order. The KY PSC issued an order on June 6, 2017 affirming the KY PSC Staff Opinion, and holding that "Energy-efficiency resource providers within EKPC's service territory may participate in the PJM

⁵ See KY PSC Staff Opinion, Case No. 2017-004, at 6-7 (Feb. 2, 2017) ("KY PSC Staff Opinion").

Capacity Market only pursuant to a [KY PSC] approved tariff or special contract . . .”⁶ Further, the KY PSC clarified that the state law treated demand response and energy efficiency effectively the same and thus the KY PSC’s prior rulings on the integration of the Three Kentucky Utilities, and PJM’s commitments made therein, prohibited retail customers from participating as energy efficiency resources in PJM’s capacity market (unless specifically authorized by the KY PSC). Further, in supporting its decision, the KY PSC discussed an underlying FERC-approved stipulation that governed the integration of AEP-Kentucky into PJM in 2004.⁷

When AEP-Kentucky initially sought to join PJM in 2002, its application was denied by the KY PSC in July 2003.⁸ The applicant and PJM sought rehearing of that order, and rehearing was granted requiring additional studies and submissions. In order to settle the KY PSC and FERC proceedings, the parties (which included PJM, AEP-Kentucky, a group of Kentucky industrials, and the KY PSC Staff) entered into a settlement stipulation (the “Stipulation”). The Stipulation contained the following provisions:

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 [KY PSC] and Kentucky law.⁹ . . . Nothing in this Stipulation alters in any way the laws of the Commonwealth or rules or policies of [the KY PSC] which provide that service to retail customers be provided through the provision of bundled retail electric service.¹⁰

⁶ KY PSC Order, Case No. 2017-00129, at P 2 (Jun. 6, 2017) (“June 2017 KY PSC Order”).

⁷ *New PJM Companies and PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,272 (2004) (“2004 FERC Stipulation Order”).

⁸ *See e.g.* 2004 FERC Stipulation Order at P 3.

⁹ KY PSC Order, Case No. 2002-00475, at Appendix A, P 4 (May 19, 2004).

¹⁰ *Id.* at Appendix A, P 7.

The Stipulation was approved by the KY PSC on May 19, 2004, which stated in relevant part:

The [KY PSC] 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.¹¹

Notably, the Stipulation was filed with this Commission and approved by this Commission pursuant to Rule 602. Relevant to the issues raised in this waiver request, the Commission stated:

Paragraph 4 [of the Stipulation] 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.¹²

A similar commitment was made by PJM in the subsequent proceedings before the KY PSC involving the integration of Duke Kentucky and EKPC into PJM in 2010 and 2012, respectively. Both integrations were approved by the KY PSC on the condition that no third-party supplier could commit a Kentucky retail-customer in PJM's "demand response program" absent approval of the KY PSC.¹³ Further, PJM agreed to abide by the terms of the Duke Integration Order and EKPC Integration Order. This

¹¹ *See id.* at 9.

¹² 2004 FERC Stipulation Order at P 8.

¹³ *See* June 2017 KY PSC Order at 15-17 (citing KY PSC, Case No. 2010-00203, 16-18 (Dec. 22, 2010) ("Duke Kentucky Integration Order") and KY PSC, Case No. 2012-00169, at 17-18 (Dec. 20, 2012) ("EKPC Integration Order")).

Commission reviewed and approved the applications of Duke Kentucky and EKPC to integrate into PJM.¹⁴

In its order issued on June 6th, the KY PSC has now interpreted of Kentucky law finding that the term “demand response” under Kentucky law is broad and inclusive so as to include energy efficiency. As a result, the Kentucky PSC has now clarified that Energy Efficiency offered into the PJM markets is captured within the meaning of “demand side response” as such term is used in the Stipulation. Specifically, the June 2017 KY PSC Order held:

Energy-efficiency resource providers within EKPC's service territory may participate in the PJM Capacity Market only pursuant to a [KY PSC] 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.¹⁵

The KY PSC further held that “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 [KY PSC] precedent is unlawful, unreasonable and a violation of Kentucky law.”¹⁶ In explaining its rulings, the KY PSC stated that “[u]nder Kentucky law, the definition of ‘[Demand-Side Resource]’ is broad, and it includes not only the DR programs offered by PJM, *but also the EER programs*

¹⁴ See *PJM Interconnection, L.L.C., Duke Energy Ohio, Inc., and Duke Energy Kentucky, Inc.*, 139 FERC ¶ 61,068 (2012) (Commission order approving Duke Kentucky integration); *East Kentucky Power Cooperative, Inc.*, Letter Order, Docket No. ER13-1177-000, et al., (May 22, 2013) (Commission order approving EKPC integration).

¹⁵ June 2017 KY PSC Order at P 2.

¹⁶ *Id.* at P 4.

*offered by PJM,*¹⁷ and “[a]ny 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 [KY PSC] *is in violation of Kentucky statutes*”¹⁸ Importantly, the June 2017 KY PSC Order applies to all retail electric suppliers in Kentucky, meaning that all three Kentucky utilities in the PJM Region – AEP-Kentucky, Duke Kentucky and EKPC – are subject to the order.¹⁹

Although interpretations of terms under one state’s laws is not necessarily dispositive of the interpretation of those terms in the PJM Tariff, in this unique case what is at issue is the interpretation of a Stipulation which contained integration conditions. These integration conditions are specific to Kentucky and to the Three Kentucky Utilities. Moreover, this Commission expressly approved that Stipulation in its 2004 FERC Stipulation Order authorizing the integration of AEP into PJM. As a result, the circumstances of this waiver are very narrow and targeted. In short, the Commission need not address the broader issues raised in the AEE Petition in order to grant this waiver which is anchored in specific facts.

II. REQUEST FOR WAIVER

Prior to the June 2017 KY PSC Order, the KY PSC had not clarified that Energy Efficiency Resources were considered “demand-side resources” under Kentucky law. Although the implementation of the June 2017 KY PSC Order is a subject of the AEE Petition in Docket No. EL17-75-000, the June 2017 KY PSC Order has not been appealed or challenged in any court and thus consideration must be given to the June

¹⁷ *Id.* at 18-19 (emphasis added).

¹⁸ *Id.* at 20 (emphasis added).

¹⁹ *See e.g. id.* at 21-22.

2017 KY PSC Order.²⁰ However, the implementation of the KY PSC's determination and the exclusion of unauthorized EERs located in Kentucky from participation in PJM's capacity market auctions would arguably contravene PJM's Tariff to the extent that unauthorized Kentucky EERs were to assert that the Tariff requires PJM to allow them to participate.

A temporary waiver is appropriate as the broader issue is before the Commission in the Petition proceeding. In addition, PJM has initiated an ongoing stakeholder process tasked with establishing rules and verification processes to address unauthorized EERs by requiring that EERs comply with the orders or other laws of the applicable retail regulatory authority (e.g., the state public utility commission, municipal utility board, etc.). PJM expects to make a filing pursuant to Section 205 of the Federal Power Act after the Commission rules on the Petition or otherwise provides jurisdictional clarity. In the interim, this waiver is needed so as to ensure that this Commission and PJM honor the Stipulation which governed the integration of these companies into PJM and continue to recognize the need for comity and coordination between the states and this Commission when addressing resources which directly interact with retail customers such as energy efficiency and demand response.

PJM respectfully requests a temporary, limited waiver of the Tariff, Attachment DD-1 with respect to compliance with June 2017 KY PSC Order. Specifically, the requested waiver would authorize PJM to exclude from its capacity market auctions the

²⁰ PJM is obligated, under its governing documents, to comply with applicable law in its governing documents. *See, e.g.*, Operating Agreement, sections 3.1 and 3.2.

participation of EERs located in Kentucky that have not been authorized by the KY PSC consistent with the KY PSC Order and PJM's underlying commitments.²¹

III. THE REQUESTED WAIVER CONFORMS TO THE COMMISSION'S APPLICABLE CRITERIA AND IS IN THE PUBLIC INTEREST

The Commission has held that temporary, limited tariff waivers are justified when (1) the underlying error, if one occurred, was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem needs to be remedied; and (4) the waiver does not have undesirable consequences, such as disruptive market impacts.²² PJM's waiver request meets each of the criteria.

PJM does not concede that an error has occurred. However, in light of the clarification by the KY PSC that under Kentucky law the meaning of demand response includes energy efficiency, arguably PJM should not have allowed EERs from Kentucky that were not authorized by the KY PSC to participate in the past in its capacity market auctions. To the extent that any error was made, however, it was made in good faith based upon a lack of clarity regarding the interpretation of PJM's prior commitments by the KY PSC. In any event, such error is not directly pertinent to the waiver being sought. PJM is not seeking to disqualify or void any capacity obligations awarded to unauthorized EERs from Kentucky in past auctions. Rather, PJM is seeking a waiver only prospectively in light of the KY PSC's clarification of its interpretations of PJM's commitments.

Second, the requested waiver is of limited scope, and will apply only to unauthorized EER in Kentucky. As explained above, the circumstances of the KY PSC

²¹ PJM expects to implement the waiver through its EER qualification and auction registration processes.

²² See, e.g., *PJM Interconnection, LLC*, 137 FERC ¶ 61,184 at P 13 (2011); *PJM Interconnection, LLC*, 137 FERC ¶ 61,109 at P 11 (2011); *PJM Interconnection, LLC*, 135 FERC ¶ 61,069 at P 8 (2011).

integration orders and the PJM commitments made to the Three Kentucky Utilities are specific, and thus the waiver is proposed to apply only to EER within that state. The waiver is also of limited duration as it will only apply to the Third Incremental Auction for the 2018/2019 Delivery Year, the BRA for the 2021/2022 Delivery Year, and subsequent auctions prospectively, until the Commission rules on the Petition or otherwise provides jurisdictional clarity. This temporary waiver will help address and bridge the regulatory lag while the Commission deliberates on the issues raised in the Petition for Declaratory Judgment and is entirely reasonable and justified under these unique circumstances.

Third, the requested waiver will remedy the concrete problem, given the KY PSC's recent determination that energy efficiency is included in the term demand side response as that term is used in the Stipulation, of PJM potentially being unable to both comply with its commitments made in the integration proceedings of the Three Kentucky Utilities and with the KY PSC Order, as well its obligation to provide services to market participants under its Tariff.

Fourth, PJM does not believe that the requested waiver will have undesirable consequences, such as material disruptive market impacts. PJM will allow such EERs in Kentucky to fulfill their current capacity market obligations, as well as future commitments that exist at this time. PJM does not anticipate that prospectively excluding unauthorized EERs in Kentucky will have any market impact because, as explained

earlier herein, the EERs and the adjustments to the load forecast for energy efficiency resources effectively offset.²³

As noted, in order to implement the requested waiver, PJM requests that the Commission grant this waiver within sixty (60) days.

IV. CORRESPONDENCE AND COMMUNICATIONS

The following individuals are designated for inclusion on the official service list in this proceeding, and for receipt of any communications regarding this filing.

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V. SERVICE

PJM has served a copy of this filing on all PJM Members and on all state utility regulatory commissions in the PJM Region by posting this filing electronically. In accordance with the Commission's regulations,²⁴ PJM will post a copy of this filing to the FERC Filings section of its website, located at <http://www.pjm.com/documents/ferc-manuals/ferc-filings.aspx>, with a specific link to the newly filed document, and will send an email on the same date this filing is made to all PJM Members and all state utility regulatory commissions in the PJM Region²⁵ alerting them of the filing and its

²³ Indeed, the KY PSC would be expected to assert that Kentucky end use customers will benefit from the requested waiver because they will be protected from wholesale market charges resulting from unauthorized EERs.

²⁴ See 18C.F.R §§ 35.2(e) and 385.2010(f)(3).

²⁵ PJM already maintains updates and regularly uses e-mail lists for all PJM members and affected state commissions.

availability on PJM's website. Notwithstanding the foregoing, if the document is not immediately available by using the referenced link, it will be available within 24 hours of the filing. A copy of this filing also will be available on the Commission's eLibrary website located at <http://www.ferc.gov/docs-filing/elibrary.asp> in accordance with the Commission's regulations and Order No. 714.

VI. CONCLUSION

PJM respectfully requests that the Commission grant the temporary, limited waiver requested herein by December 1, 2017.

Respectfully submitted,



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Dated: October 2, 2017