175 FERC ¶ 61,227
DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM18-9-003; Order No. 2222-B]

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

(Issued June 17, 2021)

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Final rule.

SUMMARY: In this order, the Federal Energy Regulatory Commission (Commission) addresses arguments raised on rehearing, sets aside in part and clarifies in part Order No. 2222-A.

DATE: This rule will become effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**

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SUPPLEMENTARY INFORMATION:

175 FERC ¶ 61,227
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators — Docket No. RM18-9-003

ORDER NO. 2222-B

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING, SETTING ASIDE IN PART AND CLARIFYING IN PART PRIOR ORDER

(Issued June 17, 2021)

TABLE OF CONTENTS

Paragraph Numbers

I. **Introduction**

1. On September 17, 2020, the Federal Energy Regulatory Commission (Commission) issued its final rule (final rule or Order No. 2222) adopting reforms to remove barriers to the participation of distributed energy resource[1] aggregations in the Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets (RTO/ISO markets).[2] Specifically, the Commission found that existing RTO/ISO market rules are unjust and unreasonable in light of barriers that they present to the participation of distributed energy resource aggregations in RTO/ISO markets, which reduce competition and fail to ensure just and reasonable rates.[3] To help ensure that

[1] Order No. 2222 amended the Commission's regulations to define a distributed energy resource as any resource located on the distribution system, any subsystem thereof or behind a customer meter. *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 85 FR 67094 (Oct. 1, 2020), 172 FERC ¶ 61,247, at P 1 n.1 (2020), *corrected*, 85 FR 68450 (Oct. 29, 2020), *order on reh'g*, Order No. 2222-A, 86 FR 16511 (Mar. 24, 2011), 174 FERC ¶ 61,197 (2021); 18 CFR 35.28(b)(10). These resources may include, but are not limited to, resources that are in front of and behind the customer meter, electric storage resources, intermittent generation, distributed generation, demand response, energy efficiency, thermal storage, and electric vehicles and their supply equipment. Order No. 2222, 172 FERC ¶ 61,247 at PP 1 n.1, 114.

[2] For purposes of Order No. 2222, the Commission defined RTO/ISO markets as the capacity, energy, and ancillary services markets operated by the RTOs and ISOs. Order No. 2222, 172 FERC ¶ 61,247 at P 1 n.2; *see also* 18 CFR 35.28(b)(11).

[3] Order No. 2222, 172 FERC ¶ 61,247 at P 1.

RTO/ISO markets produce just and reasonable rates, pursuant to the Commission's legal authority under Federal Power Act (FPA) section 206,[4] the Commission, in Order No. 2222, modified § 35.28[5] of the Commission's regulations to require each RTO/ISO to revise its tariff to ensure that its market rules facilitate the participation of distributed energy resource aggregations.[6]

2. More specifically, Order No. 2222 requires each RTO/ISO to revise its tariff to establish distributed energy resource aggregators as a type of market participant that can register distributed energy resource aggregations under one or more participation models in the RTO/ISO tariff that accommodate the physical and operational characteristics of each distributed energy resource aggregation.[7]

3. On March 18, 2021, the Commission issued Order No. 2222-A, which addressed arguments raised on rehearing, set aside in part, and clarified in part the Commission's determinations in Order No. 2222. While the Commission largely affirmed its findings in Order No. 2222, the Commission set aside the finding that the participation of demand response in distributed energy resource aggregations is subject to the opt-out and opt-in

[4] 16 U.S.C. 824e.

[5] 18 CFR 35.28.

[6] Order No. 2222, 172 FERC ¶ 61,247 at P 1.

[7] *Id.* P 6.

requirements of Order Nos. 719 and 719-A.[8] The Commission stated that if a distributed energy resource aggregation is composed solely of resources that participate as demand response resources, then the Order No. 719 opt-out would apply to that aggregation, but if a distributed energy resource aggregation contains any resources that participate as another type of distributed energy resource, then the Order No. 719 opt-out would not apply to that aggregation.[9] In addition, as relevant here, the Commission provided clarification regarding restrictions to avoid double counting of services.[10]

4. On April 19, 2021, the Edison Electric Institute (EEI); the Louisiana Public Service Commission and the Mississippi Public Service Commission (together, the Southern Regulators); the National Association of Regulatory Utility Commissioners (NARUC); the North Carolina Utilities Commission (the North Carolina Commission); and the MISO Transmission Owners[11] filed timely requests for rehearing of Order

[8] Order No. 2222-A, 174 FERC ¶ 61,197 at P 22; *see Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 FR 64100 (Oct. 28, 2008), 125 FERC ¶ 61,071, at P 155 (2008), *order on reh'g*, Order No. 719-A, 74 FR 37776 (July 29, 2009), 128 FERC ¶ 61,059, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[9] Order No. 2222-A, 174 FERC ¶ 61,197 at PP 22-23.

[10] *Id.* PP 63-64.

[11] The MISO Transmission Owners consist of Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Cooperative Energy; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Entergy Arkansas, LLC; Entergy Louisiana, LLC; Entergy Mississippi, LLC; Entergy New Orleans, LLC; Entergy Texas, Inc; Great River Energy; GridLiance

No. 2222-A. On April 19, 2021, Advanced Energy Economy and Advanced Energy Management Alliance (together, AEE/AEMA) filed a request for clarification, or in the alternative, rehearing of Order No. 2222-A. On April 19, 2021, Voltus, Inc. (Voltus) filed a request for clarification of Order No. 2222-A. On April 30, 2021, the Midcontinent Independent System Operator, Inc. (MISO) filed an answer in response to the rehearing requests. On May 4, 2021, ISO New England Inc. (ISO-NE) filed an answer to AEE/AEMA's request. On May 14, 2021, AEE/AEMA filed an answer in response to ISO-NE's answer. On May 28, 2021, AEE/AEMA filed an answer in response to the requests for rehearing and MISO's answer.[12]

5. Pursuant to *Allegheny Defense Project v. FERC*,[13] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by

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Heartland LLC; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Lafayette Utilities System; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company LLC; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power, Inc.; Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

[12] Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 CFR 385.713(d)(1), prohibits an answer to a request for rehearing. Accordingly, we reject ISO-NE's, MISO's, and AEE/AEMA's answers.

[13] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

section 313(a) of the FPA,[14] we modify the discussion in Order No. 2222-A and set aside the decision, in part, and clarify in part, as discussed below.[15]

6. Specifically, we set aside the decision in Order No. 2222-A to decline to extend the opt-out and opt-in requirements of Order Nos. 719 and 719-A to demand response resources participating in heterogeneous distributed energy resource aggregations. We also provide further clarification regarding appropriate restrictions to avoid double counting of services and the compensation of demand response resources that participate in heterogeneous distributed energy resource aggregations, as discussed further below.

II. Discussion

A. Order No. 719 Demand Response Opt-Out

7. In Order No. 2222, the Commission stated that the final rule does not affect the ability of relevant electric retail regulatory authorities (RERRA) to prohibit retail customers' demand response from being bid into RTO/ISO markets by aggregators pursuant to Order No. 719.[16] The Commission also stated that, because the definition of a distributed energy resource includes demand response resources, an aggregator of demand response could participate as a distributed energy resource aggregator, but that

[14] 16 U.S.C. 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[15] *Allegheny Def. Project*, 964 F.3d at 16-17.

[16] Order No. 2222, 172 FERC ¶ 61,247 at P 59 (citing 18 CFR 35.28(g)(1)(iii)).

the final rule does not affect existing demand response rules.[17] The Commission further found that the participation of demand response in distributed energy resource aggregations is subject to the opt-out and opt-in requirements of Order Nos. 719 and 719-A.[18] The Commission therefore clarified that if the RERRA for a demand response resource has either chosen to opt out or has not opted in, then the demand response resource may not participate in a distributed energy resource aggregation.

8. In Order No. 2222-A, the Commission set aside in part the Commission's conclusion that the participation of demand response in distributed energy resource aggregations is subject to the opt-out and opt-in requirements of Order Nos. 719 and 719-A.[19] The Commission stated that, upon reconsideration, it declined to extend this opt-out to demand response resources that participate in heterogeneous distributed energy resource aggregations—i.e., distributed energy resource aggregations that are made up of different types of resources including demand response.[20] 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 the Commission's regulations, because they are not solely aggregations of retail customers.[21]

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[17] *Id.* P 118.

[18] *Id.* P 145.

[19] Order No. 2222-A, 174 FERC ¶ 61,197 at P 22.

[20] *Id.* PP 22-23.

[21] *Id.* P 23 (citing 18 CFR 35.28(g)(1)(iii); 18 CFR 35.28(b)(10), (g)(12); Order No. 2222, 172 FERC ¶ 61,247 at P 114); *id.* P 28 (concluding that if a distributed energy

The Commission stated that the Order No. 719 opt-out will continue to apply to aggregations made up *solely* of resources that participate as demand response resources, consistent with the Commission's regulations.[22]

9. The Commission found that extending the Order No. 719 opt-out to demand response resources in heterogeneous distributed energy resource aggregations would undermine the potential of Order No. 2222 to break down barriers to competition, which would interfere with the Commission's responsibility to ensure that wholesale rates are just and reasonable.[23] Specifically, the Commission concluded that extending the Order No. 719 opt-out to demand response resources that seek to participate in heterogeneous distributed energy resource aggregations would undermine the ability of aggregations to take advantage of the different resources' operational attributes and complementary capabilities.[24] The Commission stated that ensuring that demand response resources can combine with other forms of distributed energy resources has the potential to increase both the number and the variety of distributed energy resource aggregations.[25] The Commission explained that, in addition to enhancing competition, diversity in distributed

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resource aggregator aggregates only demand response resources, it is materially indistinct from the aggregations of retail customers subject to the Order No. 719 opt-out).

[22] *Id.* P 22 (emphasis in original).

[23] *Id.* P 23 (citing Order No. 2222, 172 FERC ¶ 61,247 at PP 1, 3, 142; *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1189 (D.C. Cir. 2020) (*NARUC*)).

[24] *Id.* P 24.

[25] *Id.* P 25.

energy resource aggregations facilitates these non-traditional resources' ability to provide a wide range of services in RTO/ISO markets.[26] The Commission stated that applying the Order No. 719 opt-out to aggregations that contain a combination of demand response and other types of distributed energy resources could prevent distributed energy resource aggregators from incorporating the complementary capabilities of existing and future demand response technologies. The Commission also found that precluding demand response from participating in heterogeneous distributed energy resource aggregations would undermine the Commission's goal of "ensur[ing] a technology-neutral approach to distributed energy resource aggregations, which will ensure that more resources are able to participate in such aggregations, thereby helping to enhance competition and ensure just and reasonable rates."[27]

10. The Commission stated that it did not propose to overturn the Order No. 719 opt-out in this rulemaking and, to the extent that parties asked the Commission to do so on rehearing, it found that such requests were out of scope.[28] The Commission also clarified that the small utility opt-in adopted in Order No. 2222 still applies to all distributed energy resource aggregations, including those containing demand response resources.

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[26] *Id.* P 26 (citing Order No. 2222, 172 FERC ¶ 61,247 at P 141).

[27] *Id.* P 27 (quoting Order No. 2222, 172 FERC ¶ 61,247 at P 26).

[28] *Id.* P 28.

a. Requests for Rehearing

i. Jurisdiction

11. Some petitioners argue that the Commission's opt-out finding in Order No. 2222-A violated the Commission's jurisdiction under the FPA or usurped state authority.[29] The Southern Regulators argue that the Commission failed to properly balance the jurisdictional limitations of the FPA with the states' exclusive jurisdiction over retail issues in its decision to exercise authority over retail demand response.[30]

12. The Southern Regulators argue that the Commission contravened *EPSA* because, in their view, the Supreme Court concluded that it is precisely a state's right to opt out of participation by retail customers in an RTO demand response wholesale market that ensures the balance of federal and state power under the FPA.[31] The Southern Regulators argue that *EPSA* requires a careful balancing of the interests of the states and those of the Commission in order to determine whether the Commission has and/or should exercise jurisdiction under the FPA. The Southern Regulators argue that in Order No. 2222-A the Commission disregarded the concept of cooperative federalism upon which the Court relied to reach its decision, a concept fundamental to the balance of overlapping

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[29] NARUC Request for Rehearing at 3, 5; Southern Regulators Request for Rehearing at 12.

[30] Southern Regulators Request for Rehearing at 12.

[31] *Id.* at 13 (citing *FERC v. EPSA*, 136 S. Ct. 760, 779-80 (2016) (*EPSA*)).

jurisdiction under the FPA.[32] The Southern Regulators argue that the Court concluded that, when it comes to retail customer participation in wholesale markets, states have the last word.[33] The Southern Regulators argue that the Commission's historic practice in areas where federal and state jurisdiction overlap has been to recognize that balance, as it did in Order No. 1000.[34] The Southern Regulators argue that Order No. 2222-A offers no discussion of or replacement for the state opt-out authority that would evidence the Commission's "compliance with § 824(b)'s allocation of federal and state authority."[35]

13. The North Carolina Commission similarly argues that the Commission did not account for the long-standing authority of the states and the traditional, cooperative roles played by federal and state regulators in promoting adequate, reliable, safe, clean, and affordable electric services.[36] The North Carolina Commission argues that the cooperative federalism inherent in the FPA and the regulation of wholesale and retail electric service requires a role for both federal and state regulators.[37] The North Carolina

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[32] *Id.* at 12.

[33] *Id.* at 14 (citing *EPSA*, 136 S. Ct. at 780).

[34] *Id.* at 13-14 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), 136 FERC ¶ 61,051, at PP 225-27, 287 (2011), *order on reh'g*, Order No. 1000-A, 77 FR 32184 (May 31, 2012), 139 FERC ¶ 61,132, at P 392, *order on reh'g and clarification*, Order No. 1000-B, 77 FR 64890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014)).

[35] *Id.* at 15 (quoting *EPSA*, 136 S. Ct. at 780).

[36] North Carolina Commission Request for Rehearing at 10.

[37] *Id.* at 11.

Commission maintains that the Commission's action does not encourage utility participation in an RTO/ISO or encourage a state commission to allow a utility's RTO/ISO participation.[38]

14. NARUC argues that, by eliminating the opt-out for demand response resources in heterogeneous aggregations, the Commission usurped authority from states that used the Order No. 719 opt-out and built a legal framework for that regulatory scheme.[39] NARUC argues that Order No. 2222-A allows a demand response resource to disregard the judgment of state regulators by joining a third-party aggregation with other types of resources.[40] In addition, NARUC argues, the order allows third-party aggregators of demand response resources to add a solitary unit of a different type of distributed energy resource to its aggregations to circumvent state law.

15. NARUC disputes the Commission's position 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."[41] NARUC argues that the Commission's action in Order No. 2222-A is unlike the Commission's decisions in Order Nos. 841 and 2222 because there were no state regulations already in

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[38] *Id.* at 10.

[39] NARUC Request for Rehearing at 3, 5.

[40] *Id.* at 6.

[41] *Id.* (quoting Order No. 2222-A, 174 FERC ¶ 61,197 at P 12 n.36).

place.[42] NARUC explains that there was no need *prior* to Order No. 841 for states to prohibit storage resources on the distribution system or behind the meter from participating in wholesale markets because that was not possible before the order.[43] NARUC points out that the challenge to Order No. 841 in *NARUC* was a facial challenge and argues that *NARUC* does not address as-applied challenges.[44] NARUC explains that *prior* to Order No. 2222-A, some states had regulations that applied to demand response aggregations on the distribution system or behind the meter because Order No. 719 permitted such participation in the wholesale markets.[45] NARUC argues that Order No. 2222-A takes away this authority over demand response resources.[46]

ii. <u>Adequate Notice</u>

16. Multiple petitioners argue that the Commission violated the Administrative Procedure Act (APA) by effectively eliminating the Order No. 719 opt-out without providing adequate notice and without soliciting comments and evidence from RERRAs that have adopted and relied upon that opt-out.[47] The Southern Regulators and NARUC argue that the procedurally proper method to modify the opt-out is in the proceeding in

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[42] *Id.* at 5.

[43] *Id.* at 6.

[44] *Id.* (citing *NARUC*, 964 F.3d at 1188-89).

[45] *Id.* at 6-7 (emphasis in original).

[46] *Id.* at 7.

[47] Southern Regulators Request for Rehearing at 10; EEI Request for Rehearing at 4; North Carolina Commission Request for Rehearing at 8-9.

Docket No. RM21-14-000 that was noticed for this purpose.[48] The Southern Regulators argue that nothing in the Notice of Proposed Rulemaking in Docket No. RM16-23-000[49] indicated an effort or intent by the Commission to reconsider the Order No. 719 opt-out.[50]

17. The Southern Regulators argue that they were prejudiced by the Commission's failure to provide notice that the Order No. 719 opt-out was at risk in Docket No. RM18-9.[51] The Southern Regulators and the North Carolina Commission explain that they have provisions restricting aggregators of retail customers in their respective jurisdictions.[52] The Southern Regulators maintain that, because the NOPR offered no hint that the opt-out was in jeopardy, they had no reason to oppose elimination of the opt-out in the rulemaking docket or actively participate in the other portions of the rulemaking affecting demand response resources.

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[48] Southern Regulators Request for Rehearing at 10; NARUC Request for Rehearing at 8.

[49] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 81 FR 86522 (Nov. 30, 2016), 157 FERC ¶ 61,121 (2016) (NOPR).

[50] Southern Regulators Request for Rehearing at 10.

[51] *Id.* at 11.

[52] Southern Regulators Request for Rehearing at 11; North Carolina Commission Request for Rehearing at 2-3.

18. In addition, NARUC and the Southern Regulators argue that eliminating the Order No. 719 opt-out for demand response resources in heterogeneous aggregations is outside the scope of Order No. 2222.[53]

iii. <u>Reasoned Decision-making</u>

19. Several petitioners argue that the Commission acted arbitrarily and capriciously by departing from its policy in Order Nos. 719 and 719-A in Order. No. 2222-A without acknowledgment, an adequate explanation, or an examination of the policy considerations in support of the opt-out.[54] The MISO Transmission Owners further argue that the Commission did not adequately address how it will enforce the policy of avoiding unduly burdening states and retail regulators or why the policy considerations are no longer relevant.[55] The Southern Regulators contend that the Commission's reasons for eliminating the opt-out in Order No. 2222-A were present at the time Order No. 719 was issued, and that the Commission has not explained why those reasons now require elimination of the opt-out.[56]

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[53] NARUC Request for Rehearing at 8; Southern Regulators Request for Rehearing at 7.

[54] *See, e.g.*, MISO Transmission Owners Rehearing Request at 6; NARUC Rehearing Request at 8; North Carolina Commission Rehearing Request at 5; Southern Regulators Rehearing Request at 9.

[55] MISO Transmission Owners Rehearing Request at 8-9, 11.

[56] Southern Regulators Rehearing Request at 8-9.

20. Next, several petitioners claim that the Commission failed to acknowledge the states' role in overseeing demand response activities within their borders.[57] The MISO Transmission Owners assert that the Commission failed to consider the effect that limiting the opt-out will have on states' ability to control consumer costs, and the Southern Regulators argue that the Commission's opt-out decision unreasonably restricts the ability of states to protect retail customers.[58]

21. Next, some petitioners argue that the Commission relies on a false distinction between heterogeneous and homogeneous distributed energy resource aggregations to justify eliminating state opt-out authority.[59]

22. NARUC challenges the Commission's finding 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," because the definition of "aggregator of retail customers" that the Commission relies upon does not say that the aggregations are exclusively retail loads, just "mostly."[60] NARUC argues that the Commission acted

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[57] *See, e.g.*, MISO Transmission Owners Rehearing Request at 9-10 (citing *EPSA*, 136 S. Ct. at 779).

[58] MISO Transmission Owners Rehearing Request at 9-10; Southern Regulators Rehearing Request at 15.

[59] *E.g.*, Southern Regulators Rehearing Request at 19.

[60] NARUC Rehearing Request at 7 (quoting Order No. 2222-A, 174 FERC ¶ 61,197 at P 23).

capriciously by changing the treatment of demand response resources on the distribution system and behind the meter without further evidence of the types of load involved or inquiry into the experience of states that have employed the opt-out.[61]

23. Some petitioners also object to the Commission's characterization of demand response resources in declining to extend the opt-out to heterogeneous distributed energy resource aggregations. The Southern Regulators criticize the Commission's reliance on the ability of distributed energy resources to take advantage of operating attributes and complementary capabilities.[62] The MISO Transmission Owners argue that, in allowing demand response resources to participate through a heterogeneous aggregation, the Commission did not distinguish between injection and non-injection resources, as it previously did when maintaining the opt-out in Order Nos. 841 and 2222.[63]

24. Several petitioners further argue that the Commission's decision is arbitrary and capricious because it would allow distributed energy resource aggregations comprised primarily of demand response resources to evade state regulations.[64]

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[61] *Id.* at 8.

[62] Southern Regulators Rehearing Request at 20 (citing Order No. 2222-A, 174 FERC ¶ 61,197 at P 24).

[63] MISO Transmission Owners Rehearing Request at 7 (citing Order No. 841-A, 167 FERC ¶ 61,154 at P 53).

[64] EEI Rehearing Request at 4; MISO Transmission Owners Rehearing Request at 6 n.13; North Carolina Commission Rehearing Request at 7-8.

25. Finally, EEI argues that it was arbitrary and capricious for the Commission to remove the opt-out without allowing an opportunity for public comment in Docket No. RM21-14-000, where the Commission has opened a far-reaching inquiry about removing the demand response opt-out from its regulations.[65] EEI and the MISO Transmission Owners argue that the Commission has effectively undermined that inquiry in Docket No. RM21-14-000.[66]

b. <u>Commission Determination</u>

26. Upon reviewing the requests for rehearing, we set aside our prior decision not to extend the Order No. 719 opt-out to demand response resources that participate in heterogeneous distributed energy resource aggregations. As discussed below, we find that these issues are better addressed in Docket No. RM21-14-000.[67]

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[65] EEI Rehearing Request at 1-2; MISO Transmission Owners Rehearing Request at 11.

[66] EEI Rehearing Request at 4; MISO Transmission Owners Rehearing Request at 8.

[67] The Commission has broad discretion in how to manage its proceedings. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (recognizing that agencies have broad discretion over the formulation of their procedures); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 81 (D.C. Cir. 2014) (affirming the Commission's discretion in how to manage the proceedings before it); *Tenn. Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) ("The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem.") (citing *Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . .")).

27. As an initial matter, we disagree with the arguments on rehearing that the Commission's interpretation of the Order No. 719 opt-out in Order No. 2222-A would have exceeded the Commission's jurisdiction under the FPA. The Southern Regulators rely on *EPSA* to argue that the Commission failed to properly balance the jurisdictional limitations of the FPA. We disagree. *EPSA* held that the Commission's regulation of demand response participation in wholesale markets is a practice that directly affects wholesale rates.[68] Further, the Court also held that the Commission's regulation of demand response resources does not regulate retail sales in violation of FPA section 201(b).[69] As the D.C. Circuit explained in *NARUC*, the Court in *EPSA* "did not condition its holdings on the existence of an opt-out."[70] Accordingly, we continue to conclude that

[68] *EPSA*, 136 S. Ct. at 774 (referring to the Commission's jurisdiction under FPA sections 205 and 206 to regulate practices affecting jurisdictional rates); *see also* Order No. 2222, 172 FERC ¶ 61,247 at P 41 (discussing *EPSA*'s application to this proceeding).

[69] *EPSA*, 136 S. Ct. at 784; *see also* Order No. 2222, 172 FERC ¶ 61,247 at P 41.

[70] *NARUC*, 964 F.3d at 1189-90; *see Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 83 FR 9580 (Mar. 6, 2018), 162 FERC ¶ 61,127 (2018), *order on reh'g and clarification*, Order No. 841-A, 84 FR 23902 (May 23, 2019), 167 FERC ¶ 61,154, at P 40 (2019), *aff'd sub nom. NARUC*, 964 F.3d 1177 (explaining that the Court in *EPSA* described how its "analysis of FERC's regulatory authority proceeds" without referring to an opt-out, and explaining that, when the Court stated that it viewed the opt-out merely as the "finishing blow" to EPSA's already losing arguments that the Commission "aimed to obliterate [states'] regulatory authority or override their pricing policies," that statement was not a determinative part of its analysis) (quoting *EPSA*, 136 S. Ct. at 773, 779).

the Commission was not legally required either to grant the opt-out in Order No. 719 or to extend that opt-out in this proceeding.[71]

28. Nonetheless, we acknowledge that, in implementing the opt-out in Order No. 719, a number of states broadly prohibited demand response participation in RTO/ISO markets,[72] and that those states—and other entities affected by the opt-out—may not have anticipated that this proceeding would call into question those broad prohibitions. Given the importance of these issues, which affect both federal and state regulatory interests,[73]

[71] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 59 (explaining that the Commission was not obligated to provide an opt-out in Order No. 719 but did so as an exercise of its discretion); *see also NARUC*, 964 F.3d at 1187 ("[B]ecause FERC has the exclusive authority to determine who may participate in the wholesale markets, the Supremacy Clause . . . requires that [s]tates not interfere.").

[72] *See, e.g.*, North Carolina Commission Request for Rehearing at 2-3 (quoting 2010 North Carolina Commission decision ordering that "under North Carolina law and its traditional regulatory structure, Dominion's retail customers cannot participate in PJM's wholesale markets through its demand response programs individually or through aggregation by a third party not regulated by the Commission"); Southern Regulators Request for Rehearing at 11 n.33 (citing *Notice of Intent of Entergy Mississippi, LLC to Change Rates by Filing Market Valued Demand Response Rider*, 2019 WL 5212152, at *1 (Miss. Pub. Serv. Comm'n Sept. 10, 2019) ("The Commission further finds that [Market Valued Demand Response] Schedule MVDR-1 is the only vehicle through which end-use retail customers and/or [aggregators of retail customers] will be permitted to participate as DR resources in the MISO wholesale market. Entergy Mississippi will be the sole Market Participant [] in MISO for all DR resources provided by Participants in [Entergy Mississippi's] service territory.")).

[73] *Compare* Order No. 2222-A, 174 FERC ¶ 61,197 (Christie, Comm'r, dissenting at P 6) ("Providing such flexibility to the states and other RERRAs [to fully opt-out] would allow them to manage the deployment of behind-the-meter [distributed energy resources] in ways necessary to meet their own unique challenges."); NARUC Request for Rehearing at 6-7 (arguing that the Commission in Order No. 2222-A took away the authority of those states that had regulations that applied to wholesale market participation of demand response aggregations on the distribution system or behind the meter); *with* Order No. 2222-A, 174 FERC ¶ 61,197 at P 23 ("find[ing] that extending the

we believe that the better course is to provide them full consideration through the Notice of Inquiry (NOI) issued contemporaneously with Order No. 2222-A. The record under development in that proceeding bears on many of those federal and state interests and will provide an opportunity for all interested views to be heard and considered by the Commission.[74] Specifically, the NOI states that the Commission is "exploring whether to revise the Commission's regulations to remove the [Order No. 719 opt-out], recognizing that the Commission, when it established the [Order No. 719 opt-out], balanced the interests and concerns of state and local regulatory authorities with the Commission's goal of removing barriers to demand response resource participation in RTO/ISO

Order No. 719 opt-out to demand response resources in heterogeneous distributed energy resource aggregations would undermine the potential of Order No. 2222 to break down barriers to competition").

[74] For example, the Commission in the NOI asked: "What are the potential benefits of removing the [Order No. 719 opt-out], including any benefits not considered by the Commission in Order Nos. 719 and 719-A, *and considering any changed circumstances that may be relevant*?" *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 86 FR 15933 (Mar. 25, 2021), 174 FERC ¶ 61,198, at P 24 (2021) (question five) (emphasis added); *see id.* P 25 (question 9) ("To what extent has the [Order No. 719 opt-out] prevented interference with the operation of existing retail demand response programs, or avoided placing an undue burden on state and local retail regulatory entities, as noted in Order No. 719?"); *id.* P 24 (question 6) ("What are the potential benefits of creating more consistency between the participation models for [aggregators of retail customers] and distributed energy resource aggregators by removing the [Order No. 719 opt-out]? In light of market participation opportunities for energy efficiency resources, electric storage resources, and distributed energy resource aggregations, would eliminating the [Order No. 719 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?"); *id.* (question 8) ("Is there any other evidence to suggest that RTO/ISO market rules reflecting the [Order No. 719 opt-out] are no longer just and reasonable?").

markets. Circumstances may have changed in the years since the issuance of Order Nos. 719 and 719-A, such that the balance reflected in those orders adopting the [Order No. 719 opt-out] may have shifted and the RTO/ISO market rules reflecting the [Order No. 719 opt-out] may no longer be just and reasonable."[75] To ensure an adequate opportunity for interested entities to comment on the Order No. 719 opt-out in light of our decision to set aside Order No. 2222-A in part, concurrently with this decision, the Commission is issuing a notice extending the comment periods in Docket No. RM21-14-000.[76]

29. Because we set aside our prior decision in Order No. 2222-A to not extend the Order No. 719 opt-out to demand response resources that participate in heterogeneous distributed energy resource aggregations, we find that, as the Commission stated in Order No. 2222, "the participation of demand response in distributed energy resource aggregations is subject to the opt-out and opt-in requirements of Order Nos. 719 and 719-A. Therefore, if the relevant electric retail regulatory authority where a demand response resource is located has either chosen to opt out or has not opted in [pursuant to Order

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[75] *Id.* P 21.

[76] Notice of Extension of Time for Filing Initial and Reply Comments, *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Docket No. RM21-14-000 (June 17, 2021) (extending time to and including July 23, 2021 to file initial comments, and to and including August 23, 2021 to file reply comments).

Nos. 719 and 719-A], then the demand response resource may not participate in a distributed energy resource aggregation."[77]

B. <u>Definition of Demand Response for Purposes of Applying the Order No. 719 Opt-Out to Heterogeneous Distributed Energy Resource Aggregations</u>

30. Order No. 2222 requires each RTO/ISO to revise its tariff to allow market participation by heterogeneous distributed energy resource aggregations.[78] The Commission found that requiring each RTO/ISO to allow heterogeneous aggregations will further enhance competition in RTO/ISO markets by ensuring that complementary resources, including those with different physical and operational characteristics, can meet qualification and performance requirements such as minimum run times, which will help ensure that these markets produce just and reasonable rates.

31. In Order No. 2222-A, for purposes of applying the opt-out, the Commission clarified the definition of heterogeneous aggregations as "those that are made up of different types of resources including demand response as opposed to those made up solely of demand response."[79] The Commission found that "[t]he opt-out will continue to apply to aggregations made up *solely* of resources that participate as demand response resources, consistent with [its] regulations" (i.e., consistent with the opt-out requirements of Order No. 719). The Commission clarified that, "if an individual distributed energy

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[77] Order No. 2222, 172 FERC ¶ 61,247 at P 145.

[78] *Id.* P 142.

[79] Order No. 2222-A, 174 FERC ¶ 61,197 at P 22.

resource can be configured to engage in either demand response or injection of energy onto the grid to make wholesale sales (e.g., a behind-the-meter generator), it may choose to participate in the wholesale markets by reducing a customer's metered load on the grid from the customer's expected consumption (i.e., as a demand response resource subject to Order No. 719) or it may choose to participate by injecting energy onto the grid to make wholesale sales (i.e., as a different type of distributed energy resource)."[80] The Commission stated that, "if a distributed energy resource aggregation is composed solely of resources that participate as demand response resources, then the Order No. 719 opt-out would apply to that aggregation." But, the Commission stated, "if a distributed energy resource aggregation contains any resources that participate as another type of distributed energy resource, then the Order No. 719 opt-out would not apply to that aggregation."

a. <u>Request for Clarification</u>

32. Voltus requests clarification that demand response paired with a behind-the-meter distributed energy resource constitutes a heterogeneous distributed energy resource aggregation not subject to the Order No. 719 opt-out.[81] Voltus argues that the Commission stated that resources "made up solely of demand response" are subject to the opt-out. Voltus maintains that the Commission could have easily stated that demand

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[80] *Id.* P 29.

[81] Voltus Request for Clarification at 1, 4.

response paired with behind-the-meter distributed energy resources to reduce load is a demand response resource subject to the opt-out, but it did not draw this distinction.[82]

33. Voltus argues that clarification is necessary because paragraph 29 of Order No. 2222-A has caused MISO to propose that an aggregation of demand response using behind-the-meter generation and/or storage to reduce load would be subject to the Order No. 719 opt-out.[83] Voltus argues that this conclusion is based on an overly broad reading of a single paragraph, which draws no distinction regarding whether a distributed energy resource acts to reduce load. Voltus maintains that it would be needlessly complicated if a resource could evade the opt-out because it is configured to inject but never actually does.[84]

34. Voltus argues that classifying demand response paired with behind-the-meter resources as a heterogeneous aggregation is consistent with AEE/AEMA's request for clarification that a behind-the-meter distributed energy resource used to serve onsite load should be paid at the locational marginal price (LMP), as required by Order No. 745. Voltus argues that LMP payments are proper because Order No. 2222-A did not change Order No. 745's payment structure for resources that reduce load to the bulk power system.[85]

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[82] *Id.* at 5.

[83] *Id.* at 1, 4, 5.

[84] *Id.* at 5.

[85] *Id.* at 6.

b. Commission Determination

35. Because we set aside the Commission's decision in Order No. 2222-A to decline to extend the Order No. 719 opt-out to heterogeneous distributed energy resource aggregations, we find that Voltus's request for clarification is largely moot.

36. Nevertheless, with respect to potential confusion underlying Voltus's request for clarification, we note that the Commission has stated previously that load reductions in demand response programs can be facilitated by a variety of technologies and still constitute demand response.[86] Thus, we clarify that a behind-the-meter resource that is solely used to facilitate demand response, i.e., deployed solely to reduce customer load from expected consumption, would itself be considered a demand response resource.[87]

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[86] *See, e.g.*, *Demand Response Supporters v. N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,151, at P 13 (2016) ("[A] reduction in metered load on the grid, even a reduction facilitated by behind-the-meter generation, is still a reduction and thus is appropriately considered demand response as defined in section 35.28(d)(4)."); *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 76 FR 16658 (Mar. 24, 2011), 134 FERC ¶ 61,187, *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215, at P 66 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev'd & remanded sub nom. EPSA*, 136 S. Ct. 760 ("[T]he manner in which a customer is able to produce such a load reduction from its validly established baseline (whether by shifting production, using internal generation, consuming less electricity, or other means) does not change the effect or value of the reduction to the wholesale grid.").

[87] *See* 18 CFR 35.28(b)(4).

C. Double Counting and Compensation for Behind-the-Meter Distributed Energy Resources that Reduce Load

37. In Order No. 2222, the Commission clarified that the requirements in Order No. 745 would apply to demand response resources participating in heterogeneous aggregations.[88] The Commission also stated that "this final rule does not affect existing demand response rules."[89] In Order No. 2222-A, the Commission stated that ensuring that demand response resources can combine with other forms of distributed energy resources has the potential to increase both the number and the variety of distributed energy resource aggregations, thereby enhancing competition and furthering its mandate to ensure that Commission-jurisdictional rates are just and reasonable.[90]

38. With respect to double counting, the Commission in Order No. 2222 required each RTO/ISO to include any appropriate restrictions on distributed energy resource participation in RTO/ISO markets through distributed energy resource aggregations, if narrowly designed to avoid counting more than once the services provided by distributed energy resources in RTO/ISO markets.[91] The Commission stated that, for instance, if a

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[88] Order No. 2222, 172 FERC ¶ 61,247 at P 145. In Order No. 2222, the Commission stated that "[d]emand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy." *Id.* P 2 n.8 (citing 18 CFR 35.28(b)(4)).

[89] *Id.* P 118.

[90] Order No. 2222-A, 174 FERC ¶ 61,197 at P 25 (citing 16 U.S.C. 824e).

[91] Order No. 2222, 172 FERC ¶ 61,247 at PP 160-161.

distributed energy resource is offered into an RTO/ISO market and is not added back to a utility's or other load serving entity's load profile, then that resource will be double counted as both load reduction and a supply resource.[92] In Order No. 2222-A, the Commission clarified that, when the Commission stated that "if a distributed energy resource is offered into an RTO/ISO market and is not added back to a utility's or other load serving entity's load profile, then that resource will be double counted as both load reduction and a supply resource,"[93] the Commission was indicating that, for planning purposes, double counting of services would occur if the same distributed energy resource reduces the amount of a service that an RTO/ISO procures on a forward-looking basis in a certain time period while also acting as a provider of that same service in that same delivery period.

a. Request for Clarification or Rehearing

39. AEE/AEMA seek clarification—or, in the alternative, rehearing—that behind-the-meter distributed energy resources used to serve onsite load, therefore reducing power consumption from the bulk power system, should be compensated at full locational marginal price (LMP) in compliance with Order No. 745 with no need to eliminate retail savings generated by the distributed energy resource, and that payment of full LMP to

[92] *Id.* P 161.

[93] Order No. 2222-A, 174 FERC ¶ 61,197 at P 63 (citing Order No. 2222, 172 FERC ¶ 61,247 at P 161).

behind-the-meter distributed energy resources does not constitute double counting.[94] AEE/AEMA ask the Commission to confirm that double counting does not occur when a distributed energy resource participating in an aggregation is compensated for acting as a provider of a service, whether procured on a forward-looking basis or in real-time, and reduces an end-use customer's load on the bulk power system, resulting in retail savings.[95]

40. AEE/AEMA maintain that the Supreme Court in *EPSA* held that the Commission has authority to authorize RTOs/ISOs to pay demand response resources full LMP.[96] AEE/AEMA contend that the Commission has clarified that payment of full LMP to demand response resources does not constitute double counting—regardless of the existence of behind-the-meter distributed energy resources or other manner of load reduction to the bulk power system.[97] AEE/AEMA argue that the principles of Order No. 745 apply to all reductions in load from the perspective of the bulk power system, regardless of the method or methods used to achieve that reduction, even though Order No. 2222 defined demand response resources more narrowly as reductions to usage by a customer.[98]

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[94] AEE/AEMA Request for Clarification at 2-3, 5-6.

[95] *Id.* at 2, 5.

[96] *Id.* at 3-4 (citing *EPSA*, 136 S. Ct. 760).

[97] *Id.* at 4 (citing Order No. 745, 134 FERC ¶ 61,187 at PP 64, 66).

[98] *Id.* at 5 (citing Order No. 745-A, 137 FERC ¶ 61,215 at P 66; Order No. 2222,

41. AEE/AEMA state that their members are encountering continued confusion in ongoing RTO/ISO stakeholder processes regarding the double counting restrictions in Order No. 2222, specifically regarding compensation for wholesale market services provided by aggregations.[99] AEE/AEMA argue that, absent clarification, RTO/ISO compliance submissions may not fully comply with Order Nos. 745 and 2222-A and may result in significant stakeholder discussions that could delay implementation of new participation rules and deployment of distributed energy resources.[100] AEE/AEMA assert that Order No. 2222 proposals that pay demand response resources less than full LMP would not enhance competition or ensure just and reasonable rates.[101]

b. <u>Commission Determination</u>

42. We grant, in part, AEE/AEMA's request for clarification. As an initial matter, we disagree with AEE/AEMA's claim that Order No. 2222 modified the definition of demand response. In Order Nos. 745 and 2222, the Commission cited to the same definition of demand response contained in the Commission's regulations.[102] Further, we

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172 FERC ¶ 61,247 at P 2 n.8).

[99] *Id.* at 2, 6.

[100] *Id.* at 6.

[101] *Id.*

[102] Order No. 745, 134 FERC ¶ 61,187 at P 2 n.2; Order No. 2222, 172 FERC ¶ 61,247 at P 2 n.8 (citing 18 CFR 35.28(b)(4)) ("Demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.").

disagree with AEE/AEMA's suggestion that *all* reductions in load from the perspective of the bulk power system should be compensated consistent with Order No. 745. Only those reductions that meet the definition of demand response in the Commission's regulations and are used to reduce customer load from a validly established baseline pursuant to Order Nos. 745 and 745-A must be compensated consistent with those orders.[103]

43. We clarify that payment of full LMP in the energy market to behind-the-meter distributed energy resources participating as demand response resources in distributed energy resource aggregations does not constitute double counting, so long as the requirements of Order No. 745, including the net benefits test, are satisfied.[104] Order No. 2222 provided that the requirements of Order No. 745 apply to demand response resources participating in heterogeneous aggregations.[105] In Order No. 745, the Commission found that when a demand response resource is participating in an RTO/ISO market and dispatch of that demand response resource is cost-effective as determined by the net benefits test, that demand response resource must be compensated in the energy

[103] *See supra* P 36.

[104] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 145.

[105] *Id.*

market at the LMP.[106] Accordingly, in circumstances in which the net benefits test is satisfied, paying LMP to behind-the-meter distributed energy resources participating as demand response resources in distributed energy resource aggregations, without reflecting the savings load realized from not having to purchase electricity, does not reflect a double payment.[107] We will evaluate, on compliance, any proposed distributed energy resource aggregation compensation rules regarding demand response for consistency with the requirements of Order No. 745. However, with respect to compensation issues beyond the scope of Order No. 745, such as if a behind-the-meter resource participates as another type of distributed energy resource, we will not prejudge RTO/ISO proposals but rather evaluate them on compliance.

44. With respect to the participation of demand response resources in distributed energy resource aggregations, we clarify that, if an individual distributed energy resource is a behind-the-meter generator, it may participate within a distributed energy resource aggregation as a demand response resource or as a different type of distributed energy resource. If the distributed energy resource participates as demand response, the requirements in Order No. 745 would apply, and the RTOs/ISOs are required to allow

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[106] Order No. 745-A, 137 FERC ¶ 61,215 at P 64 (citing Order No. 745, 134 FERC ¶ 61,187 at P 61).

[107] *See id.*

that distributed energy resource to aggregate with other types of distributed energy resources in a heterogeneous distributed energy resource aggregation.[108] If the behind-the-meter resource participates as another type of distributed energy resource (i.e., not as a demand response resource), the requirements in Order No. 745 would not apply.

45. We reiterate, however, that we will evaluate each RTO's/ISO's "proposal submitted on compliance to determine whether it meets the goals of this final rule to allow distributed energy resources to provide all services that they are technically capable of providing through aggregation,"[109] and accordingly, whether it appropriately compensates distributed energy resources for providing such services.

III. Information Collection Statement

46. The burden estimates have not changed from the final rule.

IV. Regulatory Flexibility Act

47. The Regulatory Flexibility Act of 1980 (RFA)[110] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the RFA, we still conclude that

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[108] *See* Order No. 2222, 172 FERC ¶ 61,247 at P 142 (requiring RTOs/ISOs to allow heterogeneous DER aggregations); *id.* P 145 (clarifying that the requirements in Order No. 745 apply to demand response resources participating in heterogeneous aggregations).

[109] Order No. 2222, 172 FERC ¶ 61,247 at P 130.

[110] 5 U.S.C. 601-612.

this rule will not have a significant economic impact on a substantial number of small entities.

V. **Document Availability**

48. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

49. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

50. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202)-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

VI. <u>Effective Date and Congressional Notification</u>

51. This rule is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

By the Commission. Commissioner Chatterjee is concurring with a separate statement attached.
Commissioner Danly is concurring with a separate statement attached.
Commissioner Christie is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

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. RM18-9-003

(Issued June 17, 2021)

CHATTERJEE, Commissioner, *concurring*:

1. I concur with today's order because it continues to find that the Commission was under no legal obligation to provide the Order No. 719 opt-out.[1]

2. I write separately to reiterate and emphasize my support for eliminating the Order No. 719 opt-out, which has for years prevented demand response resources in many states from participating in our wholesale markets. The outdated Order No. 719 opt-out cannot be reconciled with the competitive principles underpinning Order No. 2222 and the Commission's statutory responsibility to ensure rates subject to the Commission's jurisdiction are just and reasonable and not unduly discriminatory or preferential.[2] There is no reasonable explanation as to why the Commission should maintain the Order No. 719 opt-out and treat demand response resources differently from all other distributed energy resources. Accordingly, to ensure consumers can realize the full benefits of Order No. 2222 and the wholesale market services demand response resources can provide, I urge the Commission to press forward to eliminate the Order No. 719 opt-out once and for all.

For these reasons, I respectfully concur.

Neil Chatterjee
Commissioner

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[1] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222-B, 175 FERC ¶ 61,227 at P 27 (2021). *See* Order No. 2222, 172 FERC ¶ 61,247 at P 59 (explaining that the Commission was not obligated to provide an opt-out in Order No. 719 but did so as an exercise of its discretion); *see also NARUC*, 964 F.3d at 1187 ("[B]ecause FERC has the exclusive authority to determine who may participate in the wholesale markets, the Supremacy Clause . . . requires that [s]tates not interfere.").

[2] 16 U.S.C. § 824e.

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(Issued June 17, 2021)

DANLY, Commissioner, *concurring*:

1. I agree with the Commission's order today granting rehearing to extend the states' existing rights to opt-out of wholesale demand response programs[1] including demand response resources that participate in "heterogeneous distributed energy resource aggregations."[2] In other words, states can choose to prohibit demand response resources within their boundaries from participating in multi-state, wholesale distributed energy resource programs. This order represents the correct division of authority between state and federal jurisdiction.

2. I write separately to highlight that even if the Commission is correct that it has jurisdiction over distributed energy resource aggregations—including those "aggregations" comprised of a single resource[3]—the Commission still should have chosen not to exercise such jurisdiction in Order No. 2222.[4] This order on rehearing returns authority over demand response resources—which often are included in

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[1] *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at P 155 (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).

[2] *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 175 FERC ¶ 61,227, at P 26 (2021) (Order).

[3] *See Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222, 85 Fed. Reg. 67,094 (Oct. 21, 2020), 172 FERC ¶ 61,247, at P 1 n.1 (2020), *corrected*, 85 Fed. Reg. 68,450 (Oct. 29, 2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021) (Danly, Comm'r, *dissenting*) (discussing single resource "aggregations"); 18 C.F.R. § 35.28(b)(10) (2020).

[4] *See* Order, 175 FERC ¶ 61,227 at P 27 (discussing case law on jurisdiction).

distributed energy resource aggregations—to the states, letting the states choose whether demand response resources can participate in wholesale distributed energy resource aggregations. This correctly preserves the traditional allocation of authority between the individual states and the federal government.

For these reasons, I respectfully concur.

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James P. Danly
Commissioner

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. RM18-9-003

(Issued June 17, 2021)

CHRISTIE, Commissioner, *concurring in part and dissenting in part*:

1. I concur with the first sentence of Paragraph 26 and other provisions of the order which set "aside our prior decision [in Order No. 2222-A] not to extend the Order No. 719 opt-out to demand response resources that participate in heterogeneous distributed energy resource aggregations. . . ."[1]

2. As the second sentence in Paragraph 26 and other provisions in today's order indicate, however, there is no decision affirmatively to preserve those Order No. 719 opt-out provisions;[2] on the contrary, the prospect of ultimately removing even these opt-out provisions is very much alive as a result of the NOI proceeding in Docket No. RM21-14-000.[3]

3. Beyond the parts of this order that restore, at least temporarily, those opt-out provisions, I dissent from the remainder of the order, because I would have voted against Order No. 2222 had I been a member of the Commission at that time and I did vote against Order No. 2222-A. As I said in my dissent to the latter:

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[1] *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222, 85 FR 67094 (Oct. 1, 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), *order on reh'g and clarification*, Order No. 2222-B, 175 FERC ¶ 61,227, at P 26 (2021).

[2] Order No. 2222-B at P 26.

[3] *Participation of Aggregators of Retail Demand Response Customers in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice of Inquiry, 174 FERC ¶ 61,198 (2021) (NOI); *see also* Order No. 2222-B at P 28.

> Today the majority . . . sides against the consumers who for years to come will almost surely pay billions of dollars for grid expenditures likely to be rate-based in the name of "Order 2222 compliance."
>
> . . .
>
> Sadly, instead of making the states, municipal and public-power authorities and electric co-operatives truly equal partners in managing the timing and conditions of deployment of behind-the-meter DERs in ways that are sensitive to local needs and challenges – both *technical* and *economic* – today's order denies them any meaningful control by prohibiting any opt-out or opt-in options except in relatively tiny circumstances. This order – and its predecessor – intentionally seize from the states and other authorities their historic authority to balance the competing interests of deploying new technologies while maintaining grid reliability *and* protecting consumers from unaffordable costs. . . .[4]

4. To ameliorate at least some of the damaging effects caused by Order Nos. 2222 and 2222-A, I would authorize states and other RERRAs the right to exercise an opt-out from the requirements of those orders, if not permanently then at least for some period of years to enable them better to prepare for the impacts on retail customers and distribution grids they now face.

For these reasons, I respectfully concur in part and dissent in part.

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Mark C. Christie
Commissioner

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[4] Order No. 2222-A (Christie, Comm'r, dissenting at PP 1, 3 (emphasis in original) (footnotes omitted) (available at https://www.ferc.gov/news-events/news/item-e-1-commissioner-mark-c-christie-dissent-regarding-participation-distributed)).