

their jurisdiction and that Order 719, that allowed RERRAs to opt-out of participation of Demand Response (DR) resources, did not apply to EERs.⁴

On July 19, 2017, the OMS filed a Protest⁵ asking that the Petition be denied due to the myriad of disputed issues contained in the filing. In the alternative, the OMS provided the basis for the Commission to adopt the Order 719 protections established for DRs to EERs, noting the similarities between the two types of resources in the impacts they have on the planning, operations, and assessment of retail jurisdictional energy efficiency programs. Offering an additional alternative, the OMS suggested that the Commission create a broader forum to address the far-reaching and important jurisdictional matters raised in the docket.

Then, on August 17, 2017, AEE filed its Answer to address the concerns raised by the OMS and other parties about the unavoidable interplay between the Wholesale EERs AEE describes and the state and local retail energy efficiency programs. OMS believes that AEE is either misunderstanding or misstating the important concerns raised by OMS and others and offers the following information to provide additional clarification.

III. Response

The attempted clarifications made by AEE in their Answer do not remedy the important concerns raised by OMS and others in this docket. Similar to AEE's Petition, the Answer attempts to simplify a complex policy issue with jurisdictional implications. OMS renews its request that the Commission dismiss AEE's Petition, or, for the reasons stated below, affirmatively apply the opt-out provision established in Order 719 for Wholesale DR to Wholesale EER. In the alternative, a forum should be established to vet the vast concerns raised

⁴Advanced Energy Economy, Pet. for Declaratory Order, EL17-75-000, 9-12 (June 5, 2017) [hereinafter "AEE Pet."].

⁵ Protest of the Organization of MISO States, EL17-75-000 (July 19, 2017)[hereinafter "OMS Protest"].

in this docket through a proceeding before the Commission. Nonetheless, there are several issues raised in AEE's Answer that must be addressed to ensure a complete record in this matter.

1. AEE's Answer Fails to Recognize Differences Between Jurisdictions with Retail Competition and Vertically Integrated Regulatory Structures

Most of the examples and assertions made by AEE related to the utilization of Wholesale EERs and their impact on retail programs in both the Petition and Answer are specific to PJM, yet both pleadings seek to apply the requested declarations nationally. This approach fails to take into account important policy differences across the country, including retail competition or vertical integration, state and local energy efficiency policies, and regional capacity market constructs. The underlying policy context in which the Wholesale EERs operate matters greatly and must be considered in the evaluation of AEE's requests.

For instance, AEE claims that competition from Wholesale EERs in the capacity market is additive to utility efficiency programs and will benefit customers with lower costs of energy, capacity, and efficient products.⁶ However, in the MISO footprint, approximately 90% of the load is in vertically integrated jurisdictions,⁷ and those entities mainly meet their capacity needs through long-term planning processes, which include self-supply, bilateral contracting, and competitively-bid energy efficiency programs. These processes are then supplemented by a prompt (one-year forward) capacity auction.⁸ The competition AEE touts does not take place in a wholesale capacity market in MISO. It occurs during the development of utility programs at the retail level through competitive bidding processes and other mechanisms. As described

⁶ AEE Answer at 14.

⁷ See <http://www.misomtep.org/long-term-resource-assessment/>.

⁸ See e.g. MISO, 2017-2018 Planning Resource Auction Results (May 10, 2017)(available at: <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RASC/2017/20170510/20170510%20RASC%20Item%2002a%202017-18%20PRA%20Summary.pdf> last visited September 11, 2017)[hereinafter 2017/2018 MISO PRA Results].

below, allowing third-parties to disrupt the retail programs outside of the approved planning process has the potential to harm those programs. AEE further states that added visibility and transparency is a benefit of Wholesale EERs.⁹ In prompt markets, like MISO, there is no visibility into future years. Wholesale EERs would present themselves two months before the next Planning Year and there is no reasonable way to predict where they would occur or in what quantity.

Retail choice jurisdictions, like many of the states in PJM and some in MISO, may wish to have these resources participate in the markets, and under OMS's request that the Order 719 opt-out provision be applied to Wholesale EER, they may. In fact, a number of retail choice states have embraced Wholesale DR participation and have already done the same with Wholesale EERs. However, this highlights the reason a request to address a specific issue in a single Regional Transmission Organization (RTO) should not be done through a declaratory order process.

These policy differences also have an impact on the interaction between retail and wholesale energy efficiency programs. OMS enumerated the consequences of Wholesale EER participation in local utility territories in its Protest.¹⁰ These issues are particularly acute for utilities in vertically integrated jurisdictions but AEE's filings do not take these differences into account.

⁹ AEE Answer at 21.

¹⁰ OMS Protest at 7-11.

2. *Nothing in AEE's Answer Addresses the Negative Impacts Wholesale EERs will have on Retail Energy Efficiency Programs*

AEE states that the “Petition does not target successful energy efficiency efforts of states and retail utilities,” and that no participant has demonstrated harm to utility programs.¹¹ In fact, AEE focuses its Answer on the assertion that Wholesale EERs are created outside of the utility efficiency programs and that their Petition “only” concerns itself with Wholesale EERs.¹² But this misses the critical point that utility efficiency programs, particularly in vertically integrated states, are created without the knowledge or expectation of the Wholesale EERs that AEE seeks to protect in this proceeding. The concern *is* that they are created outside of the utility efficiency programs. As the OMS explained in its Protest, without knowledge and coordination, energy efficiency programs are being created and administered by state regulators and jurisdictional utilities, the success of which is based on what is expected in that state or local utility footprint.¹³ That fact that these load-reduction programs are created outside of that process doesn’t solve the problem, it *is* the problem. AEE fails to address the logical nexus between retail and wholesale, particularly in vertically integrated states like those in MISO.

AEE also states that existing RTO tariffs and manuals address the concerns about negative impacts to “load-serving entity planning and operations, retail energy efficiency programs, and other matters.”¹⁴ To support this, AEE points out that Wholesale EERs have participated in PJM (a deregulated market) and “other,” unnamed, RTOs, for several years.¹⁵ To the point above about jurisdictional and regional differences, Wholesale EERs cleared the MISO

¹¹ AEE Answer at 3.

¹² *Id.* at 15.

¹³ OMS Protest at 9-11.

¹⁴ AEE Answer at 19-20.

¹⁵ *Id.* at 20.

PRA for the first time in 2017.¹⁶ Further, the “add back” provisions discussed in AEE’s Answer¹⁷ apply only to PJM and do not remedy the forecasting concerns in a one-year prompt auction like the one utilized in MISO.

Finally, and possibly most importantly, AEE characterizes the jurisdictional concerns raised by the OMS and others incorrectly. The concern is not infringement on the ability of retail utilities to participate in wholesale markets, it’s the impact of third-party Wholesale EER on the policies and programs established at the retail level. OMS is not trying to assert jurisdiction over the “manufacturers and retailers of energy efficient products, those who finance installation of such products, and others...”¹⁸ Contrary to AEE’s Answer, the concern raised by the OMS and others is that the Petition *does* “risk upending state-regulated retail energy efficiency programs or the ability of an RERRA to regulate such programs.”¹⁹

3. *AEE’s Attempt to Distinguish Wholesale DR and EER for the Purpose of Rejecting the Logic of Applying Order 719 to Wholesale EER Falls Short*

While Order 719 did not apply the opt-out provisions to Wholesale EERs at the time it was issued, both technologies present similar impacts to the local utility system, and thus the same logic should be applied. AEE presents two arguments on why the opt-out provision for DR from Order 719 should not be applied to EER. First, AEE states that, “[w]holesale EERs are employed without direction from the utility or provider and, once employed, require no ongoing communication or relationship with the customer” and “do not involve any communications or business relationships with end-use customers or their regulated retail utility, and thus do not present the same coordination or regulatory authority issues that motivated the adoption of the

¹⁶ 2017/2018 MISO PRA Results at 11.

¹⁷ AEE Answer at 21.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 7.

opt-out regime in Order No. 719 with respect to DR.”²⁰ Taken in turn, the ongoing relationship with the customer is not the impact to the utility program for DR or EER that is problematic. It is shifting customer load without knowledge or the ability to incorporate the changes into utility planning and forecasting, which applies equally to DR and EER. Furthermore, and as discussed in Section 2.B of the OMS Protest, the need for coordination and regulatory authority issues are the reasons the OMS sought the opt-out provision for Wholesale EER originally.

AEE also characterized the Order 719 opt-out provisions as a “broad barrier” to participation for Wholesale EER.²¹ However, not even AEE claims the DR opt-out provisions have been a broad barrier to participation. This is likely due to the well understood pervasiveness of DR in the PJM capacity market. Even in MISO, where the majority of states have utilized the opt-out created by Order 719, the most recent MISO PRA cleared over 3,300 MW of DR.²² Furthermore, an uneven playing field between similarly situated technologies would be created if Wholesale DR and Wholesale EER are treated differently within wholesale markets. If the Order 719 opt-out authority for Wholesale DR is not extended to Wholesale EER, a clearly unjust and unreasonable technology preference will be established.

IV. Closing

The OMS appreciates the opportunity to address the misstatements, misunderstandings, and/or inaccuracies in AEE’s Answer. For the reasons stated above, the OMS reiterates its request that the Petition be denied. Appropriate alternatives include adopting the Order 719 opt-out provision for Wholesale EERs or initiating a technical conference or other policy forum to evaluate the multitude of issues raised in this docket.

²⁰ *Id.* at 19.

²¹ *Id.* at 13.

²² 2017/2018 MISO PRA Results at 11.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 14th day of September 2017.

Tanya Paslawski