

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Participation of Distributed Energy)	
Resource Aggregations in Markets)	
Operated by Regional Transmission)	Docket No. RM18-9-000
Organizations and Independent)	
System Operators)	

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

Among the most important issues the Federal Energy Regulatory Commission must address in this rulemaking is the role that state and local regulators will play in determining whether retail and other distribution-connected customers can participate in distributed energy resource (“DER”) aggregations in Regional Transmission Organization (“RTO”) and Independent System Operator (“ISO”) wholesale markets. Over the past month, the Commission has received supplemental comments from the Arkansas Public Service Commission (“Arkansas PSC”) and the Missouri Public Service Commission (“Missouri PSC”) with different preferred proposals to resolve that question, as well as an “answer” by Advanced Energy Economy (“AEE”) and supplemental comments by Advanced Energy Management Alliance (“AEMA”) supporting the Arkansas proposal.¹ The American Public Power Association (“APPA”) and the

¹ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket Nos. RM16-23-000, *et al.*, Answer of Advanced Energy Economy to Supplemental Comments of Arkansas Public Service Commission (March 29, 2019) (“AEE Answer”); *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM18-9-000, Supplemental Comments to the Post-Technical Conference of Advanced Energy Management Alliance (March 29, 2019); *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket Nos. RM16-23-000, *et al.*, Supplemental Comments of the Missouri Public Service Commission (March 29, 2019) (“Missouri PSC Comments”); *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket Nos. RM16-23-000, *et al.*, Supplemental Comments of Arkansas Public Service Commission (March 15, 2019) (“Arkansas PSC Comments”).

National Rural Electric Cooperative Association (“NRECA”) respectfully submit these supplemental comments to oppose the Arkansas PSC’s proposal and support the Missouri PSC’s preferred proposal.² In particular, APPA and NRECA reiterate their recommendation that the Commission’s final rule provide that the relevant electric retail regulatory authority (“RERRA”) has the authority to determine if a DER should be permitted to participate in a DER aggregation in RTO/ISO wholesale markets, similar to the Commission’s Order Nos. 719 and 719-A opt-out/opt-in framework applicable to demand response aggregation.³

I. SUPPLEMENTAL COMMENTS

APPA and NRECA have consistently expressed support for the Commission’s goal of removing barriers to the participation of DERs and electric storage resources (“ESRs”) in the organized wholesale markets. At the same time, APPA and NRECA have cautioned that the participation of DERs (including ESRs connected at the distribution level or behind the meter) in wholesale markets presents complex operational, reliability, cost, and regulatory concerns, including potential disruption of established state and local DER programs.⁴ These challenges,

² Rulemaking comments are not pleadings. 18 C.F.R. § 385.202 (2018). To the extent necessary to respond to AEE’s “answer” to the Arkansas PSC supplemental comments, APPA and NRECA respectfully request leave to file these supplemental comments as an answer to AEE’s answer pursuant to 18 C.F.R. § 385.213(a)(2) (2018). The Commission will accept an answer to an answer under Rule 213(a)(2) where the additional answer provides information that assists the Commission in its decision-making process. If the Commission considers the supplemental comments filed by the Arkansas PSC, the Missouri PSC, AEMA, and the AEE “answer,” then APPA and NRECA ask the Commission also to consider this brief response, which will assist the Commission in its decision-making process by clarifying the issues in dispute.

³ See *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM18-9-000, Post-Technical Conference Comments of the American Public Power Association at 12-19 (June 26, 2018) (“APPA DER Comments”); *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM18-9-000, Post-Technical Conference Comments of the National Rural Electric Cooperative Association at 27-28 (June 26, 2018) (“NRECA DER Comments”); see also *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh’g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 51, *order on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

⁴ See generally, e.g., APPA DER Comments at 7-10; NRECA DER Comments at 5-25; *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*,

APPA and NRECA have explained, could be particularly daunting for small utilities.⁵ To help ensure that the operational, reliability, and regulatory challenges associated with aggregated DER participation in the RTO/ISO markets are adequately addressed, APPA and NRECA have both urged the Commission to adopt the Order Nos. 719/719-A opt-out/opt-in framework for DER aggregation in RTO/ISO markets.⁶

The Arkansas PSC’s supplemental comments endorse a different approach. Under the Arkansas PSC proposal, “DER owners would decide whether to sell through RTO/ISO markets,” and “[s]tates, acting pursuant to their exclusive retail authority over retail rates, could limit a resource’s participation in retail programs when that resource contracts with an aggregator selling to an RTO/ISO.”⁷ Thus, “every DER owner would have the option of indirectly participating in RTO/ISO markets by contracting with a DER aggregator,” but “a DER resource owner may be barred by the terms of retail tariffs from participating in state-regulated programs.”⁸ While APPA and NRECA appreciate the Arkansas PSC’s effort to suggest a solution, APPA and NRECA agree with the Missouri PSC that the Arkansas PSC proposal is not an adequate substitute for a full opt-out/opt-in approach.⁹ The Arkansas PSC may well decide that its proposal is the appropriate policy choice for its state, but APPA and NRECA strongly urge the Commission not to force every other retail electric regulatory authority to adopt Arkansas’s policy choice.

Docket Nos. RM16-23-000, *et al.*, Request for Rehearing of American Municipal Power, Inc., the American Public Power Association, and the National Rural Electric Cooperative Association (March 19, 2018) (“AMP/APPA/NRECA Rehearing Request”).

⁵ See APPA DER Comments at 7-10; NRECA DER Comments at 25-27.

⁶ See *supra* at footnote 3.

⁷ Arkansas PSC Comments at 2.

⁸ *Id.*

⁹ See Missouri PSC Comments at 2.

The Arkansas PSC’s proposal (and the supporting comments filed by AEE and AEMA) start from the premise that technically-capable DERs necessarily must have the option to exit state or local DER programs and participate in the wholesale market.¹⁰ That assumption glosses over the complex jurisdictional issues raised by retail customers on the distribution system seeking to make wholesale sales into the organized RTO/ISO markets. Section 201(b) of the Federal Power Act (“FPA”) reserves regulation of retail service and local distribution facilities to the states.¹¹ The Commission may not “specif[y] terms of sale at retail – which is a job for the States alone.”¹² Overriding state laws or retail tariff requirements that limit or prevent DER participation in wholesale markets would be an unsupported federal intrusion into the authority of states to regulate retail electric service.¹³

Further, DERs that might participate in a wholesale aggregation will interconnect with state-jurisdictional distribution facilities, with the terms of the interconnections governed by state law.¹⁴ State and local authority over the terms and conditions of interconnection to the distribution system would encompass authority to limit the manner in which a DER uses the distribution system. While AEE suggests that retail regulators could not exercise their jurisdiction over distribution interconnections to preclude wholesale market participation by DERs,¹⁵ AEE cites no authority for this limitation on state and local interconnection jurisdiction. The mere fact that the owner of a DER asset may intend to make a wholesale sale over

¹⁰ See Arkansas PSC Comments at 2-3; AEE Answer at 2; AEMA Answer at 6.

¹¹ 16 U.S.C. § 824(b)(1).

¹² *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 775 (2016) (footnote omitted).

¹³ See AMP/APPA/NRECA Rehearing Request at 7-11.

¹⁴ See *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 at P 105 (2005), *order on reh’g*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006).

¹⁵ AEE Answer at 7 (arguing that states cannot use distribution interconnection agreements “to create de-facto bans on wholesale market participation by DERs.”).

distribution facilities does not give the Commission jurisdiction to override state and local interconnection authority.¹⁶

The Order Nos. 719/719-A opt-out/opt-in framework endorsed by APPA and NRECA provides an administratively workable, proven approach to addressing these complex jurisdictional issues in “a program of cooperative federalism.”¹⁷ In contrast, the Arkansas PSC proposal, we respectfully suggest, does not represent a reasonable “cooperative federalism approach.”¹⁸ The Arkansas proposal cedes to DERs the unilateral right to decide whether to participate in wholesale market aggregation, while merely acknowledging the right of RERRAs to “prevent[] resources that contract with an aggregator from participating in retail programs, such as net energy metering.”¹⁹ Because RERRAs clearly possess the jurisdiction to restrict participation in their own retail DER programs, however, there is no benefit in having the Commission acknowledge that a RERRA may limit such participation when a DER asset opts to participate in the RTO/ISO markets.²⁰

Even setting aside the jurisdictional complexities, an approach under which the DER owner unilaterally gets to “decide whether to sell through RTO/ISO markets”²¹ would effectively

¹⁶ In Order No. 2003-A, the Commission found that a DER owner’s intent to make wholesale transactions over distribution facilities does not provide the Commission with jurisdiction to regulate the interconnection to those facilities if they are not subject an OATT at the time the interconnection request is made. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 at P 735 (2004), *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d National Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

¹⁷ *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. at 780.

¹⁸ Arkansas PSC Comments at 1.

¹⁹ *Id.* at 3.

²⁰ Indeed, the AEE Answer agrees that the Arkansas proposal would leave states powerless to restrict DER wholesale market participation and would require no implementing procedure in a Commission final rule. *See* AEE Answer at 8.

²¹ Arkansas PSC Comments at 2.

leave distribution utilities and retail regulators no choice but to confront the operational challenges and cost exposure that DERs' wholesale market participation could impose. AEE argues that state and local regulators will have "tools . . . to address potential DER impacts on distribution systems,"²² but these "tools" are largely ill-defined and unproven in this context.²³ The availability of mechanisms to cope with the challenges associated with DER participation in wholesale markets would not, in any event, relieve distribution utilities and regulators from the burdens of managing the challenges imposed on them by DERs deciding to participate in the wholesale market. Managing these challenges is likely to be particularly difficult for small utilities, which constitute the overwhelming majority of public power and electric cooperative systems in the United States.²⁴

The Order Nos. 719/719-A opt-out/opt-in framework would allow state and local regulators, with input from distribution utilities and other stakeholders, to assess whether DER aggregation should be allowed on the distribution system(s) they regulate, taking into account the

²² AEE Answer at 6.

²³ AEE notes, for example, that states can use distribution interconnection agreements to manage reliability impacts from DERs, but cautions that "onerous interconnection agreement requirements with no connection to actual reliability needs" are not permitted. *Id.* at 7 n.22. AEE does not explain what would constitute an "onerous" requirement. AEE also points to the Commission's suggestion in Order No. 841 that, based on one prior FERC decision involving a distribution utility in PJM, "it may be appropriate, on a case-by-case basis, for distribution utilities to assess a charge on electric storage resources similar to those assessed to the market participant in that proceeding." *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 at P 301 (2018) (citing *PJM Interconnection L.L.C.*, 149 FERC ¶ 61,185 (2014), *order on reh'g*, 151 FERC ¶ 61,231 (2015)).

²⁴ If the Commission does not adopt the Order Nos. 719/719-A opt-out/opt-in framework for all aggregated DER participation in RTO/ISO markets, APPA has recommended that the Commission should, at a minimum, adopt the opt-in mechanism for small distribution utilities proposed in the post-technical conference comments submitted in Docket No. RM18-9-000 by the Transmission Access Policy Study Group. *See* APPA DER Comments at 19-20; *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM18-9-000, Post-Technical Conference Comments of the Transmission Access Policy Study Group at 19-22 (June 26, 2018). Similarly, NRECA has noted that an opt-in structure for small distribution utilities would reduce the compliance burdens of a Commission final rule and enable Commission compliance with the Regulatory Flexibility Act, 5 U.S.C. § 604(a)(6). *See* NRECA DER Comments at 26-27.

potential impacts of DER aggregation on the operation, reliability, security, and cost of the distribution system and its users. Such a holistic assessment of the impacts of DER aggregation on the local distribution system and existing DER retail compensation programs is one that only the RERRA and the distribution utility are in a position, practically and legally, to perform.

Adoption of an Order Nos. 719/719-A opt-out/opt-in mechanism, it must be emphasized, would not necessarily result in widespread restrictions on participation of aggregated DERs in RTO/ISO markets. Where state and local regulators conclude – based on a detailed assessment of the likely operational, reliability, administrative, and cost impacts – that allowing DER participation in wholesale aggregation programs is likely to benefit (or at least not harm) the local distribution facilities and service they are charged with regulating, it must be assumed they will opt to allow it. The Arkansas PSC states in this respect that it is “eager for DERs to be able to access [RTO/ISO] markets on equal footing with traditional generation and demand-side resources,”²⁵ and the Missouri PSC emphasizes that “seeking the authority to ‘opt out’ does not mean that the [Missouri PSC] has the intention to do so.”²⁶

The willingness and ability of states to promote DER – including demand response and energy efficiency – is highlighted by the examples of state programs cited in the filings by AEE and AEMA.²⁷ These examples show how much states and utilities are doing even in the absence of a Commission rule requiring that DER owners be permitted to participate in the wholesale markets without the consent of the RERRA. Indeed, aggregated demand response remains subject to the Order Nos. 719/719-A opt-out/opt-in regulations, and yet, AEE acknowledges that

²⁵ Arkansas PSC Comments at 1.

²⁶ Missouri PSC Comments at 2.

²⁷ See AEE Answer at 3-6; AEMA Comments at 7-10.

demand response, along with energy efficiency, “are the forms of DER that have the greatest penetration in retail and wholesale markets to date”²⁸ The irony is that a final rule requiring that DERs be given a right to participate in the wholesale markets without RERRA consent could circumvent and jeopardize the state efforts where DER has been most successful. As the Missouri PSC cogently observes: “Allowing state and local regulators to opt-out from wholesale participation would retain the vast majority of benefits associated with DER, while allowing for the development of best processes for and the incremental incorporation of safe and reliable DER practices on the distribution system.”²⁹

II. CONCLUSION

APPA and NRECA appreciate the Arkansas PSC’s effort to suggest a framework that respects state and federal authority in the regulation of DERs. The approach endorsed by the Arkansas PSC, AEE, and AEMA, however, would not adequately accommodate the role of retail regulators in determining whether retail customers on the distribution system ought to be authorized to make wholesale sales into the organized RTO/ISO markets. The Commission should instead adopt the RERRA opt-out/opt-in framework from Order Nos. 719 and 719-A and apply it to DER aggregation in RTO/ISO markets.

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²⁸ AEE Answer at 4.

²⁹ Missouri PSC Comments at 2.

Respectfully submitted,

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