

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of )  
**THE DETROIT EDISON COMPANY, INDIANA** )  
**MICHIGAN POWER COMPANY, THE MICHIGAN** )  
**ELECTRIC AND GAS ASSOCIATION** and )  
**CONSUMERS ENERGY COMPANY** to initiate an )  
investigation of the licensing rules and regulations )  
needed to address the effect of the participation of )  
Michigan retail customers, including those associated )  
with aggregators of retail customers, in regional )  
transmission organization wholesale markets. )  
\_\_\_\_\_ )

Case No. U-16020

At the March 29, 2016 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman  
Hon. John D. Quackenbush, Commissioner  
Hon. Norman J. Saari, Commissioner

**ORDER CLOSING DOCKET**

On August 13, 2009, DTE Electric Company, f/k/a The Detroit Edison Company (DTE Electric), Indiana Michigan Power Company (I&M), and the Michigan Electric and Gas Association (together, the Electric Utilities) filed an application 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 in conjunction with aggregators of retail customers. Additionally, the Electric Utilities were seeking a determination regarding necessary licensing requirements and appropriate rules and regulations related to the activities of these customers. On

August 21, 2009, Consumers Energy Company (Consumers) filed a letter of support for the application and joined the filing parties in seeking relief from the Commission.<sup>1</sup>

In support of their request, the Electric Utilities stated that on October 17, 2008, the Federal Energy Regulatory Commission (FERC) issued a final rule known as Wholesale Competition in Regions with Organized Electric Markets, Docket Nos. RM07-19-000 and AD07-7-000, 125 FERC P 61,071 (2008) (Order 719). According to the Electric Utilities, Order 719 required RTOs, including the Midcontinent Independent System Operator, Inc., f/k/a Midwest Independent Transmission System Operator, Inc. (MISO), to amend their market rules to allow aggregators of retail customers to bid demand response resources from retail customers directly into an RTO's organized wholesale energy and ancillary services markets in accordance with certain criteria. The Electric Utilities indicated that 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. The Electric Utilities further stated that, as part of a compliance filing made on June 17, 2009 (Docket Nos. ER08-394-007 and ER08-394-009), MISO also indicated that "Load Modifying Resource Market Participants (LMR MPs)" would be able to participate in the MISO markets. They pointed out that an LMR MP included any MISO market participant having a right to control its energy demand or energy production.

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<sup>1</sup> In recognition of its support for the filing and its joining in the request for relief from the Commission, Consumers has been added to the caption of this proceeding. All references to the Electric Utilities are meant to include Consumers.

The Electric Utilities further stated that PJM Interconnection, LLC (PJM) filed proposed tariff revisions to implement Order 719 on February 10, 2009, and that protests filed in response to the February 10 filing raised the question of whether PJM's proposed tariff properly interpreted Order 719. The Electric Utilities questioned if there were legitimate concerns whether such proposed tariffs placed an undue burden on LSEs and state commissions.

The Electric Utilities requested that the Commission initiate an investigation regarding appropriate rules and regulations for the direct participation of Michigan retail customers into an RTO wholesale market. Pending completion of this investigation, the Electric Utilities suggested that the Commission temporarily restrict the participation of Michigan retail customers in RTO wholesale markets. According to the Electric Utilities, pending the outcome of this proceeding, only LSEs within Michigan should be allowed to aggregate retail customers to whom they supply electric retail service for RTO wholesale market participation.

In an order issued on September 29, 2009, the Commission found that the relief requested by the Electric Utilities should be granted. The Commission ordered an investigation to be commenced into the appropriate rules and regulations for the direct participation of Michigan retail customers into an RTO wholesale market. Interested persons were permitted to submit comments in this docket. Finally, the Commission ordered that the participation of Michigan retail customers in any RTO wholesale market shall be temporarily restricted during the pendency of the Commission's investigation.

On October 29, 2009, EnerNOC, Inc., filed a petition to intervene, and a petition for rehearing and clarification pursuant to 1999 AC, R 460.17403 (now Mich Admin Code, R 792.10437 (Rule 437)). On November 19, 2009, I&M and the Commission Staff (Staff) filed supportive responses to the petition for rehearing.

In an order issued on January 25, 2010, EnerNOC's petition for rehearing and clarification was granted, and the Commission's 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 in this matter.

On December 2, 2010, the Commission issued an order (December 2 order) addressing the filed comments. In so doing, the Commission held 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 allowing further proceedings affecting Michigan utilities to commence after the completion of the FERC's matters investigating relevant tariffs for PJM and MISO. Specifically, the Commission ordered that within 30 days of the issuance of the final FERC orders in Docket ER09-1049 for MISO, and Docket ER09-701 for PJM, the Commission Staff shall convene a meeting with Michigan electric utilities with distribution exceeding four million megawatt-hours (MWh) in the previous fiscal year to discuss issues relative to conforming to the final orders. Further, within 120 days of the issuance of those final FERC orders, each Michigan electric utility with distribution exceeding four million MWhs in a fiscal year was required to file a contested case proceeding proposing tariffs governing the participation of retail customers of the utility in wholesale power markets.

On January 3, 2011, EnerNOC filed a petition for rehearing of the December 2 order pursuant to Rule 437. On January 24, 2011, the Staff and I&M filed responses to EnerNOC's petition for rehearing.

On February 22, 2011, the Commission granted EnerNOC's petition for rehearing on the issue of the continuing participation of the existing CSPs, and found that such 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” (Order 745), which established new standards for the compensation of demand response resources in organized wholesale markets. In Order 745, the FERC ordered RTOs to pay demand response participants the full locational marginal price (LMP) during periods when a net benefits test (ensuring that accepted bids actually save customers money) was satisfied. In addition, the FERC’s demand response resources compensation method allocated costs to all entities that purchase power in the relevant energy market.

In the aftermath of the Order 745 issuance, on December 6, 2012, the Commission issued an order setting aside the portion of the December 2, 2010 order requiring Michigan utilities with distribution exceeding four million MWhs to file proposed tariffs in contested case proceedings, and re-opened this proceeding for additional public comments. Comments were submitted by EnerNOC, Enbala Power Networks USA Inc. (EPN), the Association for Businesses Advocating Tariff Equity (ABATE), DTE Electric, I&M, and Consumers. At that time (early 2013), DTE Electric, Consumers, and I&M supported continuation of the ban on participation; EPN and ABATE advocated termination of the ban; and EnerNOC proposed that this docket be closed and the parties work collaboratively.

The Electric Power Supply Association (EPSA) and four other energy industry associations challenged Order 745 in the U. S. Court of Appeals for the D.C. Circuit. On May 23, 2014, the D.C. Circuit vacated the FERC’s decision in Order 745. *Federal Energy Regulatory Comm v Electric Power Supply Ass’n*, 735 F3d 216 (CA DC 2014), *rev’d*, 577 US \_\_\_; 136 S Ct 760 (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. The Court also found that Order 745 violated the Administrative Procedure Act because the FERC failed to answer counterarguments to its premise that Order 745's demand response pricing would make electricity rates more just and reasonable, making the order arbitrary and capricious. *Id.*

On May 4, 2015, the U.S. Supreme Court announced that it would hear the appeal of the D.C. Circuit's ruling. In so doing, the U. S. Supreme Court indicated that it was considering the following two questions:

*Whether the Federal Energy Regulatory Commission reasonably concluded that it has authority under the Federal Power Act, 16 U.S.C. § 791a et seq., to regulate the rules used by operators of wholesale-electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates?*

and

*Whether the Federal Energy Regulatory Commission's jurisdiction over interstate markets for wholesale sales of electric energy under sections 201, 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824(b)(1), 824d and 824e, provides the Commission with authority to regulate participation in those markets by demand response resources?*

135 S Ct 2049 (2015).

On January 25, 2016, the U.S. Supreme Court, in a 6-2 vote, reversed the D.C. Circuit's May 23, 2014 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*, 577 US \_\_\_\_; 136 S Ct 760 (2016). The Supreme Court found that Order 745 did not run afoul of the FPA because the demand response practices at issue directly affect wholesale rates, and Order 745 did not regulate retail sales in violation of 16 USC 824(b). *Id.* Finally, the Court found that the FERC's decision to compensate demand response resource providers at LMP was not arbitrary and capricious, because the FERC provided a detailed explanation of its reasoned decisionmaking.

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 demand response 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 EPSA'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 779-780. Thus, federal regulations continue to provide that RTOs shall accept bids from demand response 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 filings in this docket, the Commission remains unpersuaded that it should now lift the ban that was placed into effect by the prior orders in this docket. The following concerns were raised regarding aggregation of demand response resources for sale in the wholesale market: (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 demand response resource in more than one demand response program; and (4) cross-subsidization. The comments did not adequately address these concerns, and therefore the Commission believes the prohibition should remain in place. The Commission does not intend by this order to foreclose the possibility of third party

aggregation forever, but finds that, for the present, the prohibition should remain in place. The Commission agrees with EnerNOC that closing this docket will provide an opportunity for meaningful conversations on demand response outside of a contested case. The Commission is also focused on addressing demand response opportunities and barriers, and time-of-use rates, through other proceedings, such as today's order in Case No. U-17936 *et al.*

THEREFORE, IT IS ORDERED that Michigan retail electric customers (either individually or through aggregators) of Commission jurisdictional electric utilities are prohibited from bidding demand response resources into regional transmission operator wholesale markets, and this docket is closed.

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



Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at [mpscedockets@michigan.gov](mailto:mpscedockets@michigan.gov) and to the Michigan Department of the Attorney General - Public Service Division at [pungp1@michigan.gov](mailto:pungp1@michigan.gov). In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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John D. Quackenbush, Commissioner

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Norman J. Saari, Commissioner

By its action of March 29, 2016.

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Mary Jo Kunkle, Executive Secretary

# PROOF OF SERVICE

STATE OF MICHIGAN )

Case No. U-16020

County of Ingham )

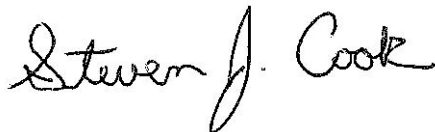
Lisa Felice being duly sworn, deposes and says that on March 29, 2016 A.D. she served a copy of the attached Commission order by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.



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Lisa Felice

Subscribed and sworn to before me  
This 29th day of March 2016



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Steven J. Cook  
Notary Public, Ingham County, Michigan  
As acting in Eaton County  
My Commission Expires: April 30, 2018

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