

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

Participation of Aggregators of Retail Demand)	
Response Customers in Markets Operated by)	Docket No. RM21-14-000
Regional Transmission Organizations and)	
Independent System Operators)	

**COMMENTS OF
INDUSTRIAL ENERGY CONSUMERS OF AMERICA**

Industrial Energy Consumers of America (“IECA”) welcomes the opportunity to submit these Initial Comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Notice of Inquiry (“NOI”) on whether to eliminate the Demand Response Opt-Out first approved by the Commission in Order Nos. 719 and 719-A.

IECA supports competitive markets and therefore supports termination of the Demand-Response Opt-Out. Terminating the Demand Response Opt-Out would expand the amount of resources available to the market, increase competition, reduce prices to consumers, enhance reliability, and reduce emissions. Further, termination of the Demand Response Opt-Out would put the Commission’s treatment of demand response resources on similar footing as the Commission’s treatment of other distributed energy resources, such as energy efficiency and electric storage resources. The Commission’s authority not to provide an opt-out, or in this case to terminate an existing opt-out, has already been established.¹ Any potential administrative burden on states or other regulatory authorities of removing the Demand Response Opt-Out is far

¹ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) (*NARUC*).

outweighed by the benefits to consumers of greater demand response participation in organized markets.

I. BACKGROUND

Under the Commission's current regulations, a relevant electric retail regulatory authority ("RERRA") can prohibit certain customers' demand response from being bid into organized markets by an aggregator of retail customers ("ARC").² A Regional Transmission Organization or Independent System Operator ("RTO/ISO") is not required to accept bids from an ARC that aggregates the demand response of the customers of utilities that distributed more than four million megawatt-hours (MWh) in the previous fiscal year, where the RERRA prohibits such customers' demand response from being bid into organized markets.³ In other words, states and other regulatory authorities currently have the power to prohibit demand response resources from participating in competitive power markets. So long as states and regulatory authorities are authorized to prohibit some demand response resources from participating in RTO/ISO markets, just and reasonable rates cannot be established and the benefits to consumers of increased demand response will not be fully realized.

In Order Nos. 719 and 719-A, the Commission explained that aggregating small retail customers into larger pools of resources would expand the amount of resources available to the market, increase competition, help reduce prices to consumers, and enhance reliability.⁴ However, despite such benefits, the Commission established the Demand Response Opt-Out whereby states and other regulatory authorities could prohibit some demand response resources from participating

² See 18 CFR 35.28(g)(1)(iii); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

³ *Id.*

⁴ *Id.* at P 154.

in competitive wholesale power markets. The Demand Response Opt-Out was meant to be an act of cooperative federalism, wholly within the Commission's power to eliminate, and not meant to be an opportunity for RERRAs to diminish competition in wholesale markets nor meant to protect utility demand response programs which remain the only program options available in RERRAs that choose to exercise the opt-out provision. The benefits of greater demand response cannot be fully realized while the Commission allows certain states and regulatory authorities to prohibit certain demand response resources, enabled through innovative ARCs or direct market participation, from fully participating in competitive wholesale power markets.

In this NOI, the Commission seeks Comments on whether it should terminate the Demand Response Opt-Out. In these Initial Comments, IECA responds to the following questions: (Q5) what are the potential benefits of removing the Demand Response Opt-Out, including any benefits not considered by the Commission in Order Nos. 719 and 719-A, and (Q6) what are the potential benefits of creating more consistency between the participation models for ARCs and distributed energy resource aggregators by removing the Demand Response Opt-Out?⁵ Further, in regard to the second question (i.e. Q6), the Commission asks – in light of market participation opportunities for energy efficiency resources, electric storage resources, and distributed energy resource aggregations, would eliminating the Demand Response Opt-Out established in Order Nos. 719 and 719-A enhance clarity for market participants and prevent disputes regarding the eligibility of resource aggregations to participate in wholesale markets?

The answer to each of the questions is that demand response is a competitive resource that should not be prohibited from participating in competitive wholesale power markets. There is no

⁵ NOI at P 24.

opt-out for other distributed energy resources, such as energy efficiency and electric storage, so it would be unreasonable for the Commission to allow the Demand Response Opt-Out to continue.

II. COMMENTS

IECA supports elimination of the Demand Response Opt-Out. Demand response is a competitive resource that should be permitted to compete in RTO/ISO markets. Further, the Commission has *exclusive* authority to set the eligibility and other terms of wholesale market participation of resources that are composed of retail customer actions or that connect at the distribution system, such as demand response resources.⁶

a. The benefits of removing the Demand Response Opt-Out include more Demand Response participation and all the benefits derived from Demand Response.

In Order Nos. 719 and 719-A, the Commission found that allowing an ARC to act as an intermediary for many small retail loads that cannot participate in organized markets would improve the competitiveness of RTO/ISO markets and fulfill the Commission's statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.⁷ Further, the Commission explained that aggregating small retail customers into larger pools of resources would expand the amount of resources available to the market, increase competition, help reduce prices to consumers, and enhance reliability.⁸ These are the benefits of additional demand response, and the Commission can increase such benefits by allowing more demand response to participate. Greater participation of demand response resources in RTO/ISO markets can increase competition, reduce prices to consumers, and enhance reliability. However,

⁶ *Elec. Power. Supply Ass'n. v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev'd & remanded sub nom. FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 771 (2016) (EPSA); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. at 1288.

⁷ Order No. 719, FERC ¶ 61,071 at P 1.

⁸ *Id.* at P 154.

such benefits will not be fully realized if the Commission allows the Demand Response Opt-Out to continue.

The Commission intended in Order Nos. 719 and 719-A to encourage the development of demand response programs and thus provide retail customers more opportunities available through larger markets.⁹ The Commission's goals have been met in part, but regulatory authorities in 18 states currently prohibit demand response resources from participating in RTO/ISO markets.¹⁰ If the Commission eliminates the Demand Response Opt-Out, demand response resources in these 18 states will have greater opportunities to participate in RTO/ISO markets, providing benefits to consumer rates and reliability.

b. The Commission should let Demand Response resources participate in RTO/ISO markets without providing states and regulatory authorities the opportunity to opt-out.

The Commission should treat demand response resources in a similar manner to how it treats other distributed energy resources. For energy efficiency and electric storage resources, the Commission has declined to establish opt-outs for RERRAs. Accordingly, the Commission should treat demand response in the same manner and eliminate the Demand Response Opt-Out.

Eliminating the Demand Response Opt-Out established in Order Nos. 719 and 719-A would enhance clarity for market participants and prevent disputes regarding the eligibility of resource aggregations to participate in wholesale markets. In Order No. 2222, the Commission adopted regulations to remove barriers to participation of distributed energy resource aggregations

⁹ *Id.*

¹⁰ Arkansas, Iowa, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Mexico, Oklahoma, South Dakota, Wisconsin.

in RTO/ISO markets.¹¹ In that proceeding, the Commission declined to adopt an opt-out for distributed energy resources. However, even though demand response was defined as a distributed energy resource, the Commission's Demand Response Opt-Out remains effective. This presents discriminatory treatment of demand response in comparison to other distributed energy resources which the Commission sought to promote in Order No. 2222 and 2222-A.

i. The Commission has not adopted an opt-out for electric storage resources.

In Order No. 841, the Commission adopted regulations supporting greater participation of electric storage resources in RTO/ISO markets.¹² Further, the Commission denied a request to allow states to decide whether electric storage resources located behind a retail meter or on the distribution system should be permitted to participate in RTO/ISO markets.¹³ Thereafter, in Order 841-A, the Commission found that the Federal Power Act and relevant precedent did not legally compel the Commission to adopt an opt-out with respect to participation in RTO/ISO markets by electric storage resources interconnected on a distribution system or located behind a retail meter.¹⁴ While states can include conditions in their own retail programs that prohibit any participating resources from also selling into RTO/ISO markets, a condition broadly prohibiting all retail customers from participating in RTO/ISO markets, even if contained in the terms of retail service, is aimed *directly* at RTO/ISO markets and intrudes on the Commission's jurisdiction over those markets.¹⁵

¹¹ *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 85 FR 67094 (Oct. 21, 2020), 172 FERC ¶ 61,247 (2020), *corrected*, 85 FR 68450 (Oct. 29, 2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶61,197 (2021).

¹² *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018).

¹³ *Id.*

¹⁴ Order No. 841-A, 167 FERC ¶ 61,154 at P 32.

¹⁵ *Id.* at P 41.

The Commission’s decisions in Order Nos. 841 and 841-A were subsequently upheld by the D.C. Circuit in *NARUC*.¹⁶ The D.C. Circuit concluded that the Commission’s prohibition of state-imposed participation bans directly affected wholesale rates, and therefore the Commission was not required to provide a RERRA opt-out with respect to RTO/ISO market participation of electric storage resource located behind a retail meter or on the distribution system.¹⁷ Regarding participation of electric storage resources, the Court noted the Commission’s decision that any administrative burdens associated with enabling the participation of energy storage resources in RTO/ISO markets were outweighed by the benefits of participation of energy storage resources in those markets.

ii. The Commission has not adopted an opt-out for energy efficiency resources.

The Commission has also declined to adopt an opt-out for energy efficiency resources. In *Advanced Energy Economy* (“AEE”), the Commission determined that it has exclusive jurisdiction to regulate participation of energy efficiency resources in RTO/ISO markets as a practice directly affecting wholesale markets, rates, and prices.¹⁸ On rehearing, the Commission found that a provision directly restricting retail customers’ participation in organized wholesale markets, even if contained in the terms of retail service, intrudes on the Commission’s jurisdiction over those markets and prevents the Commission from carrying out its statutory authority to ensure that wholesale electricity markets produce just and reasonable rates.¹⁹ This is a remarkable finding

¹⁶ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) (*NARUC*).

¹⁷ *Id.*

¹⁸ AEE Declaratory Order, 161 FERC ¶ 61,245 at P 57 (finding that RERRAs may not bar the participation of energy efficiency resources in wholesale markets unless the Commission gives RERRAs such authority and declining to opine on the requirements the Commission would impose if a RERRA requests such authority).

¹⁹ AEE Rehearing Order, 163 FERC ¶ 61,030 at P 37 (citing *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1600 (2015) (finding that the proper test for determining whether a state action is preempted is “whether the challenged measures are ‘aimed directly at interstate purchasers and wholesalers for resale’ or not”) (*Oneok*) (quoting *N. Natural Gas Co.*

considering that the Commission continues to have such a provision that directly restricts retail customers' participation in organized wholesale markets in the form of the Demand Response Opt-Out. Accordingly, the Commission should eliminate the Demand Response Opt-Out that currently prevents demand response resources in 18 states from participating in organized wholesale markets.

iii. The Commission has routinely declined to adopt an opt-out for distributed energy resources and should provide the same treatment to demand response resources.

Along with electric storage and energy efficiency resources, the Commission has conducted numerous rulemaking proceedings related to other demand-side resources and resources located on the distribution system or behind a retail meter. The Commission has consistently declined to adopt an opt-out for resources in these proceedings.²⁰

III. CONCLUSION

The Commission should eliminate the Demand Response Opt-Out and provide the stranded demand response resources in 18 states a better opportunity to participate in organized markets. Further, eliminating the Demand Response Opt-Out would result in equal treatment of demand response as other distributed energy resources, such as energy efficiency and electric storage resources. Eliminating the Demand Response Opt-Out would further the Commission's goal of encouraging greater participation of demand response resources in RTO/ISO markets.

Respectfully submitted,

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By: /s/ Robert A. Weishaar, Jr.

v. State Corp. Comm'n of Kan., 372 U.S. 84, 94 (1963)); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) (finding that "a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate").

²⁰ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 23rd day of July, 2021.

/s/

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