UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Advanced Energy Economy	**)**	**EL17-75-000**

MOTION TO FILE COMMENTS OUT OF TIME AND COMMENTS OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rules 211 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] the Illinois Commerce Commission ("ICC") respectfully submits this Motion to File Comments Out of Time and Comments regarding the petition for declaratory order ("Petition") filed by Advanced Energy Economy ("AEE") in the above-captioned proceeding on June 6, 2017. The ICC timely filed a Notice of Intervention on June 14, 2017, and, therefore, is a party to this proceeding.

I. MOTION TO FILE COMMENTS OUT OF TIME

Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,[2] the ICC respectfully moves to file comments out of time. As noted, the ICC timely filed a Notice of Intervention on June 14, 2017, and, therefore, is a party to this proceeding. Given the ICC's administrative process and other obligations, it was unable to meet the July 19, 2017 comment date for filing substantive comments. Because the outcome of this proceeding could have impacts in Illinois, the ICC believes that its comments on the matters at issue here will help the Commission in its deliberations and are in the public interest. The ICC accepts the record to date

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[1] 18 C.F.R. §385.211 and §385.212.
[2] 18 C.F.R. §385.212.

and does not wish to disrupt proceedings. Rather, the ICC seeks to clarify certain points raised in the Petition. Therefore, good cause exists to grant this motion.[3]

II. AEE'S PETITION

AEE requests that the Commission declare, among other things, it has exclusive jurisdiction over the rates, terms and conditions under which wholesale energy efficiency resources ("EERs") are sold in RTO-operated wholesale markets.[4] AEE states that it filed the Petition because of two events: (1) a proceeding before the Kentucky Public Service Commission ("KPSC") regarding the ability of EERs in Kentucky to participate in PJM markets without first obtaining a tariff or special contract from the KPSC ("KPSC Proceeding");[5] and (2) the stakeholder process initiated by the PJM Interconnection ("PJM"). [6]

AEE claims the PJM initiated stakeholder process will allow states and other retail regulators to create new barriers to EER participation in wholesale electricity markets.[7] AEE also contends that allowing states and other retail regulators to bar participation of EERs in the wholesale markets would significantly harm competition in wholesale electricity markets.[8] AEE's Petition requires the Commission to resolve questions of fact regarding the procedural,

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[3] *See*, *Trans Alaska Pipeline System, et al*., 104 FERC ¶ 61,201, at 61,706 (2003) and *Natural Gas Pipeline Company of America*, 66 FERC ¶ 61,310 (1994) (motion granted for good cause shown).

[4] Petition, at 2.

[5] In the Matter of: 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, KPSC Case No. 2017-00129 (June 6, 2017).

[6] Petition, at 2. *See also*, Problem Statement and Issue Charge, issued April 5, 2017, http://pjm.com/~/media/committees-groups/committees/mic/20170412/20170412-item-10-ee-problem-statementissue- charge.ashx; and Second PJM EER Problem Statement and Issue Charge, issued May 2, 2017, http://pjm.com/~/media/committeesgroups/ committees/mic/20170503/20170503-item-07b-ee-draft-problem-statement-and-issue-charge-redline.ashx.

[7] Petition, at 3.

[8] Petition, at 3-4.

legal and policy grounds for EER participation in wholesale electricity markets, including the role of third party aggregators.[9]

III. COMMENTS

The ICC agrees that the Commission should not permit barriers to competition in the wholesale energy and capacity markets. However, the ICC submits that the current record in this proceeding is insufficient to allow the Commission to formulate policy. Rather than reach a decision regarding the participation of EERs in wholesale markets based solely on AEE's Petition, the Commission should initiate a separate policy docket and conduct an evidentiary hearing to establish a more comprehensive record regarding EERs. In particular, the ICC recommends that the Commission: (1) initiate a broad evidentiary/policy proceeding to establish the formal record necessary to issue a comprehensive policy statement and provide the needed clarity regarding the participation of EERs in wholesale markets; (2) follow established principles of cooperative federalism to develop tailored solutions to address identified negative impacts while preserving the benefits that EERs provide to wholesale markets; and (3) deny AEE's request for a declaration that PJM's use of a stakeholder process to develop tariff provisions addressing EER market participation eligibility is improper.

A. The Commission Should Initiate a Broad Policy Proceeding Regarding the Participation of Energy Efficiency Resources in Wholesale Electricity Markets.

Earlier this year, a combined 3,800 MWs of EERs cleared the capacity auctions for PJM, ISO-New England and MISO.[10] Shortly thereafter, the Kentucky Commission issued an order

[9] Petition, at 4.

[10] *See*, *PJM, 2020/2021 RPM Base Residual Auction Results*, http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx; ISO New England, Key Grid and Market Stats, https://www.iso-ne.com/about/key-stats/markets#fcaresults; and *MISO, 2017/2018 Planning Resource Auction Results*

barring the participation of EERs in PJM markets without first obtaining a tariff or special contract from the Kentucky Commission.[11] In response to these events, PJM issued a Problem Statement wherein it summarized the procedures governing demand response resources ("DRRs") and the right of a Relevant Electric Retail Regulatory Authority ("RERRA") to govern the opt-in/opt-out provisions of Order 719.[12] In the Problem Statement, PJM proposes, *inter alia*, to establish rules for EERs similar to those governing DRRs and the right to opt-out and to release EER providers who previously cleared past auctions from any adverse financial consequences.[13] On the other hand, AEE argues that Order 719 does not apply to EERs nor permit RERRAs to "opt-out" and restrict the sale of EERs into wholesale markets.[14] These events and competing theories indicate a current need for the Commission to clarify its policy with respect to EERs. However, the ICC disagrees with AEE's claim that there is no need for the Commission to conduct an evidentiary hearing[15] as AEE ignores the practical effects of wholesale EER sales in both traditionally regulated and competitive market states.

While the Commission may be able to provide some general guidelines based on the current record, a broader policy/evidentiary proceeding would allow the Commission to fully address multiple concerns regarding the participation of EERs in wholesale markets. An evidentiary proceeding would provide, among other things, a forum for: a) interested parties to advise the Commission of their concerns regarding EERs in wholesale markets; and b) the Commission to develop a legal definition of EERs that could be applied to all wholesale markets

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https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RASC/2017/20170510/20170510%20RASC%20Item%2002a%202017-18%20PRA%20Summary.pdf.

[11] In the Matter of: 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, KPSC Case No. 2017-00129 (June 6, 2017).

[12] Petition, Ex. A.

[13] *Id*.

[14] Petition, at 28.

[15] Petition, at 13.

and to establish criteria necessary for potential resources to qualify for "wholesale EER" status. A broad evidentiary hearing would also allow the Commission to establish the formal record necessary to issue a more comprehensive policy statement that would provide the needed clarity regarding the participation of EERs in PJM and all other wholesale electricity markets.

B. Following An Evidentiary Hearing, The Commission Should Issue a Formal Policy Statement Consistent With Established Principles of Cooperative Federalism.

AEE argues that the Commission should not allow a RERRA to bar, restrict or otherwise condition the participation of EERs in wholesale markets unless the Commission expressly adopts rules or regulations granting them the authority to permit "opt-in/opt-out" authority.[16] The ICC does not believe that the "all or nothing" approach applicable to DRRs is appropriate for EER participation in wholesale markets. The ICC believes the public interest would be better served if the Commission and interested parties were able to develop and tailor specific solutions to specific identified negative impacts. Accordingly, the ICC recommends that the Commission compile a full and complete evidentiary record regarding such impacts.

In the past proceedings involving DRRs, the Commission acknowledged the legitimate concerns of some state regulators about how DRR participation in wholesale markets could impact retail regulation and retail ratemaking.[17] In those proceedings, the Commission stated its intent was to issue wholesale DRR regulations that did not interfere with states' retail demand response programs, or place an undue burden on state and local retail regulatory entities, or raise new concerns regarding federal and state jurisdiction.[18] For these reasons, the Commission

[16] Petition, at 26.
[17] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), ("Order 719") and *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 (2011), ("Order 745"), at P 103.
[18] Order 719, at P 155.

adopted an opt-out rule for regulatory authorities wishing to adopt laws or regulations restricting retail customer participation in third party (i.e., non-utility) demand response aggregation.[19] On review, the United States Supreme Court determined that "[w]holesale demand response as implemented [by the Commission] is a program of cooperative federalism, in which the States retain the last word. That feature of the Rule removes any conceivable doubt as to its compliance with § 824(b)'s allocation of federal and state authority."[20]

AEE asserts that EERs "have no nexus with or connection to state-regulated retail electric utility service" and requests the Commission to strictly prohibit the States from regulating EERs' participation in wholesale markets.[21] However, as with DRRs, it is reasonable to expect that the third-party aggregation and sale of EERs in RTO-operated wholesale markets could cause similar frictions with state utility practices in areas such as load forecasting, resource planning and retail rate-setting. Consistent with principals of cooperative federalism and with these reasons in mind, the Commission should conduct a full evidentiary hearing before drawing a bright and prohibitive line as AEE requests.

With a comprehensive record, the Commission and interested parties will be able to develop and tailor specific solutions to specific identified problems likely rendering the "all or nothing" opt-out rule utilized for DRRs an unnecessary approach to EER participation in wholesale markets. Such opt-outs run contrary to the Commission's goal of developing robust competitive markets and could significantly reduce beneficial competition in wholesale electricity markets. In fact, granting an across-the-board opt-out right may pose an unreasonable barrier to participation in markets by all technically capable resources.

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[19] Order 719, at P154.
[20] *FERC v. EPSA*, 136 S. Ct. 760, 780 (2016).
[21] Petition, at 7.

EER participation in wholesale markets provides numerous benefits such as reducing demand for electricity thereby directly reducing both electricity bills for consumers and wholesale energy prices. Retail-restructured states rely on a robust competitive wholesale market to discipline retail prices. The participation of EERs in wholesale markets broaden those markets, thereby improving market efficiency to the benefit of electricity consumers. When some state regulators bar participation of EERs in the wholesale markets, regardless of the justification, the benefits from the competitive wholesale energy markets decrease to the detriment of consumers. These reductions in competition particularly harm retail-restructured states like Illinois.

Given the benefits that EERs provide, the ICC urges the Commission, in the course of a broader proceeding, to focus on establishing procedures to mitigate any potential negative impacts, while preserving the benefits that EERs provide to wholesale markets.

C. PJM's Use of a Stakeholder Process to Help Craft Potential Solutions to Address EER Impacts on Retail Regulation is Not Improper.

AEE requests that the Commission declare that PJM's use of stakeholder process to develop tariff provisions addressing EER market participation eligibility is improper. AEE argues that PJM's initiative will eventually allow states and other retail regulators to create new barriers to participation in wholesale electricity markets by EERs without any reasonable jurisdictional, market design or reliability justification.[22] The ICC does not support Commission issuance of the requested declaration and disagrees that using the stakeholder process in this way is "improper." Regardless of any irregularities that initiated the stakeholder process, there is nothing "improper" about a stakeholder process on the topic of EER market participation

[22] Petition, at 3.

eligibility. Indeed, stakeholder processes seeking collaborative solutions to market issues should be encouraged. Any concerns regarding particular practices or policies that flow from the PJM stakeholder process are assuaged by the fact that PJM must file any tariff change proposals with the Commission for its review and approval, prior to implementation. Moreover, as is the Commission's practice in such proceedings, all interested parties, including AEE, would have the opportunity to be heard on the matter. Accordingly, AEE's objections to PJM's stakeholder process are not well founded and, therefore, the Commission should deny AEE's request for such declaration.

IV. CONCLUSION

Wherefore, for the reasons discussed above, the ICC recommends that the Commission: (1) initiate a broad evidentiary/policy proceeding to establish the formal record necessary to issue a comprehensive policy statement and provide the needed clarity regarding the participation of EERs in wholesale markets; (2) follow established principles of cooperative federalism to develop tailored solutions to address identified negative impacts while preserving the benefits that EERs provide to wholesale markets; and (3) deny AEE's request for a declaration that PJM's use of a stakeholder process to develop tariff provisions addressing EER market participation eligibility is improper.

/s/ Christine F. Ericson

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ILLINOIS COMMERCE COMMISSION

Dated: August 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 15th day of August, 2017.

/s/ Christine F. Ericson

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