STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to address outstanding issues regarding demand response aggregation for alternative electric supplier load.	)))))	Case No. U-20348

At the November 21, 2018 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On August 13, 2009, DTE Electric Company (DTE Electric), Indiana Michigan Power Company (I&M), the Michigan Electric and Gas Association, and, shortly thereafter, Consumers Energy Company (Consumers) (together, the Electric Utilities) filed an application in Case No. U-16020 seeking an order initiating an investigation into the rules and regulations governing the direct participation of Michigan retail customers into a regional transmission organization (RTO) wholesale electric market, including those customers who choose to participate through aggregators. The Electric Utilities referred to the Federal Energy Regulatory Commission's (FERC) final rule known as Wholesale Competition in Regions with Organized Electric Markets, Docket Nos. RM07-19-000 and AD07-7-000, 125 FERC ¶ 61,071 (2008) (Order 719). Order 719 required RTOs, including the Midcontinent Independent System Operator, Inc. (MISO), to amend

their market rules to allow aggregators of retail customers to bid demand response (DR) resources[1] from retail customers directly into an RTO's organized wholesale energy and ancillary services markets in accordance with certain criteria. Order 719 provided that an RTO must allow bids into its markets "unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate." Order 719, pp. 12-13. The Electric Utilities stressed that MISO's filing did not address how aggregators of retail customers will interface with the load serving entities (LSEs) responsible for serving the load of the affected customers.

In the September 29, 2009 order in Case No. U-16020, the Commission granted the request for an investigation and directed that the participation of Michigan retail customers in any RTO wholesale market be temporarily restricted during the pendency of the investigation. In an order issued on January 25, 2010, in that docket, the September 29, 2009 order was clarified to indicate that all curtailment service provider (CSP) contracts with retail customers existing on September 29, 2009, would remain in effect during the pendency of the Commission's investigation.

At the conclusion of the investigation, on December 2, 2010, the Commission issued an order in Case No. U-16020 finding that Michigan retail customers or aggregators of retail customers shall not participate in any RTO wholesale power markets until further order of the Commission. The Commission also set deadlines for further proceedings. On February 22, 2011, the

[1] The FERC defines demand response as "Changes in electric usage by demand-side resources from their normal consumption patterns in response to changes in the price of electricity over time, or to incentive payments designed to induce lower electricity use at times of high wholesale market prices or when system reliability is jeopardized." Assessment of Demand Response & Advanced Metering, FERC Staff Report, August 2006, pp. vi-viii. DR programs incentivize customers (residential, commercial, and industrial) to shift electric consumption from times when demand is high (hot summer afternoons) to times when demand is lower (nights and weekends). DR programs can benefit all utility customers by deferring or displacing the need for additional generating resources.

Commission issued an order in that docket finding that existing CSPs may complete the term of any existing contracts, but that no additional CSPs should be authorized to enter into new or renewed agreements.

On March 15, 2011, the FERC issued its Final Rule in Docket RM10-17, "Demand Response Compensation in Organized Wholesale Markets," 134 FERC ¶ 61,187 (Order 745), which established new standards for the compensation of DR resources in organized wholesale markets. In Order 745, the FERC ordered RTOs to pay DR participants the full locational marginal price during periods when a net benefits test was satisfied. In addition, the FERC's DR compensation method allocated costs to all entities that purchase power in the relevant energy market.

On May 23, 2014, the D.C. Circuit vacated Order 745. *Federal Energy Regulatory Comm v Electric Power Supply Ass'n,* 735 F3d 216 (CA DC 2014), *rev'd,* ___ US ___; 136 S Ct 760; 193 L Ed 2d 661 (2016). The Court held that Order 745 violated the Federal Power Act, 16 USC 791a *et seq.* (FPA), by invading the exclusive right of states to regulate retail rates. However, on January 25, 2016, the U.S. Supreme Court reversed the D.C. Circuit's decision and remanded the matter to the Court of Appeals for further proceedings consistent with the Supreme Court's opinion. *Federal Energy Regulatory Comm v Electric Power Supply Ass'n,* ___ US ___; 136 S Ct 760; 193 L Ed 2d 661 (2016). The Supreme Court found that Order 745 did not run afoul of the FPA because the DR practices at issue directly affect wholesale rates, and Order 745 did not regulate retail sales in violation of 16 USC 824(b). *Id.*

In finding that Order 745 did not regulate retail rates, the Court partially relied upon the continuing ability of the states to prohibit participation in the wholesale DR market within their boundaries, stating:

> [T]he Rule [Order 745] allows any State regulator to prohibit its consumers from making demand response bids in the wholesale market. [Citations omitted.] Although claiming

> the ability to negate such state decisions, the Commission [FERC] chose not to do so in recognition of the linkage between wholesale and retail markets and the States' role in overseeing retail sales. See 76 Fed. Reg. 16676, ¶¶ 112–114. The veto power thus granted to the States belies [the appellant's] view that FERC aimed to "obliterate[ ]" their regulatory authority or "override" their pricing policies. Brief for Respondents 29, 33. And that veto gives States the means to block whatever "effective" increases in retail rates demand response programs might be thought to produce. Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word.

136 S Ct at 779-780. Thus, federal regulations continue to provide that RTOs shall accept bids from DR resources on a basis comparable to any other resource that is at or below the market-clearing price, "unless not permitted by the laws or regulations of the relevant electric retail regulatory authority." 18 CFR 35.28(g)(1)(i)(A).

In light of the U.S. Supreme Court's decision and the related filings in Case No. U-16020, on March 29, 2016, the Commission issued an order in that docket (March 29 order) retaining the ban that was previously placed into effect, prohibiting "Michigan retail electric customers (either individually or through aggregators) of Commission jurisdictional electric utilities [from] bidding demand response resources into [RTO] wholesale markets." March 29 order, p. 8. The Commission indicated the following continuing concerns: (1) operational issues for Michigan jurisdictional utilities, on both the real-time and long-term bases, especially with respect to capacity planning and procurement as well as emergency operations; (2) lack of Commission oversight of third-party aggregators; (3) the possibility that customers may enroll a DR resource in more than one DR program; and (4) cross-subsidization. March 29 order, p. 7. The Commission stated that it did not intend to foreclose the possibility of third-party aggregation forever, but that, for the present, the prohibition should remain in place. The March 29 order was affirmed by the Michigan Court of Appeals. *In re Application of Detroit Edison Co re Licensing Rules*,

unpublished opinion per curiam of the Court of Appeals, issued February 8, 2018 (Docket No. 332605).

In the September 15, 2017 order in Case No. U-18369, the Commission established a framework for review and approval of utility DR programs (September 15 order). In that order, the Commission affirmed that alternative electric suppliers (AESs) may offer DR programs to their customers through a CSP or other third-party aggregator as long as the AES is the LSE that bids the DR into the wholesale market. September 15 order, pp. 5, 9-10. This is akin to a utility contracting for DR through an aggregator and the utility, as the LSE, bidding it into the market. The Commission made this determination in the context of finding that the Commission will continue to review DR programs offered by AESs as part of the capacity demonstration process required by MCL 460.6w. The Commission declined to decide whether an AES may use the DR capacity of another AES to satisfy that demonstration, finding the issue to be outside the scope of the Case No. U-18369 proceeding.

In the November 21, 2017 order on rehearing in Case No. U-18197, the Commission further clarified that an AES can use DR capacity resources from another AES's customers to meet its forward capacity demonstration obligations under certain circumstances, and provided three criteria for doing so (November 21 order).[2] November 21 order, pp. 13-14.

The Commission is aware that several important issues have been left unaddressed by the March 29, September 15, and November 21 orders, including whether a non-AES aggregator or other third party may bid DR into the wholesale market, and the appropriate treatment of aggregated DR that is not associated with the capacity demonstration requirements of MCL

[2] The three criteria are: "a) Affidavits supporting the resource are provided by both AESs involved, b) The demonstrating AES provides evidence that the customer's distribution utility was notified of the arrangement, and c) Customer contracts are made available for the Staff to review." November 21 order, p. 14.

460.6w. The Commission notes that, as discussed above, federal regulations currently permit states to ban DR aggregation in their jurisdictions, but the FERC has also found that states may not ban or restrict third-parties from accessing wholesale markets for aggregated energy efficiency resources. Order on Petition for Declaratory Order, Docket No. EL 17-75-000, 161 FERC ¶ 61,245, at P 57 (2017).

With this background, the Commission seeks to establish a process for DR aggregation for customers who are served by AESs that: (1) aligns with federal requirements and policy directions (on fundamental jurisdictional questions as well as technical specifications for qualifying DR resources under the RTO's tariff); (2) ensures proper tracking, particularly to avoid double counting in the state's capacity demonstration programs or other gaps that could ultimately affect electric reliability; (3) identifies any unnecessary barriers to third-party aggregation to make it scalable; and (4) works through issues in a collaborative manner, including any state and federal jurisdictional questions, to provide a template for scaling up aggregation that may also accommodate other applications. To that end, the Commission directs the Commission Staff (Staff) to work with third party DR aggregators, AESs, AES customers, regulated utilities, MISO, and other stakeholders on issues related to:

1. whether the ability to aggregate DR for customers of Michigan AESs for bidding into RTO markets should be limited to AESs, or be extended to non-AES third parties such as CSPs;[3]
2. how to adequately track DR resources being used for capacity demonstration purposes under MCL 460.6w;

[3] This bidding could occur in wholesale energy and ancillary markets, as well as capacity markets, and would not necessarily relate to the capacity demonstration process.

3. the appropriate treatment of aggregated DR outside the capacity demonstration framework that may affect capacity requirement allocations to LSEs, such as aggregated DR for capacity, ancillary services, and/or energy; and
4. what are appropriate reporting requirements related to DR and aggregation, and whether the capacity demonstration filing requirements need revision.

The Staff shall also examine the status of DR aggregation in Michigan over the 2017-2019 time period with a view to identifying barriers or other issues warranting guidance from the Commission. The Commission directs the Staff to file a report in this docket detailing its findings and recommendations no later than May 30, 2019.

THEREFORE, IT IS ORDERED that the Commission Staff shall commence a process for examining the demand response aggregation issues identified in this order, and shall file a report detailing findings and recommendations for the Commission in this docket no later than May 30, 2019.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of November 21, 2018.

Kavita Kale, Executive Secretary

P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-20348

County of Ingham)

Lisa Felice being duly sworn, deposes and says that on November 21, 2018 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

Lisa Felice

_____

Lisa Felice

Subscribed and sworn to before me
this 21st day of November 2018

Angela P. Sanderson

_____

Angela P. Sanderson
Notary Public, Shiawassee County, Michigan
As acting in Eaton County
My Commission Expires: May 21, 2024

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