



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Energy Efficiency Resources Must Stay In The Mix

By **Richard Drom**

Law360, New York (June 6, 2017, 12:11 PM EDT) -- A proposal by the regional transmission organization PJM Interconnection LLC threatens to create new barriers to wholesale market participation by advanced energy technologies.

Specifically, PJM will be discussing a proposal at the June 7, 2017, Market Implementation Committee (MIC) meeting to develop rules that would exclude energy efficiency resources (EERs) from competing in PJM's capacity market, if a state commission or other retail regulator prohibits wholesale EER activities in its jurisdiction.



Richard Drom

If those rules are developed and are ultimately approved by the Federal Energy Regulatory Commission (FERC), then a significant barrier to the participation of EERs in the PJM markets would be created. More importantly, it would establish a dangerous precedent of creating additional barriers for other advanced energy technologies in wholesale electricity markets.

EERs are created by capturing the system reliability benefits of the electricity savings achieved through the use of more energy efficient products. In PJM's market, and in the markets of other RTOs/ISOs, the permanent electricity savings created by the sale and use of energy efficient products (e.g., lighting, modern HVAC, high efficiency appliances, etc.) can be bundled together as EERs.

EERs compete alongside generators and demand response resources (DRs) to provide needed resource adequacy capacity in PJM's reliability pricing model. EERs must meet rigorous verification requirements to ensure that they will deliver on promised energy savings, to provide the equivalent of physical generation capacity to the system, like other capacity resources.

EERs are an important resource in the wholesale competitive electricity markets, in part because they contribute to the reliability of the grid and increase competition in the capacity market. This leads to lower overall capacity costs for consumers. The ability to capture the grid benefits of EERs and sell them in the wholesale market also lowers the cost of purchasing energy efficient products.

In April of this year, PJM proposed to begin the process of drafting new market rules that would: (1) exclude EERs from participating in its markets in areas where a state utility commission or other retail regulator restricts customer participation in wholesale EER activities; and (2) remove from its markets any existing EERs (even those that have already cleared a past capacity auction and have a position for a future delivery year) if a

state commission or other retail regulator in the locality where they are located has subsequently restricted EER participation in the wholesale markets.

To move forward, PJM's proposal must be approved in its stakeholder process, where various industry sectors within PJM (including incumbent generators, utilities, etc.) will consider and vote on the potential market rule changes.

Without any legal or logical support, the EER Problem Statement proposes "to recognize RERRA authority" over EERs "on a similar basis" to FERC's Order No. 719-A. However, Paragraph 276 of Order No. 719 expressly states that it does not address EERs (e.g., "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.")

If it is finalized and approved by FERC, PJM's proposal could significantly impede the participation of EERs in PJM's marketplace without any demonstration that reliability or market concerns require such a result. In 2008, FERC issued Order No. 719, which allowed state commissions to narrowly limit retail customer participation in wholesale DR programs, responding to claimed reliability, consumer protection and regulatory jurisdiction concerns.

There is no basis, however, to extend this precedent to EERs. Although EERs permanently reduce retail end-use consumption, the creation and wholesale market participation of EERs do not involve or implicate any state-regulated retail utility service; further, unlike DRs, EERs are not dispatched by a utility or by an aggregator of retail customers.

The EER Problem Statement is based on the faulty premise that EERs are somehow subject to the same Order No. 719 requirements as DRs, although the only purported rationale is that "a certain RERRA is now considering placing requirements" on EERs.

First, no relevant electric retail regulatory authority (RERRA) has, to date, attempted to assert jurisdiction over EERs. Second, PJM has presented no evidence that an RERRA would actually have the legal right to assert jurisdiction over EERs. Third, PJM has presented no evidence that even if an RERRA could assert such jurisdiction that there are any valid operational or market reasons for allowing RERRAs to do so.

As a result, the EER Problem Statement is fatally flawed and should be rejected by the MIC stakeholders. Barring EER participation based solely on the determination of a state commission or other retail regulator would set an alarming precedent for the future participation of other small-scale alternative and advanced-energy technologies in FERC's wholesale markets.

Like EERs, energy storage, distributed energy and other emerging technologies all help customers manage their end-use consumption. Limiting EER participation in the markets would be a harbinger of limiting participation of these other technologies in the wholesale markets, which could create a balkanized energy market where individual states adopt conflicting policies for such technologies.

In addition, barring or restricting EER participation in PJM's capacity market would deny consumers of the reliability, environmental and cost benefits that EERs currently provide, with no demonstrated offsetting benefits. Given the potential harms that PJM's proposal could have on EERs and other advanced energy technologies across the RTO/ISO markets, a coalition of parties has requested that FERC provide a declaratory ruling regarding this matter.

A Petition for a Declaratory Order was filed at FERC on June 2, 2017, by the Advanced Energy Economy (AEE) to request that FERC confirm that: (1) allowing retail regulators to

determine the ability of EERs to participate in the RTO/ISO markets violates existing law and policy; and (2) an RTO/ISO stakeholder process is an inappropriate forum for giving retail regulators such authority.

At the June 7 MIC meeting, PJM stakeholders will have the opportunity to vote by a simple majority to defeat the EER Problem Statement, and thus preserve the status quo. If the PJM stakeholders fail to defeat the Problem Statement, PJM would develop tariff language to grant authority over EERs to state commissions.

Energy markets would then have to rely upon FERC to confirm that it, not individual states, has primary jurisdiction over market activities that would significantly impact competitive wholesale energy markets, consistent with the U.S. Supreme Court's 2016 decisions in *FERC v. EPSA* and in *Hughes v. Talen Energy*.

Richard A. Drom is a member of Eckert Seamans Cherin & Mellott LLC in Washington, D.C., with expertise on wholesale energy markets, FERC regulations, regulatory compliance, regional transmission organizations, demand response compensation, resource adequacy and capacity market issues.

Disclosure: The author is representing Advanced Energy Economy, which filed the FERC Petition for a Declaratory Order regarding the subject EER Problem Statement.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2017, Portfolio Media, Inc.