

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Advanced Energy Economy

Docket No. EL17-75-000

**PROTEST OF THE
AMERICAN PUBLIC POWER ASSOCIATION AND THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

The American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) protest the Petition for Declaratory Order of Advanced Energy Economy filed on June 5, 2017, in this proceeding.¹ The Petition seeks to engage the Commission in abstract disagreements over federal and state regulatory policies well before their effects have been felt in a concrete way by the petitioning parties and the public. The issues raised by the Petition are not fit for declaratory relief, and there will be no hardship from withholding such relief. The petition should be dismissed.

- 1. The Petition seeks declarations on the lawfulness of potential public utility tariff amendments before they have been drafted or filed with the Commission.**

The Petition seeks to stop a stakeholder process in the PJM Interconnection that is considering amendments to PJM's capacity-market rules governing the participation of Energy Efficiency Resources (EERs). The Petition claims that EERs should not—indeed

¹ Separately, both Associations have filed timely motions to intervene in this proceeding.

cannot—be treated the same way as Demand Response (DR) resources under PJM’s capacity-market rules.

In Order No. 719, the Commission required RTOs and ISOs to accept DR bids into their wholesale electric markets from aggregators of retail customers “unless the laws or regulations of the relevant electric retail regulatory authority [or “RERRA”] do not permit a retail customer to participate.”² In adopting this policy, the Commission sought to protect effective retail electric rate regulation, concluding that allowing aggregators “to bid into the wholesale energy market without the relevant electric retail regulatory authority’s express permission may have unintended consequences, such as placing an undue burden on the relevant electric retail regulatory authority.”³ In Order No. 719-A, the Commission modified this “opt-out” rule by creating an “opt-in” rule for the RERRA for small electric utilities (those that distributed 4 million megawatt-hours or less in the previous fiscal year).⁴ Thus, an RTO or ISO must accept DR bids from an aggregator of retail customers of a small utility “where the relevant electric retail regulatory authority permits such customers’ demand response to be bid into organized markets by an aggregator of retail customers,” and the RTO or ISO must not accept such bids “unless the relevant electric retail regulatory authority permits such customers’ demand response to be bid into organized markets by an aggregator of retail customers.”⁵

In *FERC v. Electric Power Supply Association*, the Supreme Court upheld the Commission’s exercise of jurisdiction over wholesale demand response compensation

² Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, FERC Stats. & Regs. ¶ 31,281, P 154 (2008), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order denying reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

³ Order No. 719 at P 155.

⁴ Order No. 719-A at P 51.

⁵ 18 C.F.R. § 35.28(g)(1)(iii) (2017).

based in part on this safeguard, which “allows any State regulator to prohibit its consumers from making demand response bids in the wholesale market.”⁶

On June 7, 2017, two days after the instant Petition was filed, PJM’s Market Implementation Committee approved a stakeholder process to consider amendments to PJM’s Open Access Transmission Tariff and Reliability Assurance Agreement that would provide a similar “opt-in/opt-out” procedure for RERRAs to apply to EERs bidding in PJM’s capacity market.⁷ The PJM stakeholder process is expected to take the rest of the year.⁸ At some undetermined time, if PJM’s board approves, PJM could file a tariff amendment with the Commission under section 205 of the Federal Power Act.⁹ If that happens, parties will have an opportunity to comment on the filed amendment, and the Commission will have an opportunity to determine whether the filing is just and reasonable and not unduly discriminatory and preferential.

The Petition concedes that all the PJM committee has done is “begin the process of developing Tariff provisions” (Pet. at 21.) Yet the Petition requests the Commission to find that, ineluctably, the result of that stakeholder process will be “unlawful.” (Pet. at 8). Even more, the Petition requests the Commission to take the extraordinary step of declaring that “the use of an RTO/ISO stakeholder process to develop tariff provisions giving an RERRA ‘opt-in / opt-out’ authority is improper.” (Pet. at 32.) Tellingly, the Petition cites no instance in which the Commission has ever directed such a preemptive order to end an RTO stakeholder process. The Petition cites no basis

⁶ 136 S. Ct. 760, 779 (2016).

⁷ This issue is tracked on PJM’s website at <http://www.pjm.com/committees-and-groups/issue-tracking/issue-tracking-details.aspx?Issue={A3F3F4E6-8AAD-4B3F-8AB1-E468B2AC23AA}>.

⁸ *Id.*

⁹ 16 U.S.C. § 824d.

for the Commission to exercise such power over the internal decision-making process of a regulated public utility.¹⁰ Contrary to the Petition’s suggestions (Pet. at 35), PJM stakeholders are only considering an opt-in/opt-out procedure, not the substantive terms for EER market participation. And contrary to the Petition’s curious logic (Pet. at 33), the Commission will not find its hands tied and be unable to make necessary policy determinations if PJM’s stakeholders have considered the matter first and PJM files the tariff amendment under section 205. At that juncture, the Commission’s authority and policy discretion will not be cabined one whit.¹¹ By any measure, it is premature for the Commission to rule on the lawfulness of the outcome of a stakeholder process that has only begun.¹²

2. The Petition seeks declarations on the lawfulness of state-level retail regulatory actions that have not commenced, much less become final.

On June 6, 2017, one day after the Petition was filed, the retail regulator directly targeted by the Petition, the Public Service Commission of Kentucky, issued a declaratory order articulating the basis for its authority under Kentucky law to determine whether retail customers of the utilities under its jurisdiction may directly participate in

¹⁰ *Cf. California Independent System Operator v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) (reversing Commission order requiring changes to procedure for selecting public utility’s governing board).

¹¹ The Petition’s assertion that a PJM section 205 tariff filing developed during a stakeholder process effectively “arrives with a presumption of justness and reasonableness” that shifts the statutory burden of proof (Pet. at 33) is contrary to the terms of the statute and the case law cited in the Petition. The Petition’s claim that an RERRA must file a section 206 complaint against an RTO in order to get the tariff amended to provide an opt-in/opt-out procedure for EERs is equally contrary to the statute, which unequivocally permits public utilities to file section 205 amendments unless they have contracted away that right. *See, e.g., Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9–11 (D.C. Cir. 2002).

¹² The Petition’s claim that the tariff amendments may violate the filed-rate doctrine (Pet. at 10, 39–40) is an example of why the Commission should withhold declaratory relief now, because it is unclear what the PJM tariff language will provide and whether it will have this effect.

PJM's markets.¹³ Under the Kentucky Commission's order, "No retail electric customer is authorized to participate directly or indirectly in any PJM wholesale market, including but not limited to DR programs and EER programs, except under a tariff or special contract on file with the [Kentucky] Commission."¹⁴

The Petitioner does not indicate, either in its Petition or its supplemental filing noting the Kentucky Commission's order, that any utility, retail customer, or other party is seeking approval by the Kentucky Commission of any such tariff or special contract. The state regulator has not reached a final decision on whether, or on what terms, any specific EERs may participate in PJM's capacity market. Thus, the Commission has no facts on which it could make a declaration as to the effects on PJM's capacity market of the Kentucky Commission's future decisions on these matters. Common sense, as well as comity, counsels that the Commission should withhold declaratory relief.

3. The Petition obscures important disputed factual issues.

The Petition claims it presents only questions of "law and policy, and there are no significant factual issues in dispute." (Pet. at 13.) That claim is untenable, however. As already noted, the PJM stakeholder process has only begun, and the Kentucky Commission has only declared its authority to act but has not decided the terms of market participation by any EERs. The Petition pretends these future events do not matter, but they clearly do.

Moreover, the Petition obscures a key factual issue: What EERs would be covered by the requested declaratory order? The Petition never identifies any specific company or

¹³ *Application of East Kentucky Power Cooperative*, Case No. 2017-00129 (Ky. Pub. Serv. Comm'n June 6, 2017) (order), available at www.psc.ky.gov/order_vault/Orders_2017/201700129_06062017.pdf.

¹⁴ *Id.* at 21.

any specific EER product or service. Instead, the Petition states that it is addressing only “Wholesale EERs.” (Pet. at 3.) The Petition conveniently defines this capitalized term in a way that produces the Petition’s desired result—Wholesale EERs are those that “[b]y their very nature ... have no legal nexus or connection with the State-regulated retail electric services that buyers and users of these energy efficient products may receive.” (Pet. at 5.) The Petition repeats this mantra of no-nexus-or-connection without further elaboration. (Pet. at 3, 7, 15, 16, 23, 26, 31, 43.) The Petition even asserts the lack of nexus or connection is a “fact.” (Pet. at 23.) But the Petition provides no evidence for this fact.

This evidentiary failure not only makes the scope of the requested order indeterminate, it also shows there is no factual basis for the declaratory relief. The Petition appears to be content with assertion that EERs are “non-dispatchable.” (Pet. at 15.) But the Petition does not explain why non-dispatchability is dispositive. Most retail load is not dispatchable. But if a significant part of that retail load were to disappear—or later reappear—that could have important financial effects on a retail load-serving utility and its other retail customers. The Kentucky Commission concluded that because the state has not adopted retail competition, state law requires it to have authority over retail customer participation in wholesale markets, and it singled out an important reason why: “Unless this reduction in customer load is reflected in the serving utility’s need for generating capacity, the customer reducing its load will be unjustly enriched at the expense of all retail customers.”¹⁵ The Kentucky Commission’s declaratory order thus

¹⁵ Kentucky Commission order, *supra* n. 13, at 19. *See also id.* at 18 (“The Kentucky utilities that are members of PJM must know the amount of DR or EER being bid by a Kentucky retail customer into PJM. Absent that information, the utilities are unable to meet their respective statutory obligations ... to adequately plan to meet load requirements. This will likely result in the utilities’ overestimating their

succinctly rebuts the Petition’s no-nexus-or-connection claim. In short, the Petition substitutes speculation and unsupported assertions for the concrete facts necessary for Commission consideration in a declaratory order.

4. No party will be harmed from withholding declaratory relief.

The Petition seeks a declaratory order within sixty days, without waiting for the PJM stakeholder process to conclude. (Pet. at 12–13.) The Petition claims that the pendency of the PJM stakeholder process creates “uncertainty” for the petitioning parties. (Pet. at 12.) But the Petition never explains what specific injury this entails; provides no evidence of any injury; and does not even identify any specific company that is sustaining such injury. Thus, the Petition fails to demonstrate the need for immediate declaratory relief.

5. The Petition’s request for additional broad declarations concerning future proceedings and other energy technologies—including its collateral attack on Order No. 719—should be rejected.

The Petition invites the Commission to articulate the substantive standards and procedures it will use in determining future requests by a retail regulator or another entity to adopt similar opt-in/opt-out procedures for Wholesale EERs and other energy technologies. (Pet. at 40–47.) Here, the Petition is on even shakier ground in seeking declaratory relief. These issues are far afield from the present PJM stakeholder process. No such requests are pending and needing resolution. The “other energy technologies” are not even specified, and the relevant facts about them are entirely unknown. These issues are not appropriate for declaratory relief.

respective load requirements, resulting in unneeded generating capacity whose costs will be passed on to retail customers.”).

Moreover, the substantive standards the Petition advocates would mark a fundamental change in Commission policy and federal-state relations. The Petition would have the Commission determine whether an RERRA has a “compelling interest within its legal authority” before the Commission would “grant” the RERRA opt-in/opt-out authority over such energy technologies’ participation in wholesale markets. (Pet. at 41–42.) In our view, having the Commission evaluate the scope of a retail regulator’s authority under state or local law, and determine whether that state or local interest is compelling enough to permit the retail regulator to exercise its authority, is contrary to the division of federal and state authority in section 201 of the FPA.¹⁶ At a minimum, it would be a recipe for endless litigation. The Petition does not support that extraordinary declaratory relief.

Finally, the Petition collaterally attacks the opt-in/opt-out procedure for DR bids adopted by the Commission in Order Nos. 719 and 719-A. “The compelling state interests with respect to participation of aggregated retail customers in wholesale DR programs that the Commission concluded existed in 2007 [sic] when it adopted Order No. 719 arguably are no longer valid today.” (Pet. at 43.) The Petition provides no evidence supporting this suggestion. As already noted, the Supreme Court in 2016 relied upon the existence of this procedure in upholding the Commission’s authority over DR

¹⁶ 16 U.S.C. § 824b. The Petition’s second requested declaration—“that an RERRA may not bar, restrict, or otherwise condition the participation of Wholesale EERs in wholesale electricity markets unless the Commission expressly adopts rules or regulations giving states and retail regulators such authority” (Pet. at 26)—reads the FPA backwards. Under the FPA, the Commission does not delegate authority to state and local regulators over retail sales. The authority to regulate retail sales derives from state and local law, not from the FPA. Section 201 of the FPA, 16 U.S.C. § 824b, explicitly preserves that state and local authority from federal preemption. The Commission’s regulations adopted in Order Nos. 719 and 719-A do not delegate authority to RERRAs; those regulations are directed at RTOs and ISOs and condition the obligation of an RTO or ISO to accept DR bids from aggregators of retail customers on the opt-in/opt-out decisions of the RERRA. *See* 18 C.F.R. § 35.28(g)(1)(iii). The RERRA acts under state and local law, not under a delegation of regulatory authority by the Commission.

compensation in wholesale energy markets. The Petition provides no basis for the Commission to institute a rulemaking to modify the RERRA opt-in/opt-out regulations adopted in Order Nos. 719 and 719-A.¹⁷

CONCLUSION

The Petition for Declaratory Order should be dismissed.

Respectfully submitted,

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July 19, 2017

¹⁷ In their comments on the Commission's notice of proposed rulemaking on electric storage and distributed energy resource participation in wholesale markets, APPA and NRECA argue that the Commission should adopt opt-in/opt-out rules similar to Order Nos. 719 and 719-A for distributed energy resources. *See* Comments of the American Public Power Association and the National Rural Electric Cooperative Association on Notice of Proposed Rulemaking, Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, Docket No. RM16-23-000 (filed Feb. 13, 2017).

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 Arlington, Virginia, this 19th day of July 2017.

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