

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Participation of Distributed Energy Resource)
Aggregations in Markets Operated by Regional)
Transmission Organizations and Independent)
System Operators)

Docket No. RM18-9-002

**REQUEST FOR REHEARING OF THE NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS**

Pursuant to section 313 of the Federal Power Act (“FPA”)¹ and Rules 212 and 713 of the Federal Energy Regulatory Commission (“FERC” or “Commission”) Rules of Practice and Procedure,² the National Association of Regulatory Utility Commissioners (“NARUC”) respectfully requests rehearing of the Commission’s March 18, 2021 order in the above-captioned proceeding.³

I. INTRODUCTION

Pursuant to 16 U.S.C. § 824e,⁴ a November 17, 2016 Notice of Proposed Rulemaking (“NOPR”)⁵ proposed amending FERC’s regulations to remove barriers to the participation of electric storage resources and distributed energy resource (“DER”) aggregations in the capacity, energy, and ancillary service markets operated by regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) (“RTO/ISO markets”). When it issued a final rule in

¹ 16 U.S.C. § 8251.

² 18 C.F.R. §§ 385.212 and 385.713 (2018).

³ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021) (“Order No. 2222-A”).

⁴ 16 U.S.C. § 824e (2012).

⁵ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 81 Fed. Reg. 86,522 (Nov. 30, 2016) (Docket Nos. RM16-23 and AD16-20) (“NOPR”).

February 2018 requiring that each RTO/ISO revise its tariff to establish a participation model that would facilitate electric storage resources taking part in the RTO/ISO markets,⁶ FERC announced a new docket, Docket No. RM18-9-000, to explore DER aggregation reforms proposed in the 2016 NOPR because the record was deficient.⁷ In September 2020, FERC issued a final rule directing each RTO/ISO to revise its tariff to ensure that its market rules facilitate the participation of distributed energy resource aggregations.⁸ Responding to requests for rehearing and clarification, FERC amended that final rule by issuing Order No. 2222-A in March 2021.⁹ Among the changes and clarifications in Order No. 2222-A, the Commission eliminated the opt out provision for demand response resources in heterogeneous aggregations.¹⁰

Beginning with the 2016 NOPR, NARUC has been supportive of the Commission's efforts to open the wholesale electricity markets to new technologies and respond to changes in the industry, but with the critical caveat that those efforts respect the jurisdictional lines established in the Federal Power Act and are based on the principles of cooperative federalism.¹¹ We have been steadfast in our position that the Commission should include an opt out provision for states concerning resources located on the distribution system and behind the meter. We have argued that FERC did not have the jurisdiction to prohibit states from determining which resources on the distribution system and behind the meter could participate in the wholesale markets, but in the event that it did, we have also advocated for FERC to use its discretion to provide the opt out

⁶ Order No. 841 at P 3.

⁷ Order No. 841 at P 5.

⁸ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 172 FERC ¶ 61,247, at P 1 (2020) (“Order No. 2222”).

⁹ Order No. 2222-A at P 5.

¹⁰ *Id.*

¹¹ *Motion to Intervene and Comments of the National Association of Regulatory Utility Commissioners on NOPR* (filed on February 13, 2017) at 3 (“NOPR Comments”).

because it would be bad policy to not provide one. In Order 2222, FERC used its discretion to accommodate the needs of small utilities, but did not afford the same courtesy to its fellow sovereigns.

As we have said before, some states are open if not eager to accommodate DER participation in the wholesale markets, but as we have also said repeatedly not all states are in the same place. Some states face many of the same challenges that small utilities do of having limited human resources and constricted budgets. As the requests from the RTOs/ISOs for extensions of time to make compliance filings demonstrate, implementation of Order Nos. 2222 and 2222-A is complicated and will require significant time and resources.¹² The opt out would have provided the flexibility states need to manage the energy transition at their own pace. Now, however, with Order No. 2222-A, FERC has taken an already complicated, difficult situation and made it worse. Eliminating the opt out for demand response resources that are part of heterogeneous aggregations means that the Commission is taking away authority from states that employed the Order No. 719 opt out and built a legal framework for that regulatory scheme. This would mean that these states would have to expend their limited resources to dismantle that framework, in addition to addressing the challenges of implementing the other aspects of Order Nos. 2222/2222-A. Furthermore, as NARUC has said before and as noted by Commissioner Christie, “FERC should not eschew cooperative federalism and attempt to give control over resource adequacy and other crucial State decisions to a commercial stakeholder instead of

¹² See e.g., *Request for Extension of Time of Midcontinent Independent System Operator, Inc. to the September 17, 2020 Order No. 2222 Initial Compliance Requirement under RM18-9*. Southwest Power Pool, Inc.; PJM, Interconnection, LLC; and ISO New England Inc. filed similar requests.

FERC’s longstanding partners in energy regulation, State commissions.”¹³ This applies to *any* resources located on the distribution system and behind the meter, including the demand response resources in heterogeneous aggregations at issue in Order No. 2222-A.

While we have been concerned each time that FERC has not included an opt out for states, even if it would have been solely an act of its discretion, eliminating state authority that has an impact on existing legal frameworks betrays the principles of cooperative federalism in a more profound way. We request that the Commission reconsider its decision on this issue and failing that, we request that FERC set aside the determination of this issue and include it in Docket No. RM21-14-000 as part of the broader discussion of opt out of demand response aggregations under Order No. 719.¹⁴

II. STATEMENT OF ISSUE

In accordance with Rule 713(c)(2),¹⁵ NARUC provides the following statement of issue and error, including citations to representative Commission and court precedent on which we rely:

The Commission erred by eliminating the opt out regarding demand response resources that are part of heterogeneous aggregations.¹⁶

¹³ NARUC Comments in response to Notice Inviting Post-Technical Conference Comments, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM18-9-000 (June 26, 2018) (“NARUC Post-TC Comments”) at 4.

¹⁴ Notice of Inquiry, *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 174 FERC ¶ 61,198 (March 18, 2021) (“NOI”); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008) (Docket Nos. RM07-19-000 and AD07-7-000) (“Order No. 719”) at P 155.

¹⁵ 18 C.F.R. § 385.713(c)(2) (2018).

¹⁶ Order No. 719 at P 155.

III. ARGUMENT

A. Order No. 2222-A infringes upon and diminishes state authority.

When FERC opened the wholesale markets to participation of demand response resources, it provided the states, among others,¹⁷ with the ability to prevent the demand response resources from participating in the wholesale markets, in other words, to “opt out” of the regulatory scheme. By allowing the “opt out” to address stated concerns, FERC’s “intent was not to . . . place an undue burden on state and local retail regulatory entities.”¹⁸ Some states then conducted proceedings and adopted orders and regulations that codified their decisions to opt out.¹⁹ Unlike the situation when FERC adopted Order No. 841 or Order No. 2222 where there were no state regulations already in place, Order No. 2222-A is upending existing legal frameworks. If a state has already held a proceeding and determined that it is in the best interests of its consumers to prohibit third-party aggregators from participating in the wholesale electricity markets, then Order No. 2222-A usurps its authority.²⁰ The new order allows the demand

¹⁷ FERC orders use the term relevant electric retail regulatory authorities, which includes state public utility commissions; not-for-profit, State, municipal, and other locally owned electric utilities; and some electric cooperatives.

¹⁸ Order No. 719 at P 155.

¹⁹ *Id.*

²⁰ Commission Danly noted in his concurrence to the NOI that eighteen states have opted out of the demand response aggregation mandate in Order No. 719. NOI at 1 (Danly, Comm’r, concurring). In comments in this docket, NARUC noted that when FERC issued Orders 719 and 719-A regarding demand response, the North Carolina Utilities Commission (“NCUC”) concluded that because North Carolina is a traditionally regulated state, retail customers cannot lawfully participate in PJM’s demand response programs individually or through aggregation by a third party not regulated by the NCUC. The NCUC then “opted out.” *Order Opting Out of Retail Customer Participating in Wholesale Demand Response Programs* issued March 11, 2010 in in NCUC Docket No. E-22, Sub 418.

<http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=060b2488-1178-44e9-99bd-e40e07f419e5>. NARUC Post-TC Comments at 4. NARUC notes that the NCUC and the Louisiana Public Service Commission and the Mississippi Public Service Commission, jointly, have also filed Requests for Rehearing. NARUC supports these requests.

response resource the ability to disregard the judgment of the state regulators by joining a third-party aggregation that has other types of resources in it. It also allows third-party aggregators of demand response resources to add a solitary unit of a different type of DER to its aggregations to circumvent state law.

In trying to refute Commissioner Danly’s dissent that the Commission is “obstructing the states from asserting their own authority over distributed energy resource aggregations,”²¹ the Commission states that “Order No. 2222 and this order on rehearing address the rules governing wholesale market participation, a matter under the Commission’s exclusive jurisdiction.”²² The Commission thinks that “[b]ecause the terms of wholesale market participation are a matter under exclusive Commission jurisdiction, today’s order does not infringe upon or otherwise diminish state authority,” citing *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*.²³ It further notes that “Order No. 841 does not usurp state power because States continue to operate and manage their facilities with the same authority they possessed prior to Order No. 841.”²⁴ While that may have been true in the case of Order No. 841, that is simply not true after Order No. 2222-A. The court in *NARUC* acknowledged that the challenge to Order No. 841 was a facial challenge and that the matter was not settled with regard to as-applied challenges.²⁵ There was no need *prior* to Order No. 841 for states to have regulations that prohibited storage resources on the distribution system and behind the meter from participating in the wholesale markets because that was not a possibility before the order. Here, *prior* to Order No. 2222-A, some states had regulations that

²¹ Order No. 2222-A at P 2 (Danly, Comm’r, dissenting).

²² Order No. 2222-A at P 12 n.36.

²³ *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 964 F.3d 1177, 1187-88 (D.C. Cir. 2020) (“*NARUC*”).

²⁴ Order No. 2222-A at P 12 n.36, citing *NARUC*, 964 F.3d at 1188 (internal quotation marks and alterations omitted).

²⁵ *NARUC*, 964 F.3d at 1188-89.

applied to aggregations of demand response resources on the distribution system and behind the meter that have been in place for years because Order No. 719 permitted those resources to participate in the wholesale markets if the state allowed.²⁶ This is not the same facial challenge that the litigation in Order No. 841 was. Order No. 2222-A takes away authority over demand response resources that it had prior to the Commission issuing the order.

B. The Commission’s decision to eliminate the opt out was arbitrary, capricious and not supported by substantial evidence.

In Order No. 2222-A, the Commission changed its conclusion that participation of demand response resources in DER aggregations are subject to the opt out from Order Nos. 719 and 719-A, finding instead that the opt out will continue to apply to aggregations made up solely of resources that participate as demand response resources but not demand response resources that participate in heterogeneous DER aggregations.²⁷ The Commission found that “heterogeneous distributed energy resource aggregations that include demand response resources do not fall squarely within the Order No. 719 opt-out, as set forth in our regulations, because they are not solely aggregations of retail customers.”²⁸

The Commission is using the language in Order No. 719 that defined an “aggregator of retail customers” as “an entity that aggregates demand response bids (which are mostly from retail loads)” as justification for this change.²⁹ The definition itself, upon which the Commission relies, does not say that the aggregations under Order No. 719 are exclusively aggregations from retail loads; it says “mostly.” The Commission has not provided additional evidence or

²⁶ Order No. 719 at P 155.

²⁷ Order No. 2222-A at P 22.

²⁸ *Id.* at P 23.

²⁹ *Id.*

conducted any analysis of the types of load that actually comprised the aggregations subject to the Order No. 719 opt out prior to making this change in Order No. 2222-A. Without further evidence of the types of load involved or inquiring about the experience of the states that have employed the opt to further their regulatory obligations, the Commission capriciously decided to change the current treatment of demand response resources on the distribution system and behind the meter. The Commission discussed the goals that such a change would support, but it did not provide an analysis comparing the potential results of its aspirations of making this change to the actual regulatory experiences and considered judgments of its fellow sovereigns. The change now allows demand response resources that have been subject to state regulation the opportunity to evade that regulation. Instead, the Commission could have kept the opt out and the states would have been able to evaluate the harms and risks of the demand response resources participating in such heterogeneous aggregations, something that was not an option prior to Order No. 2222, and perhaps the states might have made changes to their respective programs. The Commission found that requests to overturn the Order No. 719 opt out in this rulemaking to be out of scope, which is appropriate. But the elimination of the Order No. 719 opt out for demand response resources in heterogeneous aggregations is similarly out of scope and should not have been done outside a rulemaking on Order No. 719 because those resources otherwise would have been subject to the opt out in Order No. 719. On the same day that the Commission issued Order No. 2222-A, it issued a Notice of Inquiry in Docket No. RM21-14-000 to address the Order No. 719 opt out. If the Commission wishes to make this change, then the change should be investigated and provided full due process as a part of that docket.

IV. CONCLUSION

NARUC respectfully requests that FERC grant the rehearing request regarding its determination to eliminate the opt out for demand response resources within heterogeneous aggregations; if it wishes to still consider that change, then NARUC requests that the Commission defer final determination on this issue until it can be addressed in the context of the Order No. 719 opt out in Docket No. RM21-14-000.

Respectfully submitted,

/s/ Jennifer M. Murphy

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Dated: April 19, 2021

CERTIFICATE OF SERVICE

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

Dated at Washington, DC: April 19, 2021

Respectfully submitted:

/s/ Jennifer M. Murphy